PUBLIC GOOD DISAPPROPRIATION

rdai.com/ojs/index.php/rdai/article/view/230

RDAI
Journal of Public Law and Infrastructure
REVISTA DE DIREITO ADMINISTRATIVO E INFRAESTRUTURA
ISSN: 2526-8120
AUGUSTO NEVES DAL POZZO
RICARDO MARCONDES MARTINS

Expropriation of public

Celso Antônio Bandeira de Mello Pontifical Catholic University of São Paulo (São Paulo, São Paulo, Brazil)

DOI: https://doi.org/10.48143/RDAI.14.cabmello
Keywords: Consultation, Fundamentals of expropriatory power, Public goods and their function, Relationship of public persons of political capacity

Consultation. The Mayor of Valinhos, explains what follows, attaching illustrative documents and formulating us, after consulting on the matter.

In verbis: a) this Municipality, for a long time, had been trying to acquire the Rocinha Pipeline, property owned by the Municipality of Campinas and located in the neighboring territory of Vinhedo; b) after enormous efforts with the Municipality of Campinas, this Municipality was successful, eventually acquiring the said property on 18.02.1974; c) with this acquisition, the population of Valinhos saw the reality become palpable its old dream, since the Administration had been afflicting with the problem of lack of water, solved with the aforementioned acquisition; d) it happens that the Municipality of Vinhedo, dissatisfied with the transaction in question, declared of public utility, to be expropriated, as a matter of urgency, the area of the former Municipal Appductor João Antunes dos Santos; e) however, the expropriatory act, Law 682, of 1974, as a copy included, did not even mention the purpose of the declaration, since the Appductor, indispensable for our Municipality, therefore represents in terms of water supply to the population, is not so in relation to Vinhedo, which supplies the waters of the Capivari River, connecting its pumps once a week.

In view of the above, we formulate V. The following consultation: “Is it lawful for Vinhedo to expropriate the João Antunes dos Santos Municipal Pipeline, which is very essential to the population of Valinhos, whose public order services he cannot do without?”

Opinion: The total unraveling of the problem presupposes the correct equation of three questions that are interconnected, in this case, namely: 1. Fundamentals of expropriatory power; 2. Public goods and their function; **3**. Relationship of legal entities under public law. A brief examination of these various issues will allow, in a final approach, to focus on the proposed problem with the help of the instrument collected at the time of the analysis of each of the topics mentioned. That's what we'll do in a final title.

I – Fundamentals of expropriatory power. Disappropriation is the administrative procedure by which the Public Power, founded on public utility, compulsorily and unilaterally strips someone of a property, acquiring it, on an original basis, upon prior and fair compensation. It underpins expropriation, from a theoretical point of view. The general supremacy that the Public Power exercises over the assets situated within the scope of the spatial validity of its legal order. In Brazilian Positive Law, the institute wears itself, as is notorious, in article 153, § 22, of the Constitutional Charter (Amendment 1, 1969), which reads: "The right to property is guaranteed, except in the case of expropriation for necessity or public utility or social interest, through prior and fair compensation in cash, subject to the provisions of art. 16..." And article 8 of the Magna Law establishes in its item XVII, f, to compete with the Union: legislate on expropriation. Decree-Law No. 3,365 of 21.06.1941, and Law No. 4,132, of 10.09.1962, enunciate the hypotheses of public utility and social interest that open up gaps when triggering expropriatory power. It is noticeable in all light that the justification of the institute lies in the prevalence of the public interest, which, as well as a result – once the hypotheses of necessity, public utility or social interest are embodied – asserts itself overly about minor interests, as a rule, private, which must then give way to the primacy of the former. It is for this reason – and only for it – that the institute is marked precisely by compulsory nature, so striking that it nullifies private property, in absentia of the holder, converting its content into the equivalent patrimonial expression it possesses. Indeed: the expropriatory prerogative, like any others that assist the Public Power, is not granted to it by the legal order as a tribute to a sovereign condition, but as an instrument, as a means or vehicle for satisfying interests, which, yes, qualified in normative ordering as deserving of special protection. Moreover, all the privileges adopted by the Public Power are not acquired by it *as a nominor leo*; quite the contrary: they assist it as a condition for the effective realization of interests that, transcending the restricted scope of the particular sphere, significantly affect the collectivity. It is the fact that the State personifies the public interest that adds differentiated legal treatment to it. In short: in the rule of law, the Public Powers justify themselves and explain themselves to the

extent that they are at the service of a function, predisposed to the realization of interests erected by the system in prevalent values. This is, therefore, as the conclusion of the indicated, that only the supremacy of one interest over another, that is, the imbalance between two orders of interests, can authorize the outbreak of expropriation, since it is inspired, precisely, by the need to make a greater interest prevail over a smaller interest. It is not a legal condition of the subject, in itself considering, but at the level of interests in charge that the legitimizing endorsement of the expropriatory exercise will be sought. However reasonable, sensible, logical or in tune with the lines of the rule of law as the weightings given here, it is not intended that the validity of the statements made rests only in this order of reasons. In fact, it is proposed that they are clearly transfused into the Brazilian legal-positive system and from the constitutional level to the legal level, since article 153, § 22, mentioned above, expressly indicates as an inescapable assumption of the institute the need for public utility and the social interest. Similarly, the already invoked Decree-Law 3,365 and Law 4,132 enunciate hypotheses of necessity, public utility and social interest, which represent the conditions for expropriating. It is quite evident, dispensing with further digressions, that the constitutional article and the legal texts contemplate public interests and prevailing public utilities over interests of lesser prominence, since it is a matter of fixing the terms of solution in the case of clashes of interests and deciding which of them will yield step, which of them will be passed over, thus converted into patrimonial expression 0 so that the preponderant utility extracts from the desired good the greater public profit that is embodied in it.

What it intends to highlight is that the very notion of general supremacy, granted by the normative system to people of Public Law of political capacity (Union, States and Municipalities), is an authority derived from legal ordering and strives to qualify the interests that it is incumbent upon them to provide, in such a way that the powers, privileges and prerogatives they enjoy constitute a fruitful authoritarian arsenal, to the extent that it instruments the purpose protected by Law, that is, the legitimization of its use depends on the adjustment to the prestigious interests in the system. It is the fine-tuning of the person's activity to the infrasystematic values of the normative when that guarantees the legitimacy of its expression and not the reverse, that is: the legitimacy of the exercise of power – in the rule of law – does not result merely from who exercises it, from where it is not the authority of the subject that qualifies the interest; on the contrary: it is the legal suitability of the interest that anchors and validates the behavior of the authority to which the order has assigned the duty-power to cure it. Thus,

when examining the institute of expropriation, it should be borne in mind that the powers of the expropriator emerge to the extent that they are in the service of the interest for which such powers have been erogated to him.

At this stage, Arturo Lentini's considerations are buckled: "*...la causa di pubblica utilità è la vera energia che mete in moto il facto dell'espropriazione per mezzo del soggetto espropriante. Questa è la raggione per cui la causa de pubblica utilità deve considersi come inesistente, qualora per determinala si sai guardato sotanto ala qualità del soggeto espropriante.*" (*Le Espropriazioni per Causa di Pubblica Utilità*. Milan: Società Editrice Libraria, 1936. p. 54.) Now, since the expropriatory institute is a legal figure intended to ensure the compulsory overcoming of minor interests by broader, more relevant interests (and which, well for this reason, should prevail), the ablation of someone's right to property for the benefit of the expropriator depends fundamentally on the supremacy of the interest, that is, on the supremacy of the necessity and utility proclaimed over the interest that the legal order has categorized in a subordinate degree, by staggering it at a secondary level in relation to the other that can impose itself. These obvious considerations, which therefore seem to be dispromised when one looks at the common hypotheses of expropriation, in which public necessity or utility is opposed to the particular interest, prove to be fundamental in the expropriation of public goods. Their crystal clear clarity and the theoretical support that supports them are not minimized at all, but the exceptionality of the hypothesis can have the risk of blurring their clarity and blurring their perception if they are not, injunctionally, highlighted, when recalling the foundations of the institute. It can be said, therefore, as a conclusion of this topic that:

"Expropriation presupposes the invocation of interests and a public person (need, public utility or social interest) superior to that of another person, whose interests are qualified by the legal order as of lesser relevance or scope and, therefore, surmountable by the expropriator."

II – Public goods and their function. Not all assets belonging to the Public Power are directly and immediately affected to the realization of a public interest, that is, certain goods are preposed to the realization of a public need or utility, serving it by themselves; others are affected to it in an instrumental way, so that the Administration uses them as a physical environment, in which it develops public activity, that is: they correspond to a place where the service developed has no inseparable correlation with the nature of the good, since this represents nothing more than the special basis

on which the Administration is installed. Finally, other assets, yet, although publicly owned, are not affected by the performance of a service or administrative activity.

Due to the diverse function of goods in relation to public utility, there are various classifications of them, with no uniformity in the doctrine and Positive Law of the various countries, either regarding the categorization of the typological species they entail or with regard to the inclusion of certain goods in one or the other of the different species provided for in the classification schemes. Brazilian Positive Law divided them into three types, catalogued in article 66 of the CC (LGL\2002\400), namely:

"I – those of common use of the people, such as seas, rivers, roads, streets and squares; II – those of special use, such as buildings or land applied to federal, state or municipal service or establishment; III – Sundays, that is, those that constitute the heritage of the Union, States or Municipalities as an object of personal or real law of home one of these entities."

Any of them were granted the special protection of unseizability provided for in article 117 of the Constitutional Charter, the inalienability (or alienability, in the terms provided by law) contemplated in article 67 of the CC (LGL\2002\400) and imprescriptibility, which results from being regarded as *res extra commercium*, pursuant to article 69 of the same law, in addition to other special texts that dispelled doubts about the imprescriptibility of Sunday goods.

Certainly there is – starting from Sunday goods to those of common use, taken as extreme points – a progressive, growing identification with the public interest. Sundays only very indirectly benefit or can benefit public utility; those of special use already present themselves as an instrument for their effectiveness; and those of common use identify with their own utility through them expressed. Moreover, as doctors of the greatest assumption have already observed, if already accommodated goods with unquestionable property in one or the other category, there are others that seem to touch the border of more than one species, and it cannot be said, in plan, on which side of the border it is located. This is due to the fact that their ascription to the public interest is especially linked, in what they seem to be on the threshold of transposition of the category of special use goods to the class of common use, tending to add to this, in which the commitment of the good to the public interest is more sensitive.

Hence the thought of the *distinguished Cirne Lima*: "Between these two classes of goods – the author refers to those of common and special use – there are, however, intermediate types; the set forms an almost insensitive gradation of tones and hues. Thus, among the roads and the constructions occupied by the public offices, there are the fortresses that, strictly speaking, participate in the characters of both: they are the national defense service, because they are the realization of this in their sector of action, and, at the same time, are merely applied to this service, because the public does not use them directly." (*Principles of Administrative Law*. 4. ed. Porto Alegre: Sulina, 1964. p. 78.)

The deep identification of certain goods with the satisfaction of public needs led the eminent Otto Mayer to include certain buildings and constructions in the category of goods in the public domain, subject in Germany to the regime of Public Law as opposed to other state assets governed by private law. Therefore, it included in this class other non-listable goods among the most typical examples of public things.

So, after observing that "roads, squares, bridges, rivers, navigation channels, ports and the seafront are the main examples of things subordinate to Public Law," he added others to them, some of which even exclude common use.

The following considerations are yours: "*Mais il y a des choses publiques donc la particularité consiste dans une exclusion rigoureuse du public. Ce sont les fortifications. Elles représentent donc un troisième groupe. Elles ont le caractère distinctif de représenter directement par elles-mêmes l' utilité publique. Cette utilité consists of ici dans la défense du territoire nationale.*" (*Le Droit Administratif Allemand*. Paris: V Giard et E. Brière, 1905. t. 3, p. 124.)

Finally, the cited author also lists among things in the public domain: "*...les grandes digues destinés a contenir les eaux des fleuves ou de la mer; elles participant, en quelque manière, à la nature des fortifications. Nous citerons encore les égouts publics; quad ils font corps avec les rues, ils sont compris dans la dominialitè de ces dernières; mais ils devront être considérés comme choses publiques em eux-mêmes quand ils separent des rues et suivent leur cours distinctement.*" (Op. cit., p. 125-126.)

In short, what the author intended to demonstrate is that not always the common use of all, occurring especially in the case of things naturally predisposed to such a destination, proves to discriminate rather to the set of goods most closely linked to public needs and, for this very reason, deserve a peculiar legal treatment, in the name of safeguarding collective interests. It

is understood, then, his criticism of Wappaus and Ihering, expressed in a footnote, where he states: "*comme la qualité de chose publish ne peut pas être conteste aux fortifications, ceux de nos auteurs qui maintiennent l'usage de tous comme condition indispensable de l'existence d' une chose publique se voient obligés de faire des èfforts pour sauver, em ce qui concerne les fortifications toutes au moins, quelques apparences d'un use de tous. Ainsi Ihering, dans 'Verm. Schriften'*, p. 152, *fait allusion à une destination de ce genre em les appelants 'établissements protecteurs qui profitent non pas à l'État, mais aux individus'. Cela tout d'abord, n'est pas exact; et même si c'était vrai, cela ne donnera pas encore un usage de tous*" (Op. cit., p. 125, note 31.).

Indeed, also in Brazilian law, there are certain goods that, in view of the systematization of the Civil Code (LGL\2002\400), would lodge very improperly and unaccommoded among the special purpose goods because, strictly speaking, they are not only buildings or land applied to a service or establishment in which public activities are developed. Indeed, there is a profound and noticeable difference between a building where some bureaucratic office operates, or even a school, a hospital, a police station and the complex of things that constitute an electric power plant, or an electric power plant, or a power plant that transforms power, or water treatment, or a sewage network, or the set of water abstraction and pipelines.

The latter are not only headquarters, places of service provision, but much more than that, they are goods functionally integrated into the service itself, which consists precisely in that complex that identifies it and provides public utility. Public agents act as operators or manipulators of such goods. The service provided to all is less a product of the personal performance of employees than one resulting from the inherent use of the good itself, that is, the goods in question provide, by reason of their own way of being, a public utility possessed in itself, once the work in which they are embodied has been carried out. As a rule, they are precisely goods that satisfy not only a utility, but an authentic collective need. In our Law, however, whether they classify themselves as special use or categorize themselves as common use of all – to the extent that their destination is the collective utility, enjoyed by all – they are in any case protected by inalienability, unenforceability and imprescriptibility. What is intended to be highlighted, however, is that now these protective effects of public goods in general – including Sundays – others may have possibly arisen and, in such a case, attention should be paid to the degree of interconnection that the good has with public need and utility. Indeed: the only fact that the Civil Code (LGL\2002\400) has proceeded to a classification of public goods, categorized on an unbelieving

scale of interconnection with public utility, obliges to recognize that there is in our system a weighting of value with public utility, obliges to recognize that there is in our system a weighting of their public value and, consequently, that the degree of protection that should assist them legally is in the direct relationship of the commitment of such goods with the satisfaction of public needs, that is: if there is a regime proper to public goods, the reason for such fact proceeds from embodying an interest awarded with a peculiar treatment. The defense of such assets assumes greater relevance depending on the degree to which they share in the interest in question, hence with corresponding legal protection; therefore, the greater the greater their membership in the satisfaction of public needs.

That said, it is worth indicating as a conclusion of this topic: "In the disputed relations incident on public goods, if the conflicting parties pursue legal interests of the same level, the protection incident on the public good prevails, when the degree of its ascription to the satisfaction of a current collective interest is based on the scales in which their commitment to the immediate realization of a public need is highest."

III – Relationship of public people of political capacity. By providing for a triple order of legal entities of political capacity – Union, States and Municipalities – the Brazilian constitutional system provided, of course, for a discrimination of competences, expressed fundamentally in articles 8, 13 and 15. Each one must, in harmonious coexistence – a condition of their coexistence and, therefore, of compliance with the constitutionally foreseen model –, pursue the objectives of their purview without penetration, interference or sacrifice of the interests pertaining to another person of political capacity.

Indeed: the achievement of the overall objectives results from the satisfaction and integration of the partial objectives of each one, a circumstance that stems directly from the distribution of competencies itself. It is well to see that corresponding to them interests of diverse amplitude, since those of the Municipalities are of lesser scope and those of the Union those of greater scope being located in the state on an intermediate scale, can occur not only tangential zones, but even of friction and even of eventual confrontation of interests. In such cases, the rule to be extracted from the whole system, by force, will have to be the prevalence of interests of more comprehensive scope, effected, however, to the strict extent that the stated preponderance is an insuppressible condition for the realization of the prevailing competencies, provided for in the system, that is, its preponderance can only be admitted when it comes to implementing a

function that has been constitutionally granted. Strictly speaking, in hypotheses of this kind, there is no contraction in the sphere of competence of the person responsible for smaller public interests.

What happens is that its own sphere of competence, a priori, has its scope defined up to the limits of compatibility with the interests of greater scope. The clash occurred is not a legally equivalent conflict of interest confronted with equal weighting in the system. One of the interests – the one that yields – bows precisely because it can no longer be considered confined to the sphere of its own and impetrable expression that is relevant to it. However, attention should be paid to the fact that said preponderance is only legitimate while attached to the limits of the indispensable, that is, in order to cause the least possible burden to the interest that is subjugated. Too much corresponds to a crossing of borders and, therefore, to an extravasation of one's own competence to the detriment of the competence of others. In view of the above, it is intended that, from the point of view of the logic of legal ordering, there are no real conflicts of rights. These are logically impossible. Conflicts of interest can always occur by the decline of those who are not striving for legal protection in force in the conflictive hypothesis. Just as Law is a harmonious whole, the harmony of legal entities of political capacity is a cardinal principle of our constitutional system. Considering that all of them are, under the Major Law, holders of public interests, their balanced interaction and peaceful coexistence is a preserveable value for all titles and insuppressible condition of the realization of the public interest globally considered.

The legislators of the Brazilian Magna Carta, as it has been happening throughout our legal tradition, have been attentive to the reiteration of this principle. Thus, article 9 of the constitutional text expressly enshrines a principle of reciprocal respect and harmonious coexistence available: “To the Union, States and Municipalities it is true: I – to create distinctions between Brazilians or preferences in favor of one of these persons of domestic Public Law against another;...” Article 19 prohibits the Union, States and Municipalities, in item II, from: “institution of tax on each other’s assets, income or services.” Article 20 establishes: “It is forbidden: I – the Union to institute taxes that are not uniform throughout the national territory or imply distinction or preference in relation to any State or Municipality to the detriment of another; [...] ; III – the States, the Federal District and the Municipalities establish a tax difference between goods of any nature, due to their origin or destination.”

The indicated devices highlight the constitutional purpose of preventing conflict between people of political capacity and ensuring in their reciprocal relations a harmonious and balanced coexistence. Even in the absence of the articles in question, it is obvious that the principle of harmony between them would have to be considered an inherence of the constitutional order, since all are part of a system and provided for in the Greater Law as segments of a total set. Peaceful reciprocal coexistence is a rational requirement for compatibility of its functions and the combination of its partial activities in the unit of the Brazilian federal state. However, the provisions invoked highlight and make explicit the consecration of this balance in the matters covered, without prejudice to the broad and unrestricted applicability of the principle in question. It should be noted that, at their respective levels, i.e. States vis-à-vis States and Municipalities each other, are legally placed in perfect balance, on complete equality. There is, by virtue of all things considered, an integral legal leveling between them. Therefore, their public prerogatives in relation to those administered cannot, in principle, be reciprocally opposed, given the absolute in which Law places them. In order to proceed with such an invocation, it must be that the interest affected by the claim is not directly related to the public activity of the person against whom it is invoked.

Otherwise, one would have to admit, illogically, that a public interest – as such enshrined in the normative system – could be disturbed or sacrificed provided that the perpetrator of the damage to the prestigious value was another public person of political capacity. Such a conclusion about being transparently meaningless and unsupported by any rule of law would also imply the implicit proclamation of ablatory effects of two principles already made more expensive: that of the harmonious coexistence of the public interests of the various political persons, resulting from the constitutional discrimination of competences, and that of the balance of the interests of public persons of the same level (States before State and Municipalities before Municipalities). In view of the previous statements, it follows as a conclusion of this topic: “Because there is no legal imbalance between political persons of the same constitutional level one cannot oppose to the other their prerogatives of authority if this proceeds to interfere in the public interest in charge of the one against whom it is intended to invoke a power of supremacy.”

IV – In the light of the considerations and conclusions of the previous topics, let us now see the concrete case sub-consultation, combining the points already stated in a broader theoretical examination with the provisions closely linked to the subject, that is, those provided for

in Decree-Law 3,365, of 21.06.3941, which are more directly related to the problem in question. Article 2 of the aforementioned law states: “Upon a declaration of public utility, all assets may be expropriated by the Union, by the State, Municipalities, Federal District and Territories.” Paragraph 2 of the same article specifically considers the expropriation of public goods, by establishing: “Goods in the domain of the States, Municipalities, Federal District and Territories may be expropriated by the Union, and those of Municipalities by the States, but in any case, the act must precede legislative authorization.” As can be seen, a gradation has been established in the exercise of expropriatory power, from which it must be deduced that, implicitly, the exercise of expropriatory power is prohibited in the opposite direction to that provided for. To solve the doubt, hypothetically, two extreme and opposite solutions are conceivable, that is, one that would unrestrictedly admit the exercise of expropriation, in such cases, and another that radically rejected it. In support of the former, the following argument could be carried:

Provided by article 2 of the expropriatory law, in its caput, that all assets are susceptible to expropriation, except for the obstacle arising from § 2 of the article – which prevents expropriation in the opposite direction to the planned escalation –, the exercise of expropriatory power would be generically franchised to the public entities related there. In the face of this, States could expropriate state assets and Municipalities municipal assets, being connatural to them the exercise of all powers within their territories.

The second interpretation, opposite to the previous one, would be based on article 2, caput, enunciating the rule relating to goods in general, but there is a specific rule regarding public goods: exactly that of § 2 of the same provision. Hence, outside the hypotheses provided for in this, no expropriation of the public good would be tolerable, that is, if the aforementioned § 2 of article 2 indicated who could expropriate what in matters of public goods, there would be no legal support to exercise it beyond the cases contemplated, hence the exercise of expropriation outside its enunciation constitutes an infringement of it. And even more: the first interpretation would lead to admit positions definitively irreconcilable with the very rationality of the legal system. This is because it would assume the existence of supremacy between people of the same constitutional level when, strictly speaking, there would be no shim for the exercise of powers of authority of one over the other, given the legal leveling of both. Above all – which is especially serious – such an interpretation would be unaware of the principle of harmonious integration of the people concerned, establishing

conflicts between them, which, precisely, is unwanted by the constitutional system itself, attentive to preventing misunderstandings and foreordinate to fix leveling and harmony between them.

Finally, it would focus on the misconception of not knowing that conflicts of this order, in themselves, displace the scope of opposing interests; that is, these would cease to be strictly municipal or state problems to become intermunicipal or interstate problems, from where they are solvable only at the supra municipal and supra-state levels, that is: because the restricted scope of interests of each person has been transcended, to the extent that a contrast of interest of two different public persons is generated, a problem that addresses the purely internal interests of each area is ipso facto at stake. In view of this, only States, where intermunicipal interests are composed and integrated, and Union, where interstate interests are integrated, could promote integration by resolving the contrast of interests. In short, the first interpretative line would incur the following misunderstandings:

a) assign to the caput of article 2 a scope and meaning totally foreign to its purposes, since without manifest objective would have been to indicate the possibility of expropriating movable, immovable, fungible, infungible and rights, that is, it would have been ordered to fix the extent of the objects expropriable by the persons referred to. The distinction between public goods and private goods would not be in question, because it is a discipline established according to its owners and not the object itself – this one considered in the head of the device; b) ignore that the treatment of the expropriability of public goods was the object of a specific rule (that of § 2o), from which its situation is inassimilable to that of the other goods considered in the caput of the article. Hence the impossibility of being exercised outside the enunciation provided for therein; c) to assume the existence of the possibility of the exercise of powers of supremacy by a public person over another of the same constitutional level, for which there would be no legal basis, on the contrary, constitutional principle in the opposite direction; d) to adopt an interpretative criterion outrage to the constitutional principle of harmony of political persons, by advocating a solution that would lead to the direct legal confrontation of these persons; e) to be unaware that the contrast of interests between Municipalities is an intermunicipal problem – and, therefore, to be soluble at the state level – and that the opposition of interests between States is a supra-state problem and therefore resoluble at the federal level, that is: only States and the Union, respectively, could declare the public utility of such assets when conflicting the interests of persons who are inferior to them.

Certainly, the first proposed solution faces insurmountable legal obstacles, because the arguments that oppose it show the inadmissibility of an unrestricted expropriatory power of States over assets of another State and of Municipalities over assets of other Municipalities, situated in the territories of possible expropriators. Indeed, it incurs unanswerable criticism that invalidates its fragile support. It is a simplistic solution, based on literal interpretation to a certain extent naive and which undoubtedly affronts constitutional principles by ignoring them, making tabula shallow of their existence and irrefragable supremacy, forgotten that all interpretive labor must be commanded by accommodation to higher norms. The second solution, although much more and with mainstays grounded in Constitutional Law – matrix of the expropriation institute – sins by radicalism, going beyond what is necessary to preserve the values it finds inculpted in constitutional ordination, by radically denying any expropriatory possibility in the hypotheses under examine.

The origin of his arguments rests on an underlying assumption, given as implicit in all cases, namely: that the interests likely to be affected by eventual expropriatory activity are always directly linked to the satisfaction of a public need of the person against whom the sword of expropriation was raised, that is, it supposes that, in any case, the threat is proposed against a public interest pertinent to the eventual taxable person. We understand that the correct resolution of the problem can only be achieved from the conclusions enunciated at the end of the examination of the previous topics. These conclusions are, in our view, the premises for the proper solution of the issue. From them, there may be the final conclusion, the unraveling of the problem in focus. Let's remember them:

“Expropriation presupposes the invocation of interest to a public person (need, public utility or social interest) superior to that of another person, whose interests are qualified by the legal order as of lesser relevance or scope and therefore supersible by the expropriator.”

“In contraverted relations, incidents on public goods, when the conflicting parties pursue legal interests of the same level, the protection incident on the public good prevails whenever the degree of its ascription to the satisfaction of a current collective interest is based on the scales in which its commitment to the immediate fulfillment of a public need is highest.”

“Because there is no legal imbalance between political persons of the same constitutional level, one cannot oppose the other his prerogatives of authority if this does so entail interference in the public interest by the one

against whom a power of supremacy is intended to be invoked."

The conclusions in question were duly justified in the previous topics. Let us therefore apply it to the problem of reciprocal expropriation of goods, between States and between Municipalities. Indeed, it is intolerable to exercise the expropriation of state good by another State or Municipal good by another Municipality when the interests put in shock are both public interests. Due to their legal balance, the intended expropriator does not have in his favor the greatest scope or relevance of interest that makes him surpassing, to serve as the cause of the expropriatory act.

As the institute of expropriation is precisely vested in the inequality of the interests confronted, in the absence of it, the institute's own support dies. Now, if the satisfaction of public needs of one Municipality (or a State) is legally as valuable as the satisfaction of public needs of another Municipality (or of another State), none can invoke in its favor utility or need with preponderant force, likely to coerceively surpass, by expropriation, the interest of another. Reversingly, if the asset achieved is not preposed to satisfy a public need, by virtue the leveling of interests is not called into question, because, in such a hypothesis, the confrontation of a primary public interest with the merely patrimonial interest of another person will occur. In this case, the aforementioned obstacle will not appear, franking the exercise of expropriatory power. Moreover, if the public good to be achieved is assigned to the satisfaction of a current public need, that is, committed to the realization of a relevant interest of the collectivity, as is the case with public goods preposed at the levels of most intense link to the implementation of public purposes – within what suggests by the classification of the Civil Code (LGL\2002\400) –, evidently the protection that the protection that the safeguards will prevail against the expropriatory claim of a person pursuing interests of the same level.

This is because the protection of such goods ultimately means, as can be seen from their own systematization, protection for the purposes for which they are intended. What the legal order enshrines, through the special regime to which they submit, is the strict defense of the interests that are made possible through them. Hence avoidance of the discipline that supports them whenever it means commitment of mentioned interests or interference in them. The protective regime prevails if the opposition of interests is based in the same legal level.

Conversely, if the claim focuses on public good not affected by the direct satisfaction of a public need or utility – as occurs in the extreme case of Sunday goods, possessed in the fashion of any priority, as a simple asset of a public person – there is no longer reason to prevent a public satisfaction of the eventual expropriator. This would not have to be paralyzed in the face of a secondary interest (according to Carnelutti's terminology) of another public person. In such a case, there would no longer be a legal leveling of interests, because of the merely patrimonial or purely incidental character of the property, therefore convertible into another without any damage or harm to the specific interests of the public person affected.

Finally, it is unacceptable, in view of the balance and harmony of persons based at the same constitutional level, for one to invoke prerogative of authority, supremacy over another, to affect interest of the same quality, of the same gradation of equal legal qualification. There is supremacy only when someone's legal sphere incorporates values to which Law has assigned priority qualification. In the face of this, there is no way to irreplace the exercise of expropriatory power in hypotheses of this jaez. On the contrary, if people present themselves on an uneven plane, that is, one, as responsible for conducting their specific public purposes, and the other unrelated to the position of accomplishing their own interests or as a holder of good whose sacrifice does not involve interference in those priority interests, the legal balance of both disappears, releasing the expropriatory force of those who, then yes, oppose prevailing interests and, for this very reason, justifying a supremacy.

Indeed, the principle of harmony between people of the same constitutional level, their peaceful rapport, the balance of mutual interests, are inextricably linked to the position of these people in the system. There is, of course. His statement is unquestionably correct. It is necessary, however, to understand them in their precise meaning. Precisely because they are linked to the quality of the subjects, they are present when such subjects are manifesting themselves *as such*, that is, as holders of public interests, therefore, in their own quality.

Hence the problem of unwanted conflict, disharmony, unevenness does not arise, whenever these people appear disconnected from their natural mission. In such situations, due to the lack of the dignifying substrate of their legal position, the peculiar legal protection that is their own fades. Conversely, whenever interests corresponding to their function are called into question, they are fully protected by the constitutional and legal system. Therefore, there is only, strictly speaking, a conflicting interstate or

intermunicipal problem, when the public interests of both clash. Since undoubtedly interests of this nature can often be projected beyond the territory of each one, it happens that the solutions of possible conflicts depend on the interference of political persons in whose scope the respective interests of the opposing parties are composed

Once all the points that seem relevant to us for the solution of the sub-consultation case are established, its outline is simple and natural, as a spontaneous result of the application of the principles indicated and criteria deduced from them. The Municipality of Vinhedo proposes to expropriate a municipal public good of Valinhos, formerly called the Rocinha Appuctor and currently named João Antunes dos Santos Appuctor, partially located in the Municipality of Vinhedo. It is a comprehensive complex of facilities, pipelines, auxiliary buildings and surrounding area, comprising the protective forests of springs against contamination, pollution and flow reduction. It is part, therefore, in the system of water abstraction and derivation for the Municipality of Valinhos, a system that, as a whole, is partially in another, according to the exposure that precedes the consultation and the documents attached to it.

Putting aside other defects suffered by the act in question — and beyond — the expropriatory claim resents an insane defect. The Municipality of Vinhedo cannot expropriate the good in question, since it is a public thing immediately assigned to the satisfaction of a utility and even, more than that, of a public need of Valinhos: the water supply. It corresponds to an onslaught against the public interest – and fundamental – of another municipality. The expropriatory law does not give the intended expropriating assistance for the exercise of the powers it wishes to trigger, since its act calls into question the public interest of another political entity of the same level, over which, consequently, it does not have supremacy, given the legal balance of the interests confronted, a circumstance that, on the one hand, generates intermunicipal conflict, soluble only at the scope at the state level, and, on the other, leads to the violation of the harmonious and peaceful coexistence of political persons, required by the constitutional system.

The obstacles to expropriation result both from the offense to constitutional principles that preserve harmony and the level position of political persons responsible for interests of the same gradation and from the absence of legal settlement for the act, since Decree-Law 3,365 allows Municipalities to expropriate assets over which they can manifest supremacy. The silence of Decree-Law 3,365 on expropriation of municipal assets by another

Municipality (and state assets by another State) cannot be interpreted as implicit unrestricted authorization, allegedly deducible from the caput of article 2. Rather, this can only result in expropriatory permissibility — connatural to the exercise of supremacy in one's own territory — in situations parifiable or analogous to those in which such power is unleashed against individuals; that is, when interests of a different nature, of different quality are confronted. Never when legally qualified interests in an isonomic position in the normative system are opposed.

Finally, the act in question has visible remnants of a war between Municipalities, of an inglorious battle, unsupported in the public interest, the only one that can legitimately trigger government action. It is also addicted to this second invalidity, since under the terms of the exposure that precedes the consultation the Municipality of Vinhedo supplies water from another source, the waters of the Capivari River, pumped only once a week, which demonstrates the lack of need to interfere with the Valinhos waterways, indispensable to the population of the latter municipality.

This is, therefore, that the act in question, about not having a valid legal cause, still affronts, for the war it proposes to make to a neighboring municipality, the constitutional principle that imperatively demands the harmonious coexistence of political people. Moreover, the absence of mention, in the declaration of public utility, of the purpose of the expropriation, about invalidating it due to the absence of an essential requirement, reinforces the indications that it is an inquidated procedure of misuse of power, whose purpose, more than disguised, was even omitted. Indeed, on another occasion we leave written: “The declaration of public utility must include: a) public manifestation of the will to subject the good to expropriatory force; b) legal basis on which expropriating power is based; c) specific destination to be given to the good; d) identification of the good to be expropriated.” (Notes on expropriation in Brazilian law. In: *RDA* 111/517-518)

The aforementioned requirements, absent in the act of the Municipality of Vinhedo, are indispensable, because expropriation is based on legal hypotheses defined by federal legislation as configuring cases of public utility or social interest. Outside of them, the exercise of expropriatory power is departed. Therefore, in order to know whether or not there is a legal basis to trigger it, it is necessary to indicate the normative seat of the act. Oliveira Franco Sobrinho, the illustrious professor of Administrative Law at the Federal University of Paraná, expends to the purpose very correct considerations: “...the law silences on the terms of the declaration of utility.

But nothing needed to say, because it is understood that the qualification of the object should fit into the species – cases pointed out in article 5 "... The very law authorizing each expropriatory operation must not only obey constitutional standards, but also the legislation relevant to the matter. Thus, the law authorizing the exercise of expropriation must obey the national regulatory law of the institute "... Indeed, on its political, legal, theoretical and normative basis, the declaration must contain the requirements and conditions that authorize it." (*Disappropriation*. São Paulo: Saraiva, 1973. p. 231) Hely Lopes Meirelles also records that: "The expropriatory act does not contain which norm; it contains only the individualization of the good to be transferred to the domain of the expropriator and the indication of the reason for the expropriation" (*Brazilian Administrative Law*. 2. ed. São Paulo: RT, 1966. p. 499). Indeed, since expropriation is only legitimated when placed in legal hypotheses, the declaration, which is its indispensable initial act, does not even acquire legal consistency if it does not enunciate on which hypothesis it rests. This is an obvious condition for verifying both the existence of a normative support in theory and a minimum degree (i.e. logical subsistence, rational admissibility) of legitimate interest in the good, which serves as a suitable reason to claim it.

If such requirements were disregarded, federal law would not need to indicate when expropriation would be appropriate. Moreover, if the cases listed in the law are not given a minimum meaning, that is, any content correlated with the concrete realities in which they apply, the legal enunciation would also mean nothing, and could serve as a mere pretext for the expropriator. It would be, strictly speaking, a blank check usable to the taste of the expropriating released from any commitment to the public interest. Finally, let it be said that the circumstance of the act of the Municipality of Vinhedo coming from its Legislative does not confer on it a peculiar qualification that purges its vices or the eximamity of judicial contrast, because, as noted by the clear Seabra Fagundes, regarding the matter: "It should be noted that, despite the intervention of the Legislative Branch, the declaration is always an act of an administrative nature, which is why it is limited to defining an individual situation. The intervention of the Legislative does not give it the character of law. He intervenes there in the performance attribution of purely administrative content" (*Of Disappropriation in Brazilian Law*. Rio de Janeiro: Freitas Bastos, 1942. p. 66.).

In the same sense, Hely Lopes Meirelles: “The law declaring the public utility of a good is not normative is essentially operative and of an individual character. It is a law of concrete effect comparable to the administrative act, which is why it can be attacked and invalidated by the judiciary, since its promulgation and independently of any execution activity, because it already carries within itself the administrative consequences of the expropriatory decree.” ([sic] Op. cit., p. 499) All this put forward and considered – and even if dispensed with the vices post-arranged – we do not hesitate to answer: The Municipality of Vinhedo cannot expropriate the Municipal Appductor João Rodrigues dos Santos, penalty of offense to the legal norms that govern the institute and to the constitutional principles that inform the possibility of exercising expropriatory power.

That's our opinion.

Downloads

There are no statistical data.

Author's Biography

Celso Antônio Bandeira de Mello, Pontifical Catholic University of São Paulo (São Paulo, São Paulo, Brazil)

Professor Emeritus of the Pontifical Catholic University of São Paulo – PUC/SP.

References

Article originally published in Revista de Direito Público, São Paulo, year VII, n. 29, p. 47-60, May-June. 1974.

MELLO, C. PUBLIC GOOD DISAPPROPRIATION. Revista de Direito Administrativo e Infraestrutura - RDAI, v. 4, n. 14, p. 113 - 133, 8 Jan. 2021. DOI:https://doi.org/10.48143/RDAI.14.cabmello

Published

2020-01-08

Edition

v. 4 n. 14 (2020)
Section

Articles

- Celso Antônio Bandeira de Mello, Notes on the theory of public agencies , Revista de Direito Administrativo e Infraestrutura - RDAI: v. 2 n. 4 (2018)
- Celso Antônio Bandeira de Mello, The content of the legal-administrative regime and its methodological value , Revista de Direito Administrativo e Infraestrutura - RDAI: v. 1 n. 1 (2017)
- Celso Antônio Bandeira de Mello, New aspects of the social function of property , Revista de Direito Administrativo e Infraestrutura - RDAI: v. 3 n. 8 (2019)
- Celso Antônio Bandeira de Mello, Bid. Application of rules of Decree-Law 200, of 1967, to municipalities: of the bidable object , Revista de Direito Administrativo e Infraestrutura - RDAI: v. 3 n. 9 (2019)
- Celso Antônio Bandeira de Mello, Civil servants: constitutional aspects , Revista de Direito Administrativo e Infraestrutura - RDAI: v. 4 n. 14 (2020)
- Celso Antônio Bandeira de Mello, Creation of municipal secretariats: Unconstitutionalities of article 43 of the Organic Law of the Municipalities of the State of São Paulo , Revista de Direito Administrativo e Infraestrutura - RDAI: v. 3 n. 11 (2019)
- Celso Antônio Bandeira de Mello, Warrant against denial or granting of injunction , Revista de Direito Administrativo e Infraestrutura - RDAI: v. 3 n. 11 (2019)
- Celso Antônio Bandeira de Mello, Employee's responsibility for direct action of the injured party , Revista de Direito Administrativo e Infraestrutura - RDAI: v. 4 n. 13 (2020)
- Celso Antônio Bandeira de Mello, Considerations around hermeneutic principles , Revista de Direito Administrativo e Infraestrutura - RDAI: v. 4 n. 13 (2020)

This journal is licensed by
Creative Commons Attribution-NonCommercial-NoDerivatives 4.0 International.

Attribution-Share-Equal 4.0 International (CC BY-NC-ND-SA 4.0)

The submission and publication of articles are free of charge; peer-reviewed; the journal uses CrossCheck (antiplagiarism);
and complies with the *COPE - Committee* on *Publication Ethics* Editors' Guide, in addition to the Elsevier and SciELO recommendations.
Check out the Rules for submission and evaluation of the GDR.