

American University of Armenia

**THE RA LAW ON “ALIENATION OF PROPERTY FOR
THE NEEDS OF THE SOCIETY AND THE STATE” AND
THE WAYS OF ITS IMPROVEMENT.**

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Yerevan, 2010

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INTRODUCTION

The RA constitution (both its earlier edition and the constitution of 27.11.2005) as well as the RA Civil Code of 5.05.1998 radically changed the regulation in the field of private property. This was required by the country's transition to the market economy.

Article 31 of the Constitution establishes that the private property may be alienated for the needs of the society and the state only in exclusive cases of prevailing public interests in the manner prescribed by the law and with prior equivalent compensation.

Article 218 of the RA Civil Code, in principle, contains, the same provision.

It is widely known that the whole process of alienation of private property for the needs of the society and the state in RA had been regulated by the decisions of the RA government¹, before adoption of the law of the Republic of Armenian on "Alienation of property for the needs of the society and the state".

Thus, the whole process of alienation of private property in RA was based on the governmental decisions, while the latter contradict the mentioned provisions of the RA Constitution, according to which the compulsory alienation of private property was possible only on the basis of the law (statute).

The ECHR, in its decision of 23 June 2009 (Minasyan and Semerjyan versus Armenia) also concluded that the deprivation of the applicants' possessions had been incomparable with the principle of lawfulness. The court reiterates that first and most

¹The decision of the RA government N 645 on «The Yerevan city's North Avenue construction programs' implementation projects» from 16.07.01, as well as the governmental decision Number 11151-H «On the projects of the construction programmes' implementation within the administrative boundaries of the Yerevan city's Kentron Community» from 1.08.2002, (in Armenia).

important requirement of article 1 of Pr. N 1 is that any interference by a public authority with the peaceful enjoyment of possession should be lawful, the second sentence of the first paragraph authorizes deprivation of possessions only a subject to the conditions provided for by the law. The second paragraph recognizes that states have the right to control the use of property by laws in force. The court further reiterates that the phrase subject to conditions provided by law, requires in the first place the existence of and compliance with adequately accessible and sufficiently precise domestic provisions.

Thus, the Court, in *Minasyan and Semerjyan*, concluded that the interference with the peaceful enjoyment of possession did not satisfy the requirement of lawfulness, was arbitrary and consequently violated art. 1 of Prof. N 1. Moreover, the Court observes that one of the requirements of the provisions of the RA Constitution, at the matter time, was that an expropriation of property for public needs to be carried out on the “basis of a law.” Thus, the whole process of alienation of private property in RA conducted before the adoption of the law of 27.11.2007 violated not only the European Convention (to which Armenia is a party from 2002) but the constitution of RA as well.

The problem discussed became more outlined during the last years especially because of the large-scaled construction of the multi-storied buildings for offices as well as living areas in the centre of Yerevan city, as well as because of the compensation paid by the Government to proprietors was not based on fair market value and even was lower than that².

Later by the adoption of law on “Alienation of property for the needs of the society and the state” in November 27, 2006 a number of legislative gaps were fulfilled

² *Baghdasaryan S.* (the head of the “Victims of state needs” NGO), “Realization of exclusive prevailing public interest in the Yerevan city”, 5.11.2007 // www.hra.am/file/sepakan-pasht.pdf.

and many practical problems solved. However, many issues, still need to be addressed and solved in the future. This Master's Paper is primarily focused on the issues mentioned above and suggests some legislative amendments necessary to resolve the problems raised.

Taking into consideration the relatively short term of the application of the above-mentioned statute, not sufficiently clear formulated case law, the contradictions in the interpretation of the legal norms in this field, it is of crucial importance to examine the foreign legal practice and especially the guarantees of the rights of the proprietors of the alienated property abroad.

The paper includes an introduction, which shows the significance of the topic and its importance for the Armenian reality. It has three chapters corresponding to the main issues discussed in the paper and a conclusion, which sums up all the information discussed and makes some offers to enhance the existing legislation on the basis of the information analyzed in the previous chapters of the work. The paper ends with the bibliography.

1. WHETHER THE APPLICATION OF THE RA LAW ON “ALIENATION OF PROPERTY FOR THE NEEDS OF THE SOCIETY AND THE STATE”, IN PARTICULAR APPLICATION OF THE ARTICLE 4 OF THE LAW, IS LAWFUL WITHOUT A PRECISE DEFINITION OF THE CONCEPTS OF “THE PREVAILING PUBLIC INTEREST” AND “THE NEEDS OF THE SOCIETY AND THE STATE”.

Paragraph 3 of the Article 31 of the Constitution of the Republic of Armenia stipulates that private property may be alienated for the needs of the society and the state only in exclusive cases of prevailing public interests, in the manner prescribed by law and with prior equivalent compensation. Article 218 of the Civil Code of the Republic of Armenia contains the same provision. Nevertheless, neither article 31 of the RA Constitution nor article 218 of the RA Civil Code define what “the prevailing public interest” or “the needs of the society and the state” are.

It would be reasonable to expect that this problem would have found its solution in the law on “Alienation of property for the needs of the society and the state”. However, the statute mentioned above also does not disclose entirely the essence of the conception of “the prevailing public interests” or of “the needs of the society and the state”.

Points 1 and 2 of the article 4 of the RA law on “Alienation of property for the needs of the society and the state” stipulate the principles according to which exclusive, prevailing public interest is established, as well as the objectives to achieve which a private property can be expropriated. At the same time in the abovementioned law there are no definitions of such essential notions as “prevailing exclusive public benefit” and

“social and public needs”, as well as there is no requirement to justify the public and social need separately in each particular case of expropriation of private property.

It is obvious, that implementation of the article 4 of the law on “Alienation of property for the needs of the society and the state” is lawful and the rights of proprietors will be fully guaranteed only in case of stipulation in the abovementioned law the definitions of the expressions “prevailing exclusive public benefit” and “social and public needs”.

In addition, the European Court of Human Rights more than once has mentioned in its decisions that an act cannot be considered a legally binding law if it does not comply with the requirement of legal certainty. In particular, if the act is not formulated sufficiently clear, precise and foreseeable, that makes impossible for a person to conform his/her behavior to that act³.

It is worth mentioning that a legislative proposal to the National Assembly of the Republic of Armenia was made, which suggested private property to be alienated only in cases of vital necessity while the non-implementation has resulted or may result in harsh consequences for the society or a certain group of the society⁴. This definition is too narrow and does not correspond to the essence of the “eminent domain” as a legal institution, the main purpose (policy) of which in broad sense is to benefit the public. Establishment of such an exceptional situation when the property can be alienated does not comply with the abovementioned rationale of this legal institution. As we can see

³ See judgment of 30.05.2000, in case 31524/96, Belvedere Alberghiera S.r.l. v. Italy, ECHR par. 57-60, as well as judgment of 30.05.2000, Carbonara & Ventura v. Italy, ECHR par. 64, see also judgment of 22.09.1994, Series A no. 296-A, the Hentrich v. France, ECHR par. 42, judgment of 8.07.1986, Series A no. 102, the Lithgow and Others v. the United Kingdom, ECHR par. 110.

⁴ Legislative proposal to the law of RA on “the alienation of property for the needs of the society and the state”, 25.11.2009., Պ-775-25 // www.parliament.am.

from numerous examples brought in this paper (western practice) alienation of property for elimination of social injustices (e.g. housing for population, elimination of “oligopoly”, etc.), creation of new jobs and decrease of unemployment, as well as the construction of a highway, park or government building in some cases are exclusive public need and benefit the society a lot, though, non-alienation of the property will not necessarily result in harsh consequences for the society or a certain group of the society, as suggested by the draft.

Thus, the definition suggested by the draft law is too narrow, including only one aspect of the institution of the alienation of private property, and not including the possibility of alienation of private property for construction of highways, parks, factories (i.e. creating jobs), and etc. Consequently, the proposed definition does not disclose the essence of “eminent domain” as a legal institution properly.

Based on all mentioned above, it is concluded that RA law on “Alienation of the property for the needs of the society and the state” can properly be implemented only when the definitions of the concepts of “the prevailing public interest” and “the needs of the society and the state” are stipulated in the law. The concepts should fully and properly disclose the essence of “eminent domain” as legal institution. While defining these notions the legislature shall take into account the International and European best practice, as discussed further in the paper.

2. WHETHER ANY URBAN PLANNING CAN BE CONSIDERED PREVAILING PUBLIC INTEREST

Point 2 of the article 4 of the RA law on “Alienation of property for the needs of the society and the state” stipulates the goals to achieve which the alienation of private property is possible. Among those goals urban planning is also mentioned. From this statement arises an issue, i.e. whether any urban planning can be considered the prevailing public interest. It is quite difficult to agree with such an assertion, as in most cases these plans have purely commercial goals. It is quite questionable whether a wish of a person to construct any building in the city can be declared a prevailing public interest. Moreover, ambiguity and uncertainty of the notion “public and social needs” as well as the notion “prevailing exclusive public interest” creates a situation, when governmental bodies and officials can make a decision to alienate the private property of a person to create another object similar by both its appearance and its purpose for another person. That is under the mask of social and public needs it is possible to give not justified from the public needs perspective preference to a group of individuals at others’ cost, as e.g. when pulling down low-rise building to construct a multistoried building.

In one of its decisions European Court of Human Rights brought an example of the functions of a democratic legislature, *i.e.* eliminating what are judged to be social injustices. More specifically, modern societies consider housing of the population to be a prime social need, the regulation of which cannot entirely be left to the play of market forces. The margin of appreciation is wide enough to cover legislation aimed at securing greater social justice in the sphere of people’s housing, even where such legislation interferes with existing contractual relations between private parties and confers no direct

benefit on the State or the community at large. In principle, therefore, the aim pursued by the leasehold reform legislation is a legitimate one⁵.

It should be noted that pulling down low-rise buildings to construct multistoried buildings in the centre of Yerevan hardly could be considered a prime social need necessary for elimination of social injustices, because the prices of the houses constructed are extremely high and consequently those buildings are not constructed to solve the public needs as they were unaffordable for those in need.

The abovementioned assumption applies equally to situations when alienation of property is in reality motivated by purely commercial considerations of a group of individuals, and not by purposes of public benefit.

However, it is worth mentioning that the European Court of Human rights in a number of its decisions has mentioned that the national authorities are in principle better placed than the international judge to appreciate what is "in the public interest", because of their direct knowledge of their society and its needs. Besides, under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment both of the existence of a problem of public concern warranting measures of deprivation of property and of the remedial action to be taken, i.e. the national authorities accordingly enjoy a certain margin of appreciation.

In any case the margin of appreciation should be clearly stated in the law, i.e. no vague conceptions in the law should exist. While state authorities may have a wide discretion in this field (this is in compliance with the essence of "eminent domain") it however should be defined clearly in the law.

⁵ See judgment of 21.02.1986, in case no. 8793/79, James and Others v. The United Kingdom, ECHR, par. 47.

The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is "in the public interest", unless that judgment be manifestly without reasonable foundation.⁶

In the judgment *James and Others v. The United Kingdom* the European Court of Human Rights agreed with the applicants that a deprivation of property effected for no reason other than to confer a private benefit on a private party cannot be "in the public interest". Nonetheless, according to the court, the compulsory transfer of property from one individual to another may, depending upon the circumstances, constitute a legitimate means for promoting the public interest. In this connection, even where the texts in force employ expressions like "for the public use", no common principle can be identified in the constitutions, legislation and case-law of the Contracting States that would warrant understanding the notion of public interest as outlawing compulsory transfer between private parties. The same may be said of certain other democratic countries; thus, the applicants and the Government cited in argument a judgment of the Supreme Court of the United States of America, which concerned State legislation in Hawaii compulsorily transferring title in real property from lessors to lessees in order to reduce the concentration of land ownership.⁷

In *Hawaii Housing Authority v. Midkiff*⁸, the Supreme Court of the United States of America upheld Hawaii's transfer of the property of certain landlords to their tenants. The court noted that the government may not take private property from one private

⁶ *Ibid*, par. 46, as well as judgment of 20.11.1995, in case no 17849/91, *Pressos Compania Naviera S.A. and Others v. Belgium*, ECHR, par. 37.

⁷ See judgment of 21.02.1986, in case no. 8793/79, *James and Others v. The United Kingdom*, ECHR, par. 40.

⁸ *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

owner and transfer it to another simply to confer a private benefit on the new owner. However, Hawaii's redistribution of property had a public purpose, because there was a great concentration of land ownership in the hands of relatively few owners, (In Hawaii, 47% of all the state's private land was in the hands of only 72 private landowners), and this had skewed the real estate market and inflated prices. The Court also emphasised, that it was deferring to the legislative judgment that such an "oligopoly" of private land ownership had created a public problem in that state.

Thus, based on what was mentioned above, it can be inferred, that when private property is to be transferred to the government, such as for the construction of a highway, park or government building, the "public use" of the taking is clear. However, the government may also use its takings authority to transfer property from one private owner to another. Relatively uncontroversial have been transfers to railroad companies⁹ for building tracks or stations or to public utilities for running gas or electric lines or for building plants, or even to developers of sports stadiums. In these instances the transferred property or the services which the transfer promotes are literally available for "public use". Some transfers to private ownership are permitted where use by public is not contemplated, so long as the transfer is for a "public purpose", as was the case in the example brought above, where the US Supreme Court emphasized a real **public problem**, caused by the "oligopoly" of private land ownership in Hawaii. Thus, though it was not for public use stricto sensu, but there was a real public problem (public need), the solution of which was a benefit for the whole society.

⁹ The issue concerning the possibility of private organizations to be a party to the contract on alienation of the private property for the needs of the society and the state in RA is considered further in this paper.

Another example of the US court practice is of a high importance. The Michigan Supreme Court in 1981 found in *Poletowan Neighbourhood Council v. City of Detroit*¹⁰ that the City of Detroit's condemnation of an entire neighbourhood and transfer of the land to a private automobile manufacturer to build a factory was for a public purpose, since the factory would create new jobs and reduce unemployment in a depressed area. However, later in 2004 the abovementioned court overruled its earlier decision and disapproved a country's efforts to condemn private homes, in order to clear the way for development of a business and technology park. The Michigan Court observed "To justify the exercise of eminent domain¹¹ solely on the basis of the fact that the use of that property by a private entity seeking its own profit might contribute to the economy's health is to render impotent our constitutional limitations on the government's power of eminent domain, It would make one's ownership of private property forever subject to the government's determination that another private party would put one's land to better use".¹²

Analyzing US judicial practice in this field, one can infer that in some cases the same social or economic result can be a public need, in others cannot, depending on different social and economic conditions, which should always be taken into consideration. E.g. in some cases creation of new jobs and decrease of unemployment are a strong public need because of the poor economic conditions of the state, in others are not proportionate to the burden carried on by the private owner as a result of the alienation of their property.

¹⁰ See William Burnham, *Introduction to the law and legal system of the United States*, 4th edition, USA, Thomson/West, 2006, p.472.

¹¹ The government's power to take private property for public use in the US is known as the power of "eminent domain".

¹² *Ibid.*

In any case, whenever assessing “the public need” the concept of proportionality should always be considered. This concept is also a fundamental constituent element of European Convention rights (to which Armenia is a party since 25.01.2001.), such as the right to peaceful enjoyment of possessions (article 1 of Protocol No. 1) etc. The principle of proportionality requires there to be a “pressing social need” for the measure of interference in question and that it is proportionate to the aim being pursued. In assessing the proportionality of a particular measure, the Court will consider whether there is an alternative means of protecting the relevant public interest without an interference at all, or by means that are less intrusive. The Court will assess whether the reasons for interference are “relevant” and “sufficient” to justify it.¹³

Anyway, the Court will always consider whether the proprietor pays too high for the public interest, i.e. whether the burden is too heavy for the private proprietor.

It is a further requirement that the decision-making process leading to the measure of interference should be fair. The existence of effective controls on measures taken by the authorities is also a relevant factor in assessing the proportionality, as well as in assessing whether rights of proprietors can be considered properly protected.

In light of the previous statement, article 9 of the law on “Alienation of property for the needs of the society and the state” should be discussed. According to it, a proprietor of the alienating property may apply to the court to appeal the decision of the Government to alienate private property for the needs of the society and the state. This can be considered one way of control over measures taken by the authorities, at the same time one should remember that rights of proprietors are restricted from the moment

¹³ See Philip Leach. Taking a case to the European Court of Human Rights, Second Edition, Oxford Publishing, 2005, p. 163.

he/she is informed of the governmental decision (e.g. proprietor bears all costs of any new constructions, cannot rent (lease) his property etc.). Nevertheless, the court later may declare the abovementioned decision invalid, and thus, proprietors miss the opportunity of an effective and rational use of their property (possessions) for the period starting from the moment the proprietor is informed about the decision of the government until the moment the decision of the court is made.

Besides, it is possible that proprietors because of their legal illiteracy will not be aware of their right to appeal the decision of the Government. Thus, in order to avoid such possible situations, it is more appropriate to stipulate the obligation of the Government to apply directly to the court to find out the legality of its decisions before enforcing them. This is the way the process of alienation of private property for the public needs is conducted in the United States¹⁴. Moreover, in some states, it is compulsory to try to settle the matter with the proprietor directly (personally), i.e. before applying to court. Besides in the U.S. the court may make a decision that alienators are obliged to leave as a deposit amount of money due to be paid to proprietors of the alienating property¹⁵. This is an additional guarantee for private owners.

Copying blindly whatever works effectively and exists in other countries is by all means incorrect. Moreover, it is uncertain whether our courts could examine such cases, as there would be a necessity for legislative changes and amendments. However, it is imperative to get advanced knowledge of such a developed country in this field as the United States and to assimilate their useful experience. This will be the key to the solution of various fundamental problems in the society.

¹⁴ Ruchtin S. A., Compulsory alienation of property in Russia, USA and Great Britain. Moscow, Arktika-4D, 2007, (in Russian).

¹⁵ Krassow O. I. Right of private proprietors on the land. Moscow, Jurist, 2000, p. 348, (in Russian).

3. WHETHER THE RIGHTS OF THE PROPRIETORS CAN BE FULLY GUARANTEED IN THE CASE WHEN THE PARTY TO THE EXPROPRIATION CONTRACT IS A PRIVATE ORGANIZATION AND NOT A STATE

According to the article 6 of the RA law on “Alienation of property for the needs of the society and the state” not only the state, but also any private organization can be the party to the expropriation contract.

Rights of the proprietors of the alienating property cannot be fully protected when the party to the expropriation contract is a private organization.

The state can entrust to a private organization or even to an individual the organization and implementation of the whole process of alienation of private property. However, they should not be entitled to be the parties to the abovementioned process¹⁶. As it was mentioned above, rights of proprietors of the alienating property cannot be fully protected and guaranteed if the party to the expropriation contract is a private organization and not a state.

In such cases to illustrate the problem mentioned above the following situation can be proposed: a private organization, which is a direct party to the expropriation contract, went bankrupt after the contract had been signed. According to the contract, the compensation was to be paid not by money, but instead an apartment was to be given to the proprietor after the construction of the building as a reimbursement for in place of the alienated property. If such organization is declared bankrupt by the court before the

¹⁶The ombudsman of RA is of the same opinion. See RA Ombudsman’s annual official report of 2006. Yerevan, Tigran Mez, 2007. (in Armenian). See also legislative proposal to the law of RA on “the alienation of property for the needs of the society and the state”, 25.11.2009., Պ-775-25 // www.parliament.am.

construction of the building is completed, proprietors will have no additional guarantees, particularly in cases when the assets of the abovementioned private organization are not sufficient to satisfy all claims, including the ones of the proprietors of the alienated property.

One should always bear in mind that the property is alienated for the needs of the society and the state, and that needs of the state and the society are always state's primary concern and, thus, should be taken care of by the state itself.

RA Constitutional Court in its judgment of 14 July 2009 found no contradiction between the article 6 of the law of RA on "the alienation of property for the needs of the society and the state" and the Constitution of RA. However, it should be noted, that the problem lies not in the fact that a private organization can be a party to an expropriation contract in general, but in the fact that in reality whenever the contract is concluded between a private organization and a proprietor of the alienating property, rights of the latter are not properly protected as it was illustrated in the example brought above. Thus, whenever a private organization is a party to an expropriation contract, proprietors of the alienating property are not protected and guaranteed against inactions, unfair acts of the builders, as well as the insolvency of the abovementioned organization, especially taking into consideration the fact that the culture, standards of the insurance are at a very low level in RA.

In such a situation, one way to solve the problem mentioned above seems to be the stipulation in the law of the subsidiary liability of the state for the obligations of the abovementioned private organizations in this field. As it was mentioned above, it should

always be remembered that the state is a primary responsible for the needs of the state and the society and that these needs should in any case be taken care of by the state itself.

CONCLUSION

Not diminishing the legal and political importance of the RA law on “Alienation of property for the needs of the society and the state” it is worth, however, outlining some gaps of the above-mentioned law. Based on the thorough analysis and examination of the main provisions of the RA legislation, regarding the alienation of property for the public needs, the U.S. case law, as well as the case law of the European Court of Human Rights in this field, the following proposals are made to enhance the RA legislation in this field:

1. *To stipulate in the law the definitions of the expressions “prevailing exclusive public interest” and “the needs of the society and the state”. While defining the abovementioned notions the European and International standards should be taken into consideration. State authorities may have a wide discretion in this field (this is in compliance with the essence of “eminent domain”), which, however, should be defined clearly in the law. The principle of proportionality should also be considered when formulating definitions of the abovementioned notions.*
2. *To stipulate in the law the obligation of a government to justify the need of the society and the state separately in each particular case of expropriation of private property.*
3. *To stipulate the obligation of the government to apply directly to the court to find out the legality of its decisions before enforcing them. This will prevent unnecessary and unjustified restrictions of the rights of private proprietors.*
4. *To stipulate in the law the subsidiary liability of the state for the obligations of the private organizations-alienators whenever the party to the expropriation contract is a private organization and not a state itself.*

Notwithstanding the abovementioned gaps of the law it should be noted that first steps are made to regulate relations between state and private proprietors in this field. One thing that should always be remembered is that the state is a primary responsible for the needs of the state and the society and that these needs should in any case be taken care of by the state itself and should not impose a burden which is too heavy and ponderous for the private proprietor. Private proprietors should not bear alone public expanses, which, in all fairness and justice, should be borne by the state and the public as a whole.

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