RETROCESSION IN BRAZILIAN LAW

rdai.com.br /ojs/index.php/rdai/article/view/248

Regis Fernandes de Oliveira University of São Paulo (São Paulo, São Paulo, Brazil)

DOI: https://doi.org/10.48143/RDAI.11.rfo
Keyword: Retrocession, Expropriation, procedures and rites, possession of the thing, legislation and constitution

resume

1 How to approach the problem
Any and all studies of law must not start from pre-legal or sociological analyzes, but it is imperative that it be investigated in the light of positive law. Hence, all involvement with positions and studies carried out in other countries, except for cultural improvement. It is evident that the analysis of comparative law becomes of interest if the alien law has a standard equal to or similar to that existing in Brazilian law. The retrospective mention of comparative law would be useless, from the perspective of practical usefulness of this work. Even because, as Marcelo Caetano points out, "there are countries where the expropriated person can request the reversal or retrocession of the assets, restoring the compensation received, or the expropriator has the duty to offer the property to the expropriated one by returning the amount paid" which sets a period of 10 years from the expropriation decree for retrocession to be requested). In Portugal there is a similar provision (art. 8 of Law 2.030, dated 6.22.48); what also happens in Spain (art. 54 of the Law of 15. 12. 54) and in Germany (Law of 23. 2.57, in § 102). In addition to this initial observation, the study of any legal institute linked to law. It is necessary to analyze a particular institute based on the Constitution. Hence the study of retrocession begins. It is necessary to analyze a particular institute based on the Constitution. Hence the study of retrocession begins. It is necessary to analyze a particular institute based on the Constitution. Hence the study of retrocession begins.

2 Expropriation. Misuse of power
Paragraph 22 of art. 153 of the Major Law "that the right to property is guaranteed, except in the case of expropriation for necessity or public utility or for social interest, by means of a previous and fair indemnity in cash ...". , before the collective interest, represented by the State. At the same time that it guarantees the property, the Constitution guarantees the State the power to remove it through expropriation. This can be understood as "the administrative procedure through which the Public Power compulsorily divests someone from a property and acquires it for themselves, through indemnity, founded on a public interest "(Elements of Administrative Law, Celso Antônio Bandeira de Mello, 1980, p. 188). Expropriation is characterized by the compulsory withdrawal of property from the private domain, with its transfer to the public domain, on the grounds of public interest through indemnity. The fulcrum of legal permission for the transfer of the domain is the public interest, that is, the purpose foreseen in the legal system to be pursued by the State. Under the heading public interest, all possible contents of collective utility are housed as

long as they are reached by the system of standards (under the label public interest, the need or public utility and social interest are accepted). The power of expropriation flows from the eminent domain that the Public Power has over all material and immaterial things subject to the spatial scope of validity of the legal system. The power of expropriation can be broken down into three aspects: a) compulsory transfer of something; b) through indemnity and c) on the grounds of public interest. Expropriation, as an original form of domain acquisition, implies the compulsory transfer of property from the private domain to the public. There will always be indemnity, duly determined through the proper process or through an agreement of wills. And, what interests us most, it must be based on public interest, under penalty of invalidity. Jurisdiction is not given in any capacity. It is always granted to a specific agent to pursue collective interests or more properly called public, which are determined by the analysis of the entire system of standards. The complete view of competence can only be interviewed, as, in contrast to the purpose described in the legal norm.

3 Conceito de retrocessão

The retrocession implies the right of the expropriated to retake the ownership of the property that was compulsorily taken from him by the Public Power. The lexicons state that "retrocession is the act by which the purchaser of a good transfers the property of that good back to the one from whom it acquired it" (New Dictionary Aurélio, 1st ed., P. 1,231). Oliveira Cruz points out that "retrocession is a public law institute, destined to return the assets that left its patrimony to the domain of the expropriated, due to an expropriation for public utility" (From the expropriation, p. 119). And, he adds that "the retrocession undoubtedly has a real aspect because it means a right that only leaves the property when the determinant purposes of expropriation are fulfilled" (ob. Cit., P. 121). Thus understood the retrocession, as a defluent of the constitutional precept that ensures property and protects its withdrawal only and exclusively by expropriation for necessity, public utility or social interest, there is no way to confuse it with preemption or prelation, or assimilate it to any type of personal right . The fixation of such a premise is fundamental for the entire development of the work and to support the conclusions that will be pointed out at the end. That is why it is not possible to agree with the assertion made by some authors that it takes care of a simple obligation imposed on the Public Power to offer the ex-owner the property that expropriated him, if he does not have the destiny for which he was expropriated (Múcio de Campos Maia, "Essay on retrocession", in RDA, 34 / 1-11). Due to the very doubt in the content of the concept, the authors, on the other hand, were surprised and the jurisprudence faltered about the analysis of the theme. Many judges even admitted that there was no retrocession in Brazilian law. But, by the analysis that will be made and by the conclusions that will be reached, it will be seen not only the existence of the institute in Brazilian Law, being unquestionable the question of Civil Law about it, deflecting the institute from only the analysis of the Brazilian constitutional text. . The retrocession is a mere corollary of the property right, constitutionally enshrined and stems from the emerging right of not using the inappropriate property for the purpose of public interest. It is under such content that the concept will be analyzed. they even admitted the inexistence of retrocession in Brazilian law. But, by the analysis that will be made and by the conclusions that will be reached, it will be seen not only the existence of the institute in Brazilian Law, being unquestionable

the question of Civil Law about it, deflecting the institute from only the analysis of the Brazilian constitutional text. . The retrocession is a mere corollary of the property right, constitutionally enshrined and stems from the emerging right of not using the inappropriate property for the purpose of public interest. It is under such content that the concept will be analyzed. they even admitted the inexistence of retrocession in Brazilian law. But, by the analysis that will be made and by the conclusions that will be reached, it will be seen not only the existence of the institute in Brazilian Law, being unquestionable the question of Civil Law about it, deflecting the institute from only the analysis of the Brazilian constitutional text. . The retrocession is a mere corollary of the property right, constitutionally enshrined and stems from the emerging right of not using the inappropriate property for the purpose of public interest. It is under such content that the concept will be analyzed. The retrocession is a mere corollary of the property right, constitutionally enshrined and stems from the emerging right of not using the inappropriate property for the purpose of public interest. It is under such content that the concept will be analyzed. The retrocession is a mere corollary of the property right, constitutionally enshrined and stems from the emerging right of not using the inappropriate property for the purpose of public interest. It is under such content that the concept will be analyzed.

4 Historical development in Brazil

In a study on the historical aspect of the development of retrocession in Brazilian law Ebert Chamoun wrote that inc. XXII of art. 179 of the Constitution of the Empire, of 25. 3. 1824 dealt with the possibility of expropriation. And Provincial Law 57, dated 3.18.1836, for the first time dealt with retrocession, ensuring that, in the event of expropriation, it would be possible to "appeal to the provincial Legislative Assembly for the restitution of property ..." The admissibility of the retrocession was accepted by the STF that thus left it decided: “that opening the same Constitution to fullness the right of property in art. 72, § 17, the singular exception of expropriation for presumed public utility, since the certainty that there is no such need, the act of expropriation equals violence (V) and must be terminated through the action of the plunderer " (The Law, vol. 67, 1895, p. 47). The reference is to the Republican Constitution of 24.2.1891. In his New Consolidation of Civil Laws in effect on August 11, 1899, Carlos de Carvalho wrote art. 855 "if the expropriation is verified, the cause that determined it ceases or the property is not applied to the purpose for which it was expropriated, the expropriation is considered resolved, and the expropriated owner may claim it". Several laws took care of the subject, culminating in the edition of art. 1,150 of the CC (LGL \ 2002 \ 400) which provided: " The Union, the State, or the Municipality, will offer the expropriated property to the expropriated property, at the price for which it was, if it does not have the destination for which it was expropriated ". Thus, the right of preemption or preference was created, as a special clause to the purchase and sale. The Constitutions that followed also ensured the right to property (that of 1934, in art. 113, 17; that of 1937, in art. 122, 14; that of 1946, in § 16 of art. 141). The 1967 Constitution also legally protected the property, the guarantee remaining with EC 1/69.

5 Chances of retrocession

The institute of retrocession was well analyzed by Landi and Potenza when they write that "fatta l'espropriazione, if l'opera non siasi eseguita, and siano trascorsi i termini a such uopo I granted the prorogati, gli espropriati potranno domandare che sia dall'autoritia giudiariar competent pronounces the decadenza dell'ottenuta dichiarazione di pubblica utilità, and siano loro restituiti i beni espropriati. (Manuale di Diritto Amministrativo, 1960, p. 501). But it is not just the lack of use of the property in the public interest or the non-construction of the work for which the expropriated property would have been, which implies the possibility of retrocession, say the authors cited. Also in the case where " l'opera pubblica sia stata eseguita: ma qualche fondo, to such fine espropriato, non abbia ricevuto in tutto or in part la planned destinazione "(ob. Cit., P. 501). therefore, it deflects, from what is read in the lesson of the transcribed authors, in the faculty of the expropriated to recover his own good declared of public utility, - when he has been given a destination other than that declared in the expropriating act or he has not been given any destination. On the other hand, André de Laubadere explains that "if the exproprié ne reçoit pas la destination prévue dans le déclaration d'utilité publique, il est juste que le propriétaire exproprié puisse le récupérer. C'est l'institution de la rétrocession "(Traité deDroit Administratif, 6." ed., 2. 0 vol., P. 250). In Brazilian law, the concepts are practically uniform. Eurico Sodré understands that "retrocession is the right of the ex-owner to recover the expropriated property, when it has not been used for what it was intended" (The expropriation for necessity or public use, 1928, pp. 85-86). Firmino Whitaker states that "it is the right of the ex-owner to repurchase the expropriated property through the refund of the amount received, when the same property was not applied to public order services" (Expropriation, 3rd ed., P. 23, 1946). Cretella Junior teaches that "it is the right of the owner of the expropriated property to recover it or to receive losses and damages, for the losses suffered, whenever there is misuse, cogitation of sale or misuse of power of the expropriated asset" (Comments on the expropriation laws , 2nd ed., 2nd run, 1976, p. 409). Making the distinction predicted by Landi and Potenza, Marienhoff writes that "the retrocession, in exchange, can only take place in the following hypotheses: a) when, after the friendly cessation, the expedition, after the end of the expropriation trial, the expropriator affects the well-being of a different fate of the tenant, according to the legislator there to make available the expropriation and to make the respective qualification of public utility; b) when the friendly cession has been carried out, the finished expropriation court has passed cierto plazo el expropiante no le gives al bien o cosa destino alguno "(Treaty of Derecho Administrativo, T. IV, 2nd ed., p. 369). Although the authors tend to distinguish the hypotheses of fit from retrocession, it seems to us that if the Public Power changes the purpose for which expropriation had been decreed, there is no right to retrocession. This is because the Federal Constitution, as already seen, holds in the concept "public interest" the most polymorphic range of interests. So, if immobile is expropriated for the construction of a school, but a hospital is built, there does not seem to be a "misuse of power" or "purpose". There was simply a deviation from the immediate end, but the remote end remains. The greater public interest, present in the legal system, was attended to. Simply, due to the immediate interests of the Public Power, but always within the competence granted by the legislation, the agent decided to give the expropriated thing another destination. In such a

hypothesis, there seems to have been no misuse of power, able to legitimize retrocession. This is how Celso Antônio Bandeira de Mello feels when he says "it is important to emphasize emphatically, however, that Brazilian jurisprudence has pacified itself in the understanding that if the goods expropriated for a specific purpose are used in another public purpose, there is no defect that may arise. to the particular retrocession action (as it is conceived today), considering that, in this case, there was no violation of the right of preference "(ob. cit., p. 210). The author cites the aforementioned case law (RDP, 2/213, 3/242 and in RDA, 88/158 and 102/188). The doctrine is remanent in affirming the possibility of being the good used for a purpose other than that alleged in the expropriating decree or in the law, provided that it is also of public use (Adroaldo Mesquita da Costa, in RDA, 93/377; Alcino Falcão, Annotated Constitution , vol. II, pp. 149 / SO; Carlos Maximiliano, Comments on the Brazilian Constitution, 1954, vol. III, p. 115; Diogo Figueiredo Moreira Neto, Course in Administrative Law, vol. 2, p. 116; Ebert Chamoun, From retrocession to expropriations, pp. 74 et seq .; Hely Lopes Meirelles, Brazilian Administrative Law, 2nd ed., P. 505; Pontes de Miranda, Comments on the 1967 Constitution, with Amendment Constitution No. 1, 1969, T. V, pp. 445/6; Cretella Junior, Treaty of Administrative Law, vol. IX, pp. 165/6). The jurisprudence in this regard is abundant (RTJ, 39/495, 42/195 and 57/46). More recently it was decided that "there is no room for retrocession when the expropriated property has a different destination, routes of public utility" (RDA, 127/440). Few authors manifest themselves to the contrary, that is, for the inadmissibility of applying the destiny of the property for a purpose other than that invoked in the decree or law that stipulates expropriation (Hélio Moraes de Siqueira, The retrocession in expropriations, p. 61 and Miguel Seabra Fagundes, Da expropriation in Brazilian Law, 1949, p. 400). Such indications were collected in the excellent Expropriation - Indications of Doctrine and Jurisprudence by Sérgio Ferraz, pp. 122/124. The result is already diverse when the property is not used for any purpose, leaving it with no specific destination, implying, practically, the abandonment of the property. Hence, the problem of retrocession arises. However, previous issues emerge to be resolved. How do you count the deadline, if any, to actively legitimate the expropriated? As a result of the solution to be given to the previous question, is the retrocession of real or personal rights taken care of, that is, does not use the expropriated property entail a claim or indemnity for losses and damages? These issues are crucial and have plagued jurists. Let us start trying to solve them.

6 Moment of the emergence of the right of retrocession

Cretella Júnior understands that there are two moments for considering the birth of the right to file a retrocession action. By express act or by tacit act. "By means of an express act, mentioning the abandonment of the use of the expropriated thing and notifying the ex-owner that he can, by his own action, exercise the right of retrocession" (Comments on the expropriation laws, p. 415) or through an tacit act , that is, for the conduct of the Administration that allows foreseeing the abandonment of the use of the expropriated asset, allowing the former owner to exercise the preemptive right ... ”(ob. cit., p. 416). Eurico Sodré's lesson, The Expropriation for Necessity or Public Use, 2nd ed., P. 289. The jurisprudence has already manifested itself in this sense (RTJ, 57/46). Ebert Chamoun (ob. Cit., Pp. 80 ff.) understands that only by an unambiguous act of the administration is the retrocession action appropriate. One could never judge by the validity of the action

aimed at retrocession, as long as the Government claims that it will still use the good. The aforementioned author affirms that "it is thus necessary to emphasize that employment, by the expropriator of the property expropriated for the purpose of public interest, does not need to be immediate. As long as he can demonstrate that the public interest is still present and that the destination for that scope has been simply postponed, because it is not opportune, feasible or advisable, the expropriated's claim for compensation should be dismissed, based on article 1.150 of the CC (LGL \ 2002 \ 400) "(ob. cit., p. 84). The lesson of Pontes de Miranda (Comments. T. V, p. 445) has the same content. Celso Antonio Bandeira de Mello has an intermediate position. It states that "the expropriator's obligation to offer the good in preference arises at the moment he gives up applying it to the public purpose. The exact determination of this moment must be verified in each case. It will serve as a demonstration of the withdrawal, the sale, assignment or any device act of the property practiced by the expropriator in favor of a third party. It may also indicate the annulment of the plan of works on which the Public Power was based to carry out expropriation or other similar facts "(ob. cit., p. 209). By the way, the STF has already stated that "the fact that the expropriated thing is not used does not characterize itself, regardless of the circumstances. Deviation from the end of the expropriation" (RTJ. 57/46). Similarly, the judgment in the GDR, 128/395. It states that "the expropriator's obligation to offer the good in preference arises at the moment he gives up applying it to the public purpose. The exact determination of this moment must be verified in each case. It will serve as a demonstration of the withdrawal, the sale, assignment or any device act of the property practiced by the expropriator in favor of a third party. It may also indicate the annulment of the plan of works on which the Public Power was based to carry out expropriation or other similar facts "(ob. cit., p. 209). By the way, the STF has already stated that "the fact that the expropriated thing is not used does not characterize itself, regardless of the circumstances. Deviation from the end of the expropriation" (RTJ. 57/46). Similarly, the judgment in the GDR, 128/395. It states that "the expropriator's obligation to offer the good in preference arises at the moment he gives up applying it to the public purpose. The exact determination of this moment must be verified in each case. It will serve as a demonstration of the withdrawal, the sale, assignment or any device act of the property practiced by the expropriator in favor of a third party. It may also indicate the annulment of the plan of works on which the Public Power was based to carry out expropriation or other similar facts "(ob. cit., p. 209). By the way, the STF has already stated that "the fact that the expropriated thing is not used does not characterize itself, regardless of the circumstances. Deviation from the end of the expropriation" (RTJ. 57/46). Similarly, the judgment in the GDR, 128/395. the expropriator's obligation to offer the good in preference arises at the moment he gives up on applying it to the public purpose. The exact determination of this moment must be verified in each case. It will serve as a demonstration of the withdrawal, the sale, assignment or any device act of the property practiced by the expropriator in favor of a third party. It may also indicate, the annulment of the works plan on which the Public Power was based to carry out the expropriation or other similar facts "(ob. Cit., P. 209). By the way, the STF stated that" the fact that the expropriated thing is not used does not characterize itself, regardless of the circumstances. deviation from the end of the expropriation "(RTJ. 57/46). The same ruling contained in the RDA, 128/395. the expropriator's obligation to offer the good in

preference arises at the moment he gives up on applying it to the public purpose. The exact determination of this moment must be verified in each case. It will serve as a demonstration of the withdrawal, the sale, assignment or any device act of the property practiced by the expropriator in favor of a third party. It may also indicate, the annulment of the works plan on which the Public Power was based to carry out the expropriation or other similar facts "(ob. Cit., P. 209). By the way, the STF stated that" the fact that the expropriated thing is not used does not characterize itself, regardless of the circumstances. deviation from the end of the expropriation "(RTJ. 57/46). The same ruling contained in the RDA, 128/395.

7 Deadline in respect. Analogy

Other authors believe that there is a period of five years for the Government to allocate the property to the Public purpose for which it expropriated. This is how Noé Azevedo (opinion in RT 193/34) and Seabra Fagundes (ob. Cit., Pp. 397/8) manifest themselves. The five-year period is already provided for in French doctrine. Laubadere affirms that "if the immobile expropriations in the past re d le le de de cinq ans la destination prévue or on cessé de recevoir cette destination, les anciens propriétaires or leurs ayants droit à titre universel peuvent en demand de la rétrocession dans un délai de trente ans à compter également de l'ordonance d'expropriation, à moins that l'expropriant ne requires in a new declaration of use publique "(ob. cit., p. 251). Such guidance is based on art. 10 of Decree-Law 3. 365/41 (LGL \ 1941 \ 6) which establishes: "the expropriation must be effected by agreement or be brought to court within five years, counted from the date of issuance of the respective decree and after which it will lapse". It is clear that since the law does not provide for the right to retrocession, the interpreter must seek the solution to the problem (prudential interpretation) within the normative system itself, to fill or fill the gap (specifically on this topic, see if our "Gap and normative system", in RJTJSP, 53 / 13-30). This arises at the moment of the decision. Since every legal problem revolves around decidability, analogical interpretation is accepted when it is understood that the period for the Public Power to give the property a specific or other destination permitted by law (purpose provided for in the order) will also be the term of five years. In this, the public interest expires. Hence, the expropriated person is entitled to file a retrocession action. If it is understood that the term is inadmissible, the birth of the right will be left to chance or, as Cretella Junior intends, the voluntary manifestation of the Public Power will decide on the offer of the property to someone, with what would expressly characterize the desire to sell or dispose of the property. There would never be a fixed term, with which the legal relationship of security and stability would suffer. The expropriated would remain forever at the disposal of the Public Power and would constantly last and in suspense, until management decides how and when to allocate or disarm the property. The solution that seems to us most compatible with the Brazilian reality is to fix the term of five years, by analogue application with art. 10, retro quoted. It is evident that inertia alone does not characterize the presumption of deviation. If the Administration expropriates without a public purpose, the act may be annulled, even without the expiration of the five-year period. But, here, the basis for the annulment of the act would be different and the specific problem of retrocession would not be taken care of. It is evident that inertia alone does not characterize the presumption of deviation. If the Administration expropriates without a public purpose, the act may be annulled, even without the expiration of the five-

year period. But, here, the basis for the annulment of the act would be different and the specific problem of retrocession would not be taken care of. It is evident that inertia alone does not characterize the presumption of deviation. If the Administration expropriates without a public purpose, the act may be annulled, even without the expiration of the five-year period. But, here, the basis for the annulment of the act would be different and the specific problem of retrocession would not be taken care of.

8 Nature of the right to retrocession The nature of the right to retrocession is widely discussed. For some, it would be a personal right and any right would be settled in compensation for losses and damages. For others, it takes care of real rights and, therefore, there is a possibility of claim. Magnificent review of opinions is made by Sérgio Ferraz in his work Expropriation , pp. 117/121. Among some names that are manifested by the recognition that personal care is taken care of and, therefore, indemnities for losses and damages are found Ebert Chamoun (ob. Cit., P. 31), Cretella Junior (Treaty. . ., vol. IX, pp. 159, 333/4), Múcio de Campos Maia ("essay on retrocession", in RT 258/49). The jurisprudence has already manifested itself in this sense (RDA, 98/178 and 106/157). Regarding jurisprudential research, see also Sergio Ferraz's repertoire. The solution pointed out by the authors is based on art. 35 of Decree-Law 3,365 / 41 (LGL \ 1941 \ 6) when establishing that "expropriated assets, once incorporated into the Public Treasury, cannot be the object of a claim, even if founded on the nullity of the expropriation process. Any action judged to be well founded, it will be resolved in losses and damages ". Based on this article, Ebert Chamoun states that "the right of the expropriated is, of course, not a real right, because the real right is never in opposition to a mere duty to offer. And, on the other hand, if the expropriator does not lose the property, nor does the expropriate acquire it, with the simple fact of inadequate destination, it is obvious that the claim that protects the right to dominion, and that falls only to the owner, the expropriated cannot have "(ob. cit., pp. 38/39). Further, it states that "the right of the ex-owner to the expropriating power that did not give the expropriated thing the destiny of public utility, therefore remains in the positive Brazilian law, as a clear and irretrievably personal, a right that does not manifest itself in the face of third parties, eventual purchasers of the thing, nor does it adhere, except exclusively to the person of the expropriator. Thus, the expropriating power, despite disrespecting the purposes of expropriation, disregarding the reasons contained in the expropriation decree, he does not lose the property of the expropriated thing, which he keeps on his farm with the same characteristics that he had when his own. acquisition "(ob. cit., pp. 44/45). In support of his guidance he invokes the aforementioned provision and states" any doubts that still existed about the nature of the expropriated's right would be beaten by this precept, clear and exact, consular perfect of the general principles of our positive law, a device that fits, like a glove, the Brazilian legal system related to the acquisition of property, preemption and expropriation "(ob. cit., p. 47). On the other hand, there are authors who understand how to take care of real rights. Among them, Hely Lopes Meirelles 44/45). In support of his guidance, he invokes the aforementioned provision and affirms "any doubts that still existed about the nature of the expropriated's right would be beaten by this precept, clear and exact, perfect consectionary of the general principles of our positive law, a device that fits, glove, to the Brazilian legal system regarding the acquisition of property, preemption and expropriation "(ob. cit., p. 47). On the other hand, there are authors who want to take care

of real rights. Among them, Hely Lopes Meirelles 44/45). In support of his guidance, he invokes the aforementioned provision and affirms "any doubts that still existed about the nature of the expropriated's right would be beaten by this precept, clear and exact, perfect consectionary of the general principles of our positive law, a device that fits, as glove, to the Brazilian legal system regarding the acquisition of property, preemption and expropriation "(ob. cit., p. 47). On the other hand, there are authors who want to take care of real rights. Among them, Hely Lopes Meirelles **(** Brazilian Administrative Law **,** 2nd ed., P. 505), Seabra Fagundes (ob. Cit., P. 397), Noé Azevedo (cited opinion, in RT, 193/34), Pontes de Miranda **(** Comments.. . ", T. V, pp. 443/6 and Vicente Ráo **(** The right and the life of rights **,** 2nd ed., P. 390, note 113). There are also several judgments (RDA, 48 / 231 and 130/229).

9 Criticism of positions

The provisions of art. 1,149 with art. 1,150 of the CC (LGL \ 2002 \ 400). The first refers to a purchase and sale pact and assumes the sale or payment in kind. It implies a volitional manifestation, through a specific contract, based on the free will of the legal businesses, thus required for the validity of the contract. Art. 1.150 constitutes a rule of Public Law, regardless of its insertion in the Civil Code (LGL \ 2002 \ 400) (Pontes de Miranda, Private Law Treaty **,** T. XIV, 2nd ed., § 1.612, p. 172). As such, the norm of art. 1,150 of the CC (LGL \ 2002 \ 400) that determines the offering of the expropriated property to the ex-owner for the exercise of the preemptive right is not revoked. But, from there it is not concluded that there is only the right to prelate. Our understanding is diverse. According to the aforementioned article, the Administration is obliged to offer the property (it is an obligation imposed on the Administration), but this cannot result from the fact that if the property is not offered, there is no right to demand it. The rule is not unilateral in favor of the Public Power. On the other hand, there is the possibility of demand from the expropriated. And this requirement is called retrocession. Superiorly teaches Hélio Moraes de Siqueira that "however, it is not in the civil law that the basis for retrocession is found. at most, glimpse the guidelines of the institute. It is in the Federal Constitution that retrocession takes root and receives the legal essence that sustains it. Even if absent the precept in the Civil Code (LGL \ 2002 \ 400), the figure of retrocession would exist in Brazilian law, as it is a legal consequence of the constitutional mandate guaranteeing the inviolability of property, with the exception of expropriation for utility and public need and interest through prior and fair indemnity in cash "(ob. cit., pp. 76/77). An identical understanding must be profiled. Indeed, it is important that article 35 of Decree-Law 3,365 / 41 (LGL \ 1941 \ 6) has established that "expropriated assets, once incorporated into the Public Treasury, cannot be the object of a claim, even if founded on nullity of the expropriation process. It is a logical assumption of the emanation of any administrative act that the competence of the agent is exercised in order to achieve the objectives or values outlined in the norms system. Such valuation measurement is carried out when the act is issued. In the course of a certain time, the interest then expressed may disappear. However, this recognition of disinterest does not only belong to the Public Administration, but also to the expropriated who can provoke it, through direct action. Public Administration, due to the circumstance of having acquired the domain of the expropriated thing, is not exempt from demonstrating the usefulness of the thing or the continuity of the public interest in maintaining it. The public interest

disappearing, which can happen at the express will of the Administration, or tacitly, during the five-year period, counted from the five years following the domain transfer, which operates through the registration of the purchase title, which is the letter of award upon prior payment of the fixed price, the expropriated person has the right to recover the thing itself. It is a real right, because the investigation of the nature of the law does not flow from the current moment of recognition of the unnecessary of the thing, but goes back to the moment of the decree of public utility. I already said elsewhere but it goes back to the moment of the decree of public utility. I already said elsewhere but it goes back to the moment of the decree of public utility. I already said elsewhere **(** Administrative Act **,** pp. 122 ff.) That the nullity or the invalid act does not prescribe. In this case, the prescription reaches the expropriated one within five years, counted from the end of the five years preceding the end of the presumption period of the needlessness of the property. To put it better: the government has five years, counting from the date of acquisition of the property, which operates by registering the letter of adjudication in the competent Registry of Real Estate, or by registering the public deed drawn up by agreement of the parties, in the same Registry, to give specific destination, as stated in the expropriation decree or other destination, considered to be in the public interest. After this period, the expropriated person has the right to own the thing, also for a period of five years, under the terms of Decree 20.910 / 32 (LGL \ 1932 \ 1). By the way it was already decided that " the prescription of the retrocession action, aiming at losses and damages, begins to run from the moment the expropriator unequivocally abandons the purpose of giving the property the destination expressed in the declaration of public utility "(PDA, 69/200 Absent public utility, either at the time of declaration or later, the act ceases to have a legal basis. As stated by José Canasi, "the retrocession has an implicit constitutional root and arises from the concept of public utility. There is no public utility that could disappear or deform a posteriori from expropriation. It would be a mistake or a falsehood " the destination expressed in the declaration of public utility "(PDA, 69/200). Absent public utility, either at the time of the declaration or later. the act ceases to have a legal basis. As stated by José Canasi," la retrocesión has a constitutional root implicit and arises from the concept of public utility. There is no public utility that could disappear or deform a posteriori from expropriation. It would be a mistake or a falsehood " the destination expressed in the declaration of public utility "(PDA, 69/200). Absent public utility, either at the time of the declaration or later. the act ceases to have a legal basis. As stated by José Canasi," la retrocesión has a constitutional root implicit and arises from the concept of public utility. There is no public utility that could disappear or deform a posteriori from expropriation. It would be a mistake or a falsehood " **(** The retrocesión en la Expropiación Publica **,** for. 47). The reasoning that the expropriated, no longer being the owner, dies the right to claim a claim, is rejected. Such an argument would also serve to & e reject the existence of a personal right. This is because, if the ex-owner has already received, according to the Federal Constitution itself, the just indemnity for the compulsory taking of his property, no right would have more. There would be no point in giving a new indemnity to the ex-owner, since the Public Power had already paid him all the fair and constitutionally required amount for the composition of the patrimony that was missing due to the loss of the property. There, any relationship created imperatively by the Government would cease. Regardless, the claim goes back to the edition of the act.

The reason for the undoing of the expropriation decree lies precisely in the absence of the final element that must always be present in the volitional manifestations of the Public Administration. Furthermore, after the public interest subsisting in the expropriation act, the Federal Constitution itself determines the persistence of property**.** A nosso ver, a discussão sobre tratar-se de direito real ou pessoal é falsa. Emana a ação da própria Constituição, independentemente da qualificação do direito. Ausente o interesse público, deixa de existir o fundamento jurídico da desapropriação. Logo, não podem subsistir efeitos jurídicos de ato desqualificado pelo ordenamento normativo. Trata-se de direito real, no sentido adotado por Marienhoff quando afirma que "desde luego, trátase de una acción real de "derecho público", pues pertenece al complejo jurídico de la expropiación**,** institución exclusivamente de derecho público, segun quedó dicho en un parágrafo precedente (n. 1.293). No se trata, pues, de una acción de derecho comun, ni regulada por este. El derecho privado nada tiene que hacer al respecto. Finalmente, la acción de retrocesión, no obstante su carácter real, no trasunta técnicamente el ejercicio de una acción reivindicatoria, sino la impugnación a una expropiación donde la afectación del bien o cosa no se hizo al destino correspondiente, por lo que dicha expropiación resulta en contravención con la garantia de inviolabilidad de propiedad asegurada en la Constitución. La acción es "real" por la finalidad que persigue: reintegro de un bien o cosa" (Tratado de Derecho Administrativo, vol. IV, p. 382, n. 1.430). De igual sentido a orientação traçada no Novíssimo Digesto Italiano, onde se afirma que "per tale disciplina deve escludersi che il diritto alla retrocessione passa considerarsi un diritto alla risoluzione del precedente trasferimento coattivo, esso e stato definito un diritto legale di ricompera, ad rem (non in rem) (ob. cit., voce - espropriazione per pubblica utilità", vol. VI, p. 950). Recentemente o Supremo Tribunal Federal decidiu que "o expropriado pode pedir retrocessão, ou readquirir o domínio do bem expropriado, no caso de não lhe ter sido dado o destino que motivou a desapropriação" (RDA 130/229). No mesmo sentido o acórdão constante da "Rev. Trim. de Jur.", vol. 104/468-496, rel. Min. Soares Muñoz.

10 Transmissibilidade do direito. Não se cuida de direito personalíssimo

Admitted the existence of retrocession in Brazilian law in specie, that is, with the possibility of reacquisition of the property, and outrightly rejecting, the solution given by the jurisprudence of admitting compensation for losses and damages, since, in our view , there is a wrong interpretation of art. 35 of Decree-Law 3,365 / 41 (LGL \ 1941 \ 6), the question also arises whether the right to retrocession is extremely personal, or is transmissible, cause mortis. In the negative, Ebert Chamoun (ob. Cit., P. 68), Eurico Sodré (ob. Cit., P. 76), Hely Lopes Meirelles (ob. Cit., P. 505) and Pontes de Miranda (ob cit., p. 446). In the opposite direction, Hélio Moraes de Siqueira (ob. Cit., P. 64) and Celso Antônio Bandeira de Mello (oh. Cit., P. 210). The jurisprudence has been favorable to the transfer of the right of retrocession (RTJ 23/169, 57/46 and 73/155). Art. Inapplicable in Public Law 1,157 CC (LGL \ 2002 \ 400). It regulates private relations, duly adjusted to art. 1,149 which, as we saw earlier, also takes care of volitional manifestations. Expropriation, on the other hand, implies the compulsory takeover of private individuals, as a result of an imperative act (as defined by us on pages 29 of the Administrative Act). Imperativeness implies a manifestation of power, that is, the possibility enjoyed by the Public Power to interfere in the legal sphere of others, by its own legal force. In private relationships, these are on the same level; when the State intervenes, the relationship is

vertical and not horizontal. That is why the said legal provision has no application to the subject under study. The TJSP has already decided that " successors of the owner have the right to be compensated, in case the expropriator of the expropriated property does not use it, and seek to alienate it to third parties, without even offering it to those (RT 322/193). Rejecting only the preemptive right, since understanding retrocession as a kind of real right, the argument of the transferability of the action is accepted. In the same sense, the guidance of the Federal Supreme Court (RTJ 59/631). The very personal actions are strictly interpreted. Only when the law provides that the causa mortis right is not transmitted will there be legal impossibility for the action of the heirs or successors in any capacity. In the case now analyzed, verifying the inapplicability of art. 1,157 of the CC (LGL \ 2002 \ 400), it is clear that deflecting the right to retrocession of the Federal Constitution itself,

11 Amount to be paid by the expropriated, for the acquisition of the property
It remains to be asked what is the criterion for setting the amount to be paid by the ex-owner when the retrocession action is upheld. Initially, it can be said that the expropriated person must return the amount determined upon receipt of the price set by the judge or by agreement drawn up in public deed. However, if the asset has received improvements that have increased its value, it seems to us that they should be taken into account, for the purpose of determining the amount of the price to be returned to the expropriator. The amount to be paid, therefore, will be that received at the time, by the expropriated plus improvements eventually introduced in the property, if this is taken care of.

12 Monetary correction
There are authors who affirm that the monetary correction will not be part of the amount to be returned, "in principle", because, although there is a legal provision for its payment when expropriated, there is a reasonable reason that if the Public Power did not allocate the property or gave If he is not used, because of his own fault, for his own behavior, he must bear the consequences of his attitude. The Supreme Court of Justice of the Argentine Nation made itself available for the lack of monetary restatement, leaving it judged that " in effect, it seems obvious that the legal basis of the institute of retrocession is different from that of expropriation, as it originates from it. I did not intend to use the item expropriated for the purpose of public utility provided by the law. If this purpose is not fulfilled, There is a decision admitting the monetary correction of the amount to be paid by the expropriated (RDP 11/274) given by Min. Jarbas Nobre, from TFR. The value of the property would serve as a ceiling for the correction index.

13 Procedural rite
The type of procedure to be adopted in cases of retrocession action provided for in procedural legislation. It is the ordinary or summary procedure, depending on the value of the case. There is no specialty of the rite, since it does not require prior deposit. Here, the expropriation procedure does not apply, inside out. This is because, in the expropriation procedure, there is a special rite and the Public Power can previously imitate itself in the possession of the thing, provided that it alleges urgency in taking it and deposits the arbitrated amount. This characteristic of the expropriation process is not

present in the procedural rite of the retrocession action. Furthermore, the action depends on prior acceptance, with proof of abandonment of the property, or its non-destination to the end announced in the decree.

14 Retrocession of movable property

Expropriation does anything. Not only can properties be expropriated. This is because art. 2.0 of Decree-Law 3,365 / 41 (LGL \ 1941 \ 6) provides "upon declaration of public utility, all assets may be expropriated by the Union, by the States, Municipalities, Federal District and Territories". As pointed out by Celso Antônio Bandeira de Mello "can be the object of expropriation, everything that is the object of property. That is, any good, immobile or movable, corporeal or incorporeal, can be expropriated. Therefore, rights in general are also expropriated. However, personal rights, such as freedom, the right to honor, etc. are not expropriated. Effectively, these are not defined by heritage content, rather, they present themselves as true projections of the individual's personality or consist of expressions of his or her legal status, such as homeland power and citizenship, for example (ob. cit., p. 194). The lesson of Ebert Chamoun (ob. Cit., 94) has the same content. The author's lesson deserves full subscription, as it is absolutely legal. The Federal Constitution guarantees the right to property. The only limitation is the possibility of expropriation, by the Government. But, as the Constitution does not limit the incidence of expropriation to only real estate and the specific law speaks of "assets", it is understood that any and all rights can be expropriated. Consequently, any asset can be subject to retrocession (verbi gratia, copyright). for. 194). The lesson of Ebert Chamoun (ob. Cit., 94) has the same content. The author's lesson deserves full subscription, as it is absolutely legal. The Federal Constitution guarantees the right to property. The only limitation is the possibility of expropriation, by the Government. But, as the Constitution does not limit the incidence of expropriation to only real estate and the specific law speaks of "assets", it is understood that any and all rights can be expropriated. Consequently, any asset can be subject to retrocession (verbi gratia, copyright). for. 194). The lesson of Ebert Chamoun (ob. Cit., 94) has the same content. The author's lesson deserves full subscription, as it is absolutely legal. The Federal Constitution guarantees the right to property. The only limitation is the possibility of expropriation, by the Government. But, as the Constitution does not limit the incidence of expropriation to only real estate and the specific law speaks of "assets", it is understood that any and all rights can be expropriated. Consequently, any asset can be subject to retrocession (verbi gratia, copyright). by the Government. But, as the Constitution does not limit the incidence of expropriation to only real estate and the specific law speaks of "assets", it is understood that any and all rights can be expropriated. Consequently, any asset can be subject to retrocession (verbi gratia, copyright). by the Government. But, as the Constitution does not limit the incidence of expropriation to only real estate and the specific law speaks of "assets", it is understood that any and all rights can be expropriated. Consequently, any asset can be subject to retrocession (verbi gratia, copyright).

15 Partial retrocession

If there has been expropriation of a property and part of it has not been used for the main purpose stated in the decree, the question arises as to whether the remaining unused can be the object of retrocession. For the same reasons explained why the existence of

retrocession in Brazilian law was admitted and taking care of real law, whereby the expropriated can regain possession and ownership of the property itself, partial retrocession is allowed.

16 Waiver
If the expropriated renounces the right of retrocession, he will have nothing to complain about. As it is, as is taken care of, patrimonial law, it is waiverable. Nothing compels you to maintain your right. As Ebert Chamoun points out, "the resignation is fully effective. Since the instrument of agreement contains a device that expresses the ex-owner's disinterest in the fate that will later be given to the good and in which the its purpose of waiving the preemptive right to purchase and the right to charge losses and damages in the face of breach of the duty to offer, failure to meet the purposes set out in the expropriation decree, will have no patrimonial consequences, becoming absolutely irrelevant under the point of view of private law "(ob. cit., p. 93). Although the consequence pointed out by the author is not adopted. the ground for the possibility of resignation is accepted.

17 Retrocession in expropriation by zone
when the expropriation is based on the improvement of a certain area (art. 4.0 of Decree-Law 3,365 / 41 (LGL \ 1941 \ 6)). In this regard, the opinions of Vicente Ráo (RDP 7/79), Castro Nunes (RDP 7/94) and Brandão Cavalcanti (RDP 7/102).

18 Jurisprudential reference
In addition to the jurisprudence already mentioned in the course of exposing the matter, it is appropriate to transcribe some judgments of the STF that deal with the matter. Negative of the validity of art. 1,150 of the CC (LGL \ 2002 \ 400). "I do not see in the contested negative decision in force of Article 1.150 of the CC (LGL \ 2002 \ 400). According to the best interpretation of this provision, the expropriator is not obliged to offer the property to the expropriated, when he decides to return it to the private domain, through sale or abandonment "(RTJ 83/97. Also the same repertoire 56/785 and 66/250. Possibility of exercising the action." If it is impossible to use the property, or to carry out the work, then it becomes possible to exercise the right of retrocession. It is not necessary to wait for the expropriator to dispose of the expropriated good "(RTJ 80/150). Different destination of the good." Retrocession or reimbursement is unavoidable if the expropriated asset has a different destination, but of public utility "(RTJ 74/95; In the same sense the same repertoire 48/749 and RDA 127/440). Assumptions of retrocession." Retrocession. Your assumptions; return of the property to the private domain, either by alienation or by abandoning it for a long time, without any public benefit. Absence of these assumptions. Action dismissed "(RTJ 83/96). Basis of the right to retrocession." Constitution, art. 153, § 22CC (LGL \ 2002 \ 400), art. 1 .150. Expropriation for public utility. Reversal of the expropriated good. The right to request the expropriated thing is based on the aforementioned constitutional rule and on the aforementioned civil rule, since both express a single principle that overlaps with that of art. 35 of Decree-Law 3. These are some jurisprudential excerpts with greater repercussion, since they faced a really controversial matter giving it a reasoned solution. There are innumerable judgments on the subject, which, however, do not require transcription or express

mention, since they do nothing but repeat the arguments already expressed. As we take care of controversial material and in terms of encyclopedic repertoire, the important thing is the news on the subject, without prejudice to the fact that we have made some personal statements about it. We did not even intend to exhaust the subject, since it is unavoidable in a work of this kind. These are some jurisprudential excerpts with greater repercussion, since they faced a really controversial matter giving it a reasoned solution. There are innumerable judgments on the subject, which, however, do not require transcription or express mention, since they do nothing but repeat the arguments already expressed. As we take care of controversial material and in terms of encyclopedic repertoire, the important thing is the news on the subject, without prejudice to the fact that we have made some personal statements about it. We did not even intend to exhaust the subject, since it is unavoidable in a work of this kind. because they do nothing but repeat the arguments already expressed. As we take care of controversial material and in terms of encyclopedic repertoire, the important thing is the news on the subject, without prejudice to the fact that we have made some personal statements about it. Nor did we intend to exhaust the subject, since it is incapable in a work of this kind. because they do nothing but repeat the arguments already expressed. As we take care of controversial material and in terms of encyclopedic repertoire, the important thing is the news on the subject, without prejudice to the fact that we have made some personal statements about it. We did not even intend to exhaust the subject, since it is unavoidable in a work of this kind.

Author's biography

Regis Fernandes de Oliveira, University of São Paulo (São Paulo, São Paulo, Brazil)

Full Professor of Financial Law at the University of São Paulo (USP). Retired judge of the São Paulo State Court of Justice. He was a Federal Deputy and Vice Mayor of São Paulo. Graduate Professor at USP and Lawyer in São Paulo.

References

Adroaldo Mesquita da Costa, in RDA 93/377.

Alcino Falcão, Annotated Constitution, vol. III.

André de Laubadère, Traité de Droit Administratif, 6. ed., 2. vol.

Brandão Cavalcanti, in RDP 7/102.

Carlos de Carvalho, New Consolidation of Civil Laws in effect on August 11, 1899.

Carlos Maximiliano, Comments on the Brazilian Constitution, 1954.

Castro Nunes, opinion in RDP 7/94.

Celso Antônio Bandeira de Mello, Elements of Administrative Law, ed. 1980, Ed. RT.

Cretela Júnior, Comments on expropriation laws, 2. ed., 1976.

_____ Administrative Law Treaty, vol. IX.

Diogo Figueiredo Moreira Neto, Course in Administrative Law, vol. two.

Ebert Chamoun, The retrocession in Brazilian law.

Eurico Sodré, The expropriation, 1928.

Firmino Whitaker, Expropriation, 3rd ed., 1946.

Hélio Moraes de Siqueira, The retrocession in · expropriations.

Hely Lopes Meirelles, Brazilian Administrative Law, 2. ed., Ed. RT.

José Canasi, The retrocession in public expropriation.

Land and Potenza, Manuale di Diritto Amministrativo, l. ed., 1960.

Marcelo Caetano, Fundamental Principles of Administrative Law, 1977, Ed. Forense.

Published

2019-12-01

Edition

v. 3 n. 11 (2019)
Section

News