

# The Individual Right to Property and Forced Expropriation— Analysis of Law and Economics

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Vilfredo Pareto describes the excellent distribution of economic resources which simultaneously achieves maximum productive efficiency and social justice. The Constitution of Greece describes the process of compulsory expropriation of property when there is a public need. The compensation criteria for this expropriation do not take into account the positive and negative externalities that the subsequent public project will cause. The consequence of this paper is the unjust social distribution of economic resources. The aim of this paper is to investigate this weakness of the compensation system that does not meet the criteria for Pareto improvement, while a constitutional analysis of comparative law concerning the provision of property is made. An appendix to the case law of the Greek Court of Audit is provided. The Contingent Valuation Method (CVM) is proposed as the most complete for the experimental assessment of the maximum amount of compensation of owners during the process of forced expropriation through Experimental Economics tools.

*Keywords:* property, expropriation, constitution, comparative law, compensation

## Introduction

Jean-Jacques Rousseau starts from the position that a guarantee for the existence of the state can only be a unanimous contract, which is called a social contract. It is an implicit and permanent contract, which binds all the persons who constitute a political community, and which, to be fundamental (that is, to legitimize the political state) must be a contract of each one with himself, from “I’m different with everyone”. This, after all, is one of the key points of differentiation between Rousseau and Locke and Hobbes, for whom the social contract is accepted as an agreement of submission to the sovereign (Grigoropoulou, 2002).

The importance of the Rousseauian “social contract” lies in the fact that it transforms the isolated individual, the simple numerical unit, into a collective body, which at once acquires its unity, its common ego, its life, and its will. Characteristically, he notes,

To find a form of community that defends and protects with all the joint power the person and goods of each member, so that each one, as he unites with all, obeys only himself and he remains just as free as before...” (Grigoropoulou, 2002, p. 18)

In the framework of the symbolic, creative supra-individual entity, an act of association “everyone puts together his person and all his power under the supreme direction of the general will”, ceding his rights and the privilege

of his natural state in order to obtain political freedom whoever does not refuse to obey the general will, will be forced to obey it by the whole body (Grigoropoulou, 2002, p. 20).

To a large extent, the purpose of establishing the state and the principle on which society is governed is the common interest. In order to achieve this (the common-general interest), each individual citizen subordinates his individual will to the general citizenship requires a kind of degeneration, which consists in replacing his individual interest with the common one. Each member desires the general good, because through it his private interest is also served, since these are obviously interrelated and if any member is left to his personal interest, he will cause the destruction of the entire collective body politic, on which he wishes to rest. On the one hand, the general will by its nature necessarily wants the good of everyone, and on the other hand, for everyone, deeper than their individual interests, lies the common interest (Grigoropoulou & Steinhauer, 2004).

The general will, which results as an agreement of the body with each of its members and which originates from all and applies to all, is approached by Rousseau abstractly and algebraically, in the sense that it is not a sum of particular wills, but a “sum of differences”, through which the common interest is determined. According to his characteristic formulation, “if you remove from the individual wills the pluses and minuses that neutralize each other, the general will will remain” (Grigoropoulou & Steinhauer, 2004, p. 25). After all, what generalizes the will is less the number of votes and more the common interest that unites them. As has been aptly pointed out, the “social contract” has no other foundation than the general interest, which is reduced to an inviolable rule and to which the sovereign, inalienable, and indivisible general will tends, as it is also approached as follows, as one of its components favored Rousseau state (Grigoropoulou & Steinhauer, 2004).

From the concluded “social contract” and the general will, as a product of the union of forces and wills, the collective and at the same time moral person of the state is formed, which constitutes the dominant force. In a time (18th century), when especially in France, the term “sovereign” is identified with the king or the absolute monarch, Rousseau defines as sovereign the entire body politic and its general will. Although the “social contract” mentions monarchy, aristocracy, and democracy as forms of government, in reality these are forms of democracy, since the power of the state stems from popular sovereignty, i.e., the people and only the people are considered sovereign (Theocharis, 2020).

Popular sovereignty, therefore, can neither be expropriated nor divided, and it is direct and not subject to the principle of representation, since it is through this (principle) that, according to Rousseau, the political freedom of the citizens is granted. Thus, Rousseau opposes the feudal institution of representation and stands in favor of a political system in which dependence on individuals is replaced by the equal relationship of all citizens before the law. In this way, in the Rousseauian state, popular sovereignty is necessarily guaranteed by the law, in the sense that it is nothing more than an expression of its will, that is, of the general will, which reflects the common interest and to which everyone must citizens to obey indiscriminately. The fact that the general will is placed above the law is also demonstrated by the fact that the will of even a citizen, as long as it expresses the general will, is sufficient for the enactment of some laws (Chrysanthi, 2020).

In addition to this, a necessary condition for the preservation of sovereignty and thus for the safeguarding of the common interest is the removal of the antinomy between the latter, as it follows from the general will, and the particular goal of each act. This lifting requires finding a body to be established between the subjects and the sovereign, which will ensure responsiveness, communication, and balance between them. This body is called the

government, which is charged with the mandate emanating from popular sovereignty, guards the political freedom of its members, and ultimately ensures political legitimacy. As has been aptly stated, “if we knew how to achieve justice without mediation, we would have no need of government or laws; but for men, who are not gods, maneuvers are inevitable...” (Spiliopoulos, 2021, p. 28).

A basic condition of Rousseau’s state is that the government faithfully and precisely executes the laws enacted by the sovereign body politic and represents the general will; otherwise, the executive function is fully subordinated to the law and merely mediates as an intermediate body between it and the popular sovereignty, also made at all times controllable by the body politic. In this framework of the legitimate constitutional state, where a fundamental characteristic is the direct popular sovereignty and the expression of the general will in the law, the equality of rights and the concept of justice that it implies emerges. The power of the state lies in alienating individuals from their physical rights, in order, however, to “return” them to them as political rights. Within the political order, it is impossible for the individual to maintain the primacy of the feelings of nature; however, a web of protection for him and his rights develops. Fiercely fighting social inequality, which was born of the invention of private property, Rousseau points out that the terms of the “social contract” are equal for all and that by obeying this and other laws, individuals “obey no one but the will their”. Therefore, the state built, by virtue of the “social contract”, ensures, in the end, and promotes the very freedom of its members, since each individual loses the negative qualities of natural freedom, the possibility that he has to harm the other, and he gains, through the collectivity, his political freedom and security, part of which is the constitutional guarantee of property and the method of expropriation only to serve the general interest.

Content of the constitutional right to property is the authoritative relationship between a subject (the bearer of the individual right to property) and a good with economic value. The right to property is guaranteed by Article 17 of the Universal Declaration of Human Rights, by Article 1 of the First Additional Protocol to the European Convention on Human Rights, and from Article 17 of the Charter of Fundamental Rights of the European Union. It is observed in both texts that in order to raise the question of deprivation of the immovable property of natural or legal persons under private law, a conflict of interest is required. Such a conflict will obviously have the interests and priorities of individuals on the one hand and the state interest on the other. And of course the state interest does not have its own goal to serve its narrowly “personal” interest, that is the interest of the respective government, nor certainly much more a narrowly private interest, but above all and primarily to serve and secure the interests of society as a whole. This social totality and the wider public interest is what must prevail over private interest. And the private must give way in favor of the public regardless of whether private interests are served behind the public interest. Incidentally, or if in order to serve the public interest, this can be done by serving another private one. However, we must emphasize, to avoid misunderstandings, that the end in itself in any case should not be the serving of private interests but the pure interest of society as a whole (Barbas, 2014).

The conflict ends with a fundamental compromise, which is embodied in the institution of forced expropriation. Article 17 Para. 2 et seq. of the Greek Constitution regulates this procedure. If we want to give a definition of the concept of forced expropriation, we can say that it is “the deprivation of property by a unilateral act of the state for public benefit, determined by law, and against judicially determined compensation of the owner”.

In order for the state to proceed with the deprivation of the private property of a legal or natural person, mainly real estate, or otherwise in order to take the measure of forced expropriation, since both concepts as mentioned above can be taken into account as identical, it is imperative that certain guarantees are observed. These guarantees are necessary so that the term deprivation does not have the meaning of forced removal without or even with insufficient compensation. And this is because in the past the forced expropriation carried out by the state at the expense of a private individual was a coercive measure, as is the case today, but also an unfavorable and burdensome measure for the managed property owner (Fortsakis & Savvaidou, 2013).

Compulsory expropriation under the Greek Constitution is allowed only if three conditions are met: (a) public benefit, (b) legislative provision, and (c) judicially determined compensation. But in de facto deprivation of property, compensation is not a condition but a legal consequence of the administrative activity. There may be a deviation from the above conditions in the cases of the dissolution of agricultural holdings, the purchase of small ownership under implanter, and the abolition of peculiar real relations (Michaelidis, 2006).

According to Decision 1781/2008 Greek Supreme Court (472022), the compensation defined in the case of forced expropriation must be paid compulsorily no later than one and a half years from the publication of the relevant court decision; otherwise the expropriation is lifted automatically. The Decision 1054/2008 of the Supreme Court (453323) refers to the special compensation given due to devaluation of the value of the remaining after the expropriation of part of the property. The part remaining to the owner, according to the reasoning of the court, which is based on Article 13 of Law 797/1971 "On Forced Expropriations", suffers a significant devaluation of its value with the consequence that the owner needs compensation even though it is still an element of his property. Decision 825/2008 of the Greek Supreme Court (452558) mainly refers to the question of the final or temporary determination of compensation, as well as in cases of automatic lifting of forced expropriation. Most modern constitutions provide for the vesting of property and the method of taking property for the public good (Finokaliotis, 2014).

### **Economic Analysis of Expropriation**

Pareto efficiency is usually considered to be a necessary condition when studying the welfare brought about by a particular mechanism. A mechanism that fails to maximize it is therefore inferior to a mechanism that offers the maximum output with the given raw materials. Nevertheless, the constitutional prohibition of incorporating positive or negative externalities into compensation leads to yet another distortion of the functioning of Adam Smith's "invisible hand" due to state interventionism.

Public Economic Analysis seeks to internalize the externalities (positive or negative) caused by the production or consumption of a private good so that resources are not unfairly distributed. Expropriated property in so far as it causes external economies or external diseconomies can be characterized as an intermediate good that lies between public and private goods and which awaits the internalization of the externality in order for the system to be at the point of general macroeconomic equilibrium, at the point where social welfare is maximized given the financial resources for the specific time period. The criteria for determining state compensation in the case of forced expropriation of property "in the name of greater public need" have occupied many authors from time to time.

### **Optimizing the Allocation of Financial Resources During Compulsory Expropriation**

Vilfredo Pareto describes the optimal allocation of economic resources that satisfies the criterion of efficiency and social justice. The Constitution of Greece describes the process of forced expropriation of properties when there is a public need. The compensation criteria for this expropriation do not take into account the positive and negative externalities that the resulting public project will cause. The consequence of this fact is the socially unfair distribution of economic resources. The purpose of this work is to investigate this weakness of the compensation system that does not satisfy the criteria of Pareto optimization.

Vilfredo Pareto defines the optimal allocation of economic resources between two contracting parties. At this sweet spot of exchange there is no possibility of moving from this distribution of economic resources in a way that benefits all individuals in the economy. Also, in the optimal distribution of economic resources, there is no possibility of moving from the specific distribution in such a way as to benefit one consumer without at the same time harming another. So any movement that benefits one consumer must necessarily harm another. That is, there is no possibility to make mutually beneficial transactions between consumers; all the benefits from the transactions have been exhausted.

The Pareto set where both consumers benefit relative to the point of their initial assets is called the contract curve. The Pareto Welfare Theorem (FWT) points to the competitive market as a general resource allocation mechanism that can be used to achieve Pareto-optimal outcomes in the economy. FWT is the formal formulation of Adam Smith's position on the "invisible hand" of the market. Since every competitive equilibrium is Pareto optimal, the only justification for intervening in the economy is to achieve redistributive ends. Externalities or external economies exist when the actions of one market participant affect another participant in a way that is either unfavorable or beneficial and no financial compensation takes place. An externality can result from either the demand side or the supply side.

The Greek Constitution places property under the protection of the state. The "protection of the state" mandated by Article 17 of the Constitution means a combination of individual right and institutional guarantee. The institutional guarantee means that private property as an institution is constitutionally guaranteed. This guarantee is directed in particular to the legislator and obliges him to establish a core of legal rules that make possible the existence, functionality, and private utility of property. In particular, the property cannot in its entirety or in its main part be converted into public property. Nationalization or forced expropriation is allowed only in specific cases, under the conditions provided by the Greek Constitution and the Greek laws.

### **Conclusion**

In Article 17 of the Greek Constitution, the constitutional legislator defines, among other things, the criteria for compensation of the expropriated person. Compensation will be determined by criteria that will not take into account the surplus or minus values that the resulting public project will cause. That is, the compensation does not take into account the positive or negative externalities that the resulting public project will cause. This fact will result in the non-optimal distribution of financial resources during the expropriation transaction. Therefore, V. Pareto's criterion is not satisfied. The state intervenes, according to Adam Smith, in the market in order to alleviate the social inequalities created by the market distribution of resources. Property is a constitutionally guaranteed right and its loss is permitted only for great public need. Compulsory expropriation entails a state

compensation to the owner in order for said owner to remain in the same state of well-being. In the event that the resulting project causes positive or negative external economies, these should be taken into account as criteria for determining compensation in order to have an optimal distribution of resources according to V. Pareto satisfying the criteria of economic efficiency and social justice. Ultimately, the determination of the optimal amount of compensation during forced expropriation can be determined after previously asking the interested party himself through the classic Willingness to Accept (WTA) question which is a tool of Experimental Economics and especially the Contingent Valuation Method (CVM).

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