

Stefano Carrer

University of Florence

E-mail: stefano.carrer@taed.

unifi.it

Key words: *expropriation, constraint, reiteration, indemnity*

The right indemnity in the case of expropriation constraint reiteration

Section 39 of the current consolidated expropriation act states: "while expecting a systematic re-regulation of the matter, in the case of reiteration of a preordered constraint or a practical expropriation constraint, the estate owner is entitled to an indemnity comparable to the amount of damage actually produced". To this date the "systematic re-regulation of the matter" has not taken place; failing specific regulations, the estimate indemnity cannot therefore be quantified.

1. First principles

The actual impediment to the transformation of building sites is frequently correlated to the reiteration of a constraint preordered to a subsequent expropriation proceeding. The issue, the basic principles of which are the subject matter of a long and complex juridical evolution, has been contemplated by the Italian current consolidated expropriation act –D.P.R. n°372/2001- which establishes the liability of indemnity against an extended constraint, or in any case one that has subsisted for the five-year period according to the law. In particular, section 39 states: "while expecting a systematic re-regulation of the matter, in the case of reiteration of a preordered constraint or a practical expropriation constraint, the estate owner is entitled to an indemnity comparable to the amount of damage actually produced". It should be noted that to this date the "systematic re-regulation of the matter" has not taken place; failing specific regulations, therefore the estimate indemnity cannot be quantified.

That being stated, it is opportune to organize briefly the juridical development of those principles directly concerned in this subject matter. To this end it must be considered that:

- sentence n°55/1968 of the Constitutional Court highlighted that the "sterilization" of a plot suitable for building, without any time limits, represents a real estate expropriation, even if not a full one, in any case an almost full one, and therefore unlawful.

- Following the sentence, the government has issued law n°1187/1968., whose section 2 confirms the expiry of constraints if they are not realized within five years from their institution. The expiry regards both the constraints "preordered for expropriation" and the constraints "which involve the ineligibility for building development".
- In 1999 with sentence n°179/1999 the Constitutional Court further ruled in constraints matter, stating that: "the constitutional guarantee of the institution of private property is lessened if the single rights, related to the institution, are repressed or cancelled without indemnity by imposition acts which –independently from their forms- lead both to a total or a partial translation of the right and to a deep and notable deprivation of its meaning, even if their appurtenance to right remain intact".
- That's how the constitutional unlawfulness was declared –in the case of lack of indemnity- not only for paragraphs n°3 and n°4 of section n°7 of law n°1150/1942, but also for paragraph n°2 of the same section, because "the zone destination can lead to the same results as an essential expropriation when such indexes can assume particularly low values, as in cases of extensive and even of sparse –that is surrounded by wide and predominant open spaces- urban building".
- The Constitutional Court has moreover declared that the matter can be stated on a constitutional level in the case of constraints: a) which are preordered to expropriation; b) which bear the essential character of expropriation, in that they involve as a practical effect a considerable "emptying of the contents of property"; c) "exceed under the "quantitative profile", on account of the greater or smaller incidence which the type of imposed sacrifice may have on the contents of the right (sentence n°6/1996) normal tolerability according to a concept of property which remain regulated by the law as regards the modes of enjoyment and the limits preordered to the social function.
- It is well to point out that even the European Court of Human Rights at Strasbourg has established (sentence Scordino / Italy, 15th July 2004) two principles, that is: a) the concept of constraints leading to estate "sterilization" has to be weighted from the point of view of substance and not of form, so as to avoid actual expropriation; b) the damage caused by the reiteration of the constraint has to be in any case refunded, even with the additional attribution of compensation for moral damages, following the excessive length of the same constraint.
- In the meantime, the Constitutional Court has resolutely moved in the direction of expropriation indemnities, equal to the market value of the expropriated real estate, without any reduction.
- In this regard, the Constitutional Court, in accordance with the above-mentioned resolution of the European Court of Human Rights, with two separate judgements (n°347-348/2007), has reinstated in practice the method of the market value of the assets as far as the repayment of indemnity is concerned. The same method has been confirmed by law n°244, 24th December 2007, the so-called 2008 financial act, which has sanctioned new rules regarding expropriation indemnity of building plots.

This synthesis of the juridical evolution of the first principles of the matter has been described so as to better focus a study aimed at suggesting a methodology capable of correctly determining the estimate of the indemnity in the case of expropriation constraint reiteration.

2. Methodological proposal

In conformity with the procedural dynamics, the indemnity consequent to an expropriation constraint reiteration must be identified in the damage; therefore it is essentially necessary to determine the damage consequent to the constraint imposition.

In the specific case, we envisage a constraint situation assimilable to a practical expropriation constraint—that is consisting in the ablation of the building of lands which does not bring about an effective dispossession, but temporarily reduces the potential development of the building sites.

The damage estimate is obtainable through the difference of two economic entities which are represented by the value of the building site (observed before any process of transformation) and by the value of the lands considered in the same state as they were up to the issue of the expropriation decree.

After estimating the damage, one has to determine the indemnity owed to the landowner, for each year of constraint reiteration, starting from those in excess of the five-year period (the ordinary length according to section 2 of law n°1187/1968). The indemnity can be established through a percentage directly comparable to a temporary occupation indemnity (contemplated by section 50 of the consolidated expropriation act). Such a percentage is equivalent for each year to 1/12 of the indemnity and therefore to the 8.33% of the same indemnity.

To conclude, it is important to point out that the above-described methodology has been favourably accepted by the court of Rimini (2006) and by the Bologna court of appeal (2010).

Bibliography

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