Expropriations in the Brazilian legal system*

As desapropriações no direito brasileiro

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ABSTRACT

The scope of this essay is to present a brief overview of the Brazilian legal regime of the expropriations, considering the different factual grounds for its legitimacy, which consider public necessity, social necessity and urban projects.

KEYWORDS

expropriation — public necessity — social necessity — expropriation as a sanction — urbanistic projects

RESUMO

O objetivo deste estudo é apresentar um breve panorama do regime legal das desapropriações no Brasil, considerando-se seus diferentes fundamentos que envolvem utilidade pública, necessidade social e finalidades urbanísticas.

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PALAVRAS-CHAVE

desapropriação — utilidade pública — necessidade social — desapropriação-sanção — finalidade urbanística

1. Introduction: expropriation and its origins and requirements

Property rights are one of the foundations of the legal system, as we know it, recognition of which suggests varied legal relationships between private citizens, and between private citizens and the State. From this right, among others, emerges the separation between public and private law and civil law, which is founded on Roman law.[1]

But, despite its centrality, this right has not always been fully supported in the legal system. Notably, during the Middle Ages, property rights were relative and to a large degree dependent on regulations imposed unilaterally by monarchs and feudal lords.

The first modern articulation of property rights appears in the English Magna Carta of the 13th century. According to its provisions, ownership rights were guaranteed, and the monarch could not freely dispose of private property or interfere without just cause.

Later, following Enlightenment advances of the 17th and 18th centuries, the right to property was enshrined in legal texts, consolidating individual rights. A landmark development was article 17 of the Universal Declaration of the Rights of Man and of the Citizen, of 1789, which enshrines the right to property, and that no one may be deprived of their assets without due recompense.[2]

In this context, the right to property was established over time as a fundamental right of defense, imposing on the State a duty to refrain from acting, a duty of forbearance. Norberto Bobbio, significantly, affirms ownership as *a first-generation fundamental right*, one that guarantees non-interference from the State.[3]

As a fundamental right, the right to property entails a *public subjective right in favor of the citizen*, ensuring a clear legal remedy for any violation resulting

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1 This is due to the fact that (i) ownership rights form the basis of civil law, vis-à-vis the idea of the legal regulation of the transfer of property, and that (ii) the separation between public and private law arises from the question of whether a citizen may or not own a given asset.

2 The aforementioned article states (*verbatim*): "Article 17—As property is an inviolable and sacred right, no one may be deprived of it, except when legally proven public necessity clearly requires it and under the condition of fair and prior indemnification."

3 BOBBIO, Norbert. *A era dos direitos*. Rio de Janeiro: Campus, 1992. p. 101 et seq.

from state action. In this sense, *it is the essence of fundamental rights to involve specific legal measures capable of ensuring their effectiveness and control of State action that may harm their exercise*.

However, the foundational status of the right to property does not suggest that its scope is unlimited; it does not imply unlimited rights. As with any right, there is a maximum limit which characterizes it.

The challenge that arises, then, is to understand the extent of the right to property, given the generality of its legal contours. As a fundamental right, it is a *principle* or *precept*, distinct from rules, which are marked by their binary nature (they apply or do not). Principles have a poorly defined scope of application in the abstract, referred to in doctrine as *broad factual support*.[4]

Furthermore, according to Robert Alexy, fundamental rights are *optimization commandments;* legal standards that must be applied to their maximum extent and adjusted according to the circumstances of the specific case.[5]

In this regard, although the right to property is limited, it must be provided for to a maximum extent and may only be restricted where a conflict arises with another fundamental right, in the nature of a legal principle. This means that the effective extent of the right must be determined vis-à-vis the practical circumstances of the case, in light of potential conflict with other basic rights.

To determine this extent, the so-called *proportionality sieve* (proportionality postulate[6] or principle of proportionality) may be used, as developed by the German Constitutional Court in the late 1950s.[7] This involves a three-step

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[4] According to Virgílio Afonso da Silva, factual support of fundamental rights is very particular, not encompassing the condition for emanation of its legal consequence. Due to the breadth and even vagueness of fundamental rights, the factual basis of property rights configures its own scope of protection, as well as the limit of state intervention. This means that a fundamental right has a broad factual basis, defining the essence of the protected right and the limit of restrictive intervention by the state, which is exactly the minimum of its function. Cf. SILVA, Virgil Afonso da. *Direitos fundamentais*: conteúdo essencial, restrições e eficácia. São Paulo: Malheiros, 2009. p. 70 et seq.

[5] Cf. ALEXY, Robert. *Teoria dos direitos fundamentais*. Tradução Virgil Afonso da Silva. São Paulo: Malheiros, 2008. p. 103 et seq.

[6] The word *postulate*, which seems highly pertinent, is adopted by ÁVILA, Humberto. *Teoria dos princípios*: da definição à aplicação dos princípios jurídicos. 14. ed. São Paulo: Malheiros, 2013. p. 163 et seq.

[7] "The Constitutional Court (BVerfG) case law of 1958 established an analytical dichotomy. The revolutionary decision, on the topic of pharmacies, is really the birthplace of the Principle of Proportionality. The fundamental element is the control test. The principle requires—in summary—that the restriction on a fundamental right be for a legitimate purpose, and that the means of achieving that purpose are appropriate, necessary, and proportionate." Cf. BERKEMANN, Jörg. Der Grundsatz der Verhältnismässigkeit—Bericht über den "State of the Art". *Deutsches Verwaltungsblatt (DVBl)*, Cologne, p. 741 et seq., 2018. Our translation.

analysis to verify, in the event of a conflict between rights, *a tolerable degree of restriction, preserving the essential content of the fundamental right in question*.

According to the idea of proportionality, therefore, in case of conflict between such rights, a preliminary examination of the lawfulness of the *purpose* of the restrictive measure must be performed. If the measure is lawful, the three aspects of proportionality (adequacy, necessity and proportionality, in the strict sense) may be considered.[8]

Adequacy entails verifying the compatibility of the measure with the intended purpose. In other words, is the measure appropriate, in terms of safeguarding a fundamental right? Is it an effective and appropriate means? If so, the next stage may be considered.

Need involves assessment of the effective demand for the restrictive measure in light of the circumstances, including consideration of the possibility of another measure which might achieve the same purpose with *a less onerous restriction on the fundamental right in the specific case*. In short, we must consider whether the measure, in the context, is essential and whether, on balance, it minimally restricts fundamental rights.

If the measure is *suitable* and *necessary*, the last aspect comes into play: *proportionality in the strict sense*. This concerns the impact of the measure and its efficiency. Confirmation of acceptability is required in terms of the maximum amount necessary to achieve the intended purpose, prohibiting measures that exceed the most essential requirements.[9]

Given these considerations, it should be noted that the right to property can be (and is, in practice) subject to a wide range of restrictions, according to the specific case. With respect to urban planning, property rights may be subject to low or high-level restrictions, as necessary, to guarantee the functionality and harmony of the urban environment. Zone regulations, for example, may require few restrictions, compared to more extreme scenarios, such as tipping.

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[8] As Mathias Klatt and Moritz Meister point out, proportionality involves an analysis including four stages: legitimacy of purpose (whether the measure deviates from its purpose), adequacy (whether it is suitable for its intended purposes), need (necessary of the measure) and proportionality in the strict sense (the balance between the measure taken and the restrictions that arise from it). Cf. KLATT, Mathias; MEISTER, Moritz Meister. *The constitutional structure of proportionality*, Oxford: Oxford University Press, 2012. p. 8 et seq.

[9] Cf. EPPING, Volker. *Grundrechte*. 4. ed. Heidelberg: Springer, 2010. p. 18 et seq., among others.

Similarly, in the specific case of property rights, there may be situations in which the restriction imposed entails that ownership of a certain non-fungible asset is replaced by a cash payment (fungible asset). *This is precisely the case with expropriation.* Competing fundamental rights may demand that property be taken from an individual and replaced with a cash payment of equivalent value.

This is not—as one might suppose—a complete suppression but a *replacement* of the right of ownership of an asset with the right of to an equivalent financial sum. However, this is a drastic intervention, *applicable only in specific or exceptional cases*.

Expropriation is nothing new. According to extensive research by Jean-Marie Auby, Pierre Bom, Jean-Bernard Auby and Philippe Terneyre, expropriation has existed in the most diverse legal systems since the Roman Empire, approached differently at different historical moments.[10]

However, what has changed significantly is the set of guarantees for individuals whose assets are subject to expropriation and the level of restriction of State discretion on this matter.

Originally, the state was free to utilize private property, for whatever purpose it so wished, with no guarantees for the expropriated citizen. Over time, however, citizens have enjoyed greater security, and the interference of the state has been restricted. Expropriation cases have been increasingly limited, requiring clear legal justification and well-defined procedures.[11]

In Brazilian law, expropriation is also far from new. It has been provided for in our legal system since the time of the empire.[12] But, as with other countries, in the Brazilian context the rights of private citizens have gradually increased and spread.

Currently, expropriation is expressly provided for in the Constitution. As determined by article 5, section XXIV, of the 1988 Constitution, *verbatim*, "the law shall establish the procedure for expropriation for public necessity or utility, or for social interest, through fair and prior indemnification, in cash, except for cases provided for in this Constitution".

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[10] AUBY, Jean-Marie; BON, Pierre; AUBY, Jean-Bernard; TERNEYRE, Philippe. *Droit administratif des biens*. 6. ed. Paris: Dalloz, 2011. p. 479 et seq.

[11] See, again, the previous study *Ibid.*, p. 481-85.

[12] On the topic, see the comprehensive study by MEDAUAR, Odete. *Destinação dos bens expropriados*. São Paulo: Max Limonad, 1986. p. 51 et seq.

According to José Afonso da Silva's classification, this is a constitutional norm of contained effectiveness since, besides determining the possibility of expropriation vis-à-vis public utility, it *transfers to the legal system the responsibility of regulating how expropriation will be affected*. However, the Constitution clearly—without the need for further regulation—determines that (i) for expropriation to occur, there must exist a *public need or utility*; and (ii) it must be accompanied by full indemnification.

Despite the limited articulation in section XXIV, it is clear that any interference with the right to property—including, obviously, the extreme case of expropriation—*is only admissible with regard to the proportionality criterion*.

Furthermore, the Federal Constitution also provides for two other hypotheses of expropriation, with *distinct legal causes*. The first is provided for in article 182, § 4, item III, concerning the so-called urban planning law *expropriation-sanction*. The second is governed by article 184 and refers to expropriation for social interest, for agrarian reform purposes.

In this study, we describe and analyze each scenario of expropriation in Brazilian law, with a clear emphasis on *expropriation for public utility*, the most widely applied. In our analysis, we will consider, with regard to each scenario, the hypotheses of incidence, the competence to rule on expropriation and implement it, and the procedural mechanisms for its conclusion.

2. Expropriation for public utility and its procedures

The first and most common type of expropriation in Brazil is that provided for in article 5, item XXIV, of the Federal Constitution: *expropriation for public utility*. It is also the oldest, legislation on which dates back to the 19th century—the imperial period.[13] In general terms, it pertains to expropriation of private property for use by the community.

Although it is a common feature of all types, with expropriation for public utility there is a marked conflict between an individual right legally qualified as a *fundamental right* and the interests of the community, which requires a *clear conciliatory application mechanism reconciling the fundamental right and the demands of the community*.

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[13] Cf. FAGUNDES, Michael de Seabra. *Da desapropriação no direito brasileiro*. Rio de Janeiro: Freitas Bastos, 1949. p. 18 et seq.

2.1 Incidence hypothesis and normative foundations

As the name suggests, expropriation of public utility occurs when private property is required for public use and must be transferred from the individual who holds it to the community.

For expropriation to occur, there must be a clear incompatibility between exclusive private ownership by a given citizen and the demands of the community. In this sense, given the variety and plurality of collective demands, there are multiple scenarios of public utility which requires private property.

Given that property rights are *fundamental*, it is necessary to prove that the incompatibility of private ownership and the respective collective demand is so intrinsic that there is no other alternative.

This means expropriation is not automatic and justifiable in itself, much less an irrefutable exercise of public power. For it to occur, it is essential to demonstrate (i) the lawfulness of the purpose, (ii) suitability, (iii) necessity and (iv) proportionality in the strict sense, with respect to the *proportionality sieve*.

In consequence, expropriation for public utility in Brazil demands, according to the regime prescribed in infra-constitutional law item XXIV of article 5 of the Federal Constitution, cumulatively, that:

(i) the cause leading the authority to seek expropriation is lawful and consistent with the competence of the expropriating public entity—in the case of public utility, this means that there must be an *effectively public* need, duly justified, and not merely the whim of a public administrator, divorced from necessity.

(ii) The property must, by definition, be the only or most appropriate means available, i.e., transfer to state patrimony is the most propitious means of satisfying the public need;

(iii) expropriation—*ultima ratio* with regard to state intervention —it must be the only legitimate means of satisfying the underlying need; *there is no less onerous means of satisfying the underlying public need*; and

(iv) finally, there must be balance (or *proportionality in the strict sense*) between the public demand in question and the need; only where no other means can be found.

Thus, in this light, Decree-Law[14] no. 3,365, of June 21, 1941, which still regulates expropriations in the service of public utility, may be analyzed.[15] Indeed, the said regulation, although it consolidates the provisions of item XXIV of article 5 of the Federal Constitution, is only be applied in a constitutionally acceptable manner if it respects the principle of the fundamental right to property.

Thus, a premise of the present study is that Decree-Law no. 3,365/1941 may only be analyzed as a binary rule with regard to the procedure enshrined therein regarding expropriation. The measure itself (the act of confiscating private property) must be analyzed as the practical application of a principle, the legality of which will depend, necessarily, on the postulate of proportionality.

It seems clear, then—as discussed below—that the notion of public utility underpinning expropriation will never be binary in terms of applicability (it will never be a rule), as it is essential in the consideration of the right to property and other rights pertaining to expropriation.

Therefore, for present purposes, the formal acts exercised by public authorities in carrying out expropriation bear no weight. In other words, whether formal requirements were in fact met is beside the point. *What is important is whether the expropriatory act (*i.e.*, the decree declaring public utility) arises from an adequate deliberation process and whether the proportionality of the act has been respected therein*.

To proceed with our analysis, we need to consider the provisions of article 5 of Decree-Law no. 3,365/1941 and compare which exercises are fundamental to public administration expropriation of private property.

The provisions of Article 5 of the Decree-Law are key, as they define the concept of *public utility*[16] for the purposes of expropriation, the nexus of the right to property and the demands of the community which cause

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[14] The decree-law is a normative source that no longer exists following the enactment of the Federal Constitution of 1988. In previous constitutional orders, this was a rule issued by the Executive Branch, with the effects of an ordinary law, to be analyzed and passed into law by the Legislative Branch. If not deliberated by the Legislative Branch within a given period, it became official. Thus, Decree-Law no. 3,365/1941 and all other decree-laws mentioned in this study continue to function as ordinary laws.

[15] The term "continue" does not suggest that legal norms have an expiry date, but that the decree in question was drafted and approved at a time when the Federal Constitution of 1937 was in force, with an authoritarian character, and was still applied (though not necessarily absorbed—or fully incorporated) under the aegis of the three following Constitutional Charters (1946, 1967 and 1988).

[16] While section XXIV of article 5 of the Federal Constitution adopts both the terms *need* and *utility*, article 5 of Decree-Law no. 3,365/1941 only refers to *public utility*, which I will adopt in the present study.

restrictions on this right. Thus, the notion of *public utility* should be used to compare expropriation with the underlying reality to understand whether the proportionality criterion is respected.

Our starting point, then, is to analyze the degree of openness of the concept of public utility determined by article 5 of Decree-Law no. 3,365/1941, as *public utility* is clearly an *indeterminate legal concept*.

According to reliable doctrine, *indeterminate legal concepts* are terms used in normative texts that cannot be defined unequivocally *in the abstract*. That is to say, indeterminate legal concepts embody an idea which is understandable to the interpreter, but which, in the abstract, has more than one possible connotation, variable according to a series of factors involved in its concrete application.[17]

For this reason, although indeterminate legal concepts fall, in general, within the hypothesis of normative texts (not in terms of normative consequence, as in cases of administrative discretion), they can be equated to other hypotheses of administrative discretion. Indeed, indeterminate legal concepts leave the public administrator with a margin of choice, depending on specific circumstances, to decide, in a non-binding manner, which decision will be taken.[18]

Weighing these considerations and taking into account the provisions of article 5 of Decree-Law no. 3,365/1941, it is important to identify, firstly, the extent of the administrative discretion contained in the rule under discussion—and which, as I stated, are fundamental to an assessment of the proportionality of the expropriator measure.

It should, therefore, be noted that, contrary to many uses of indeterminate legal concepts in the formulation of standards, the case in question provides for the existence of a list of hypotheses that *may be* configured in terms of public utility. This implies that the interpretative margin left by the legislator to the public official in the definition of public utility runs up against a normative limitation: the list of cases of public utility contemplated; since (i) not all cases of public utility will justify expropriation, given the need for proportionality, and (ii) although there may be other hypotheses of public utility, only those expressly determined by law may justify expropriation.

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[17] Indeterminate legal concepts may be defined as concepts for which there is no single focus of possible meanings, which may be attributed different meanings depending on the case. Cf. WOLFF, Heinrich Amadeus; DECKER, Andréas. *Studienkommentar VwGO VwVfG*. Munique: C. H. Beck, 2005. p. 423.

[18] On this topic, see my own work, "O poder de polícia é discricionário?". *In*: MEDAUAR, Odete; SCHIRATO, Vitor Rhein (Org.). *Poder de polícia na atualidade*. Belo Horizonte: Fórum, 2014. p. 38-39.

In this respect, a second key stage is to determine whether this role is *merely illustrative* or *essentially categorical*. An example is a set of hypotheses suggested by the legislator, which do not limit the public administrator's field of choices and so allow for additions. On the other hand, if it were exhaustive, there would be a limitation on the public official's range of choices to one of the hypotheses on the list, prohibiting any extenuating choice.

According to Miguel Seabra Fagundes, the list would be merely illustrative, as it is impossible to account, theoretically, for all cases that might constitute public utility.[19] On the flipside, according to Odete Medauar, as expropriation is an extreme measure, configuring an interference in the sphere of individual rights, the list in question is necessarily exhaustive, since a restrictive interpretation is required.[20]

As stated, the prevailing understanding seems to be the latter. In other words, it is apparent that the list in article 5 of Decree-Law no. 3,365/1941 is *essentially categorical*, precluding the creation of new hypotheses of public utility beyond those determined therein.

Therefore, although there may be a margin of discretion for the public official to, in a specific case, define the term *public utility*, this will be restricted to the hypotheses determined by article 5 of Decree-Law no. 3,365/1941. There will always be some level of comparison of the legality of discretionary decisions in the specific case.

Furthermore, it is clear, *as with all cases of discretion management*, that the administrative decision must be substantiated in detail. That is to say, a generic determination of the existence of public utility is not enough. *There is a burden on the expropriating public administrator to designate, in a clear and unequivocal manner, what public utility exists in the specific case which, in theory, justifies expropriation.*

In this context, the public administrator, given the circumstances of the case, must confirm the occurrence of the hypotheses listed in article 5 of Decree-Law no. 3,365/1941, to determine compatibility between these circumstances and any of the aforementioned hypotheses (for example, the distinction between *exploitation and preservation of a public service*). Given the scenario of compatibility between the case and the hypotheses in article 5, we should consider whether private property is, *in fact*, necessary for the realization of the existing hypothesis. If so, expropriation may be considered.

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[19] Cf. Fagundes, *Da desapropriação no direito brasileiro*, *op. cit.*, p. 109-110.
[20] Cf. MEDUAR, Odete. *Direito administrativo moderno*. 23. ed. Belo Horizonte: Fórum, 2023. p. 355.

However, expropriation is not an automatic or necessary consequence of a public utility hypothesis and the need to use private property, since, as mentioned, *the notion of public utility is not a binary rule*. It is a legal norm that depends on careful balancing before any application; at which point, expropriation becomes more complex.

Once public utility is attested and duly substantiated, the conflict between the public utility in the specific case and private property may be weighed. If this conflict exists, we must consider whether expropriation is the *proportionate* measure in the context.

In the first place, if public utility is clear and if the purpose of the administration is compatible with article 5 of Decree-Law no. 3,365/1941, *the lawfulness of the intended measure is demonstrated*, which, as seen, is the first step of the proportionality test.[21]

Secondly, it is necessary to check whether the conflict is real or apparent. It is the duty of the expropriating official, then, to show that the supply of a public utility *depends* on an extreme restriction on the right to property; that there is no way to satisfy the public utility without sacrificing private assets. *Where there is such dependency, the restrictive measure is appropriate.*

Thirdly, the extent of the restriction imposed on the right to property must be identified, in terms of the public utility in the specific case. This implies that *there is an obligation on the part of the public official to show that (i) no less onerous measure than expropriation is possible in the specific case and (ii) expropriation is limited to the maximum amount necessary for the public utility purposes in question*.

This consideration is vital as it may be that the public utility, in the specific instance, allows for less onerous measures, such as temporary occupation,[22] easement,[23] preemption or even private law mechanisms, such as rental and lease. Where a less onerous measure is possible, it must be taken.

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[21] Here, it seems unnecessary to consider the lawfulness of satisfying public utility, but there are in fact cases in which utility is a creation of the public administration that intends to use expropriation to achieve another end. These are cases in which the expropriation is characterized by *misuse of purpose*.

[22] Temporary occupation involves the authority temporarily occupying undeveloped land next to public works to facilitate their completion. Once the work is finished, the land is returned to its owner.

[23] According to Odete Medauar, administrative easement consists of "an onus of use, on the part of the Administration, of private property, in the public interest, involving indemnification for losses effectively incurred". Cf. Medauar, *Direito administrativo moderno*, *op. cit.*, p. 351. In general, the onus arising from administrative easement implies the right to use a portion of land and the imposition of *non-edifying* obligations.

Thus, once compatibility between the measure and the purpose is clear and provided the option is the least onerous, given the circumstances of the specific case, the criterion of *proportionality* is met.

Fourth and finally, it is necessary to demonstrate the balance between the restrictive measure and satisfaction of public utility, in the particular case. In other words, (i) the fundamental right to property must be preserved—the citizen may still enjoy the rights inherent to property or else is *fully* indemnified—and (ii) there must be *proportionality* between the restriction of property rights and the satisfaction of public utility. *If this can be shown, the obligation of proportionality in the strict sense is respected, thus satisfying the fourth and final criterion.*

In this regard, although the normative structure of Decree-Law no. 3,365/1941 is fairly straightforward—and constitutionality questionable—the rule must be interpreted according to the fundamental character of the right to property, as described above. To claim that the public utility of a given property is subject to binary and direct application is mistaken.

What is more, applying the traditional (and outdated) theories of administrative acts to expropriation, affirming the absurd notion that its merits cannot be investigated implies negation of the fundamental character of property rights, in violation of Article 5 of the Federal Constitution.

Since the 1988 Federal Constitution adopted a rigid model of supremacy and concentrated control, based on permanent, unalterable clauses, privileging fundamental rights with direct application (article 5, paragraph 2), administrative acts that impinge on fundamental rights may not be permitted without thorough justification, or the necessary deliberation to show the proportionality of the measure.

Thus, the primacy of fundamental rights leads to profound changes in the legal parameters of administrative law, especially with regard to the conditions for the management of discretionary power. *While, previously, decision-making was exclusive to public administration, now authorities are compelled to demonstrate respect for proportionality in specific cases.*

Therefore, regarding expropriation in the name of public utility, there is a clear conflict between the right to property and responsibilities of the public authority. Indeed, the protection of ownership as a *fundamental right* creates serious limitations on expropriation powers, imposing a duty to strictly observe the principle of proportionality and explicitly and thoroughly justify any such decision.

2.2 Expropriator powers

Having detailed the hypothesis of expropriation for public utility, we now consider the expropriator powers used in carrying out this process. This is especially relevant in the Brazilian case, given the federative structure of Brazilian public administration.

In accordance with the provisions of section II of article 22 of the Federal Constitution, it is the exclusive competence of the Federal Union to establish regulations on expropriation. In consequence, federal law Decree-Law no. 3,365/1941 has a *national scope*, and must be applied by the Federal Union, the states, the Federal District and the municipalities. Although predating the Federal Constitution of 1988, Decree-Law no. 3,365/1941 has not been scrutinized in the light of the current Constitutional Text, notwithstanding that some of its norms are fundamentally questionable.

Indeed, the regulation for all cases of expropriation in the name of public utility is Decree-Law No. 3,365/1941, proscribing regulations from other federative entities. However, *all federative entities have the authority to declare the public utility of private property and to conduct the respective expropriation process*. As is clear, each federative entity possesses a specific set of competences, the exercise of which, at some point and to some extent, may require the use of private property. Thus, the Union, states, Federal District and municipalities have the authority to conduct expropriation in accordance with the procedure set out in Decree-Law no. 3,365/1941.[24]

However, it is necessary to distinguish the competence *to determine* expropriation from the competence *to undertake* it. According to Decree-Law no. 3,365/1941, only the Union, states, Federal District and municipalities have the power to *decide on* expropriation, to affirm that a certain asset is required to satisfy a certain public utility. This competence should not be confused with the *material acts necessary to carry out the expropriation*.

In accordance with article 3 of Decree-Law no. 3,365/1941, *material acts necessary to conduct expropriation* may be carried out by the public authorities directly (federal, state, district, or municipal public administration, as the case may be), as well as by *public administration representatives*, notably public service concessionaires (item I): delegated entities (item III) or even public

[24] On this topic, see: SALLES, José Carlos de Moraes. *A desapropriação à luz da doutrina e da jurisprudência*. 6. ed. São Paulo: Revista dos Tribunais, 2009. p. 122 e ss.

works contract parties, following the global price contract, full contract and integrated contracting regimes.[25]

Thus, it follows that the act of determining expropriation of private property is *non-delegable*. This act can only be carried out by the public authorities, directly. Nonetheless, *the material act of expropriation* may be delegated, by contract or regulation, to certain legal entities under private law vis-à-vis the exercise of public functions.

2.3 Public utility expropriation procedure and process.

Decree-Law no. 3,365/1941 is a material and procedural norm. Besides determining the requirements for expropriation, it governs the procedural steps of expropriation, *notably with regard to the act of expropriation*.[26]

2.3.1 The public utility expropriation administrative phase

Here, the starting point for procedural analysis of expropriation begins with the *decision on the public utility* of a specific private asset. This concerns a declaratory *administrative act*, which ascribes to a private asset the function of public utility. Decree-Law no. 3,365/1941 rules that this administrative act must stem from a *decree* from the head of the Executive Branch of each federative entity. However, often special laws delegate to public entities the power to decide on the utility of private assets through other means, besides the Decree.[27]

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[25] The aforementioned contracting regimes are defined in article 6 of Federal Law no. 14.133, of April 1, 2021, which, in summary, consist of: (i) contracting of public works according to the global price regime for the object in question (global price contract); (ii) contracting of public works under the full contracting regime, which consists of the complete delivery of a certain project; and (iii) contracting of public works in an integrated manner incorporating design and construction.

[26] Here, we should highlight the terminology used in Brazil for the public administration procedural action. While most legal systems separate *procedure* from *administrative process*es, the one carried out by an *internal body* and the other through the Judiciary (or administrative jurisdiction in some systems), in Brazil, constitutionally, only one term is used. *Process* refers to all procedural steps, whether internal or by way of the Judiciary. On the matter, see: MEDAUAR, Odete. *A processualidade no direito administrativo*. 3. ed. Belo Horizonte: Fórum, 2021. p. 35 e ss.

[27] For example, article 24, section XIX, of Federal Law no. 10.233, of June 5, 2011, delegates to Agência Nacional de Transportes Terrestres (ANTT) the power to declare the public utility of private assets necessary for the implementation of land transportation infrastructure under the agency regulation.

Regarding the administrative declaration of the public utility of a given asset, there is an essential *unconstitutionality* in Decree-Law no. 3,365/1941, as it does not require a *prior administrative procedure*. It is a unilateral decision taken without the participation of the party concerned (*i.e.*, the owner of the property in question).

Indeed, items LIV and LV of article 5 of the Federal Constitution prescribe *prior legal guarantees of the right to due legal process and a full defense* in the case of decisions which affect the rights of private citizens. In other words, as expropriation is prejudicial with regard to individual rights, its determination may not, with respect to the Federal Constitution, be carried out without a prior administrative consideration, with the participation of the affected citizen and the guarantee of their rights to adversarial proceedings and full defense.

In reality, the system provided for by Decree-Law no. 3,365/1941 reflects a *modus operandi* of outdated administrative law, incompatible with the status of the citizen in the contemporary legal system. In this system, administration acts which result in a conflict of interest may only be reviewed by supervisory bodies after the event, when the decision has already taken effect. This system existed during a period when such decisions were the only expression of the power of public administration, as Vasco Manuel Pascoal Dias Pereira da Silva observes.[28]

Over time, the role of the public administration has altered profoundly, with regard to the rights of citizens. Rather than a passenger, whose only option is to challenge the legality of a particular administrative act, after the event, the citizen has become an integral *part of the decision-making process*. Prior to any decision, the position of the individual or entity concerned must be weighed in respect of well-defined legal parameters.[29] This is especially relevant considering the non-binary nature of public utility set out in subsection II.1, in that prior consultation is essential in determining the proportionality of a given administration measure.

In this regard, decisions on the allocation of private assets taken without prior consultation are clearly unconstitutional. This amounts to a violation of the principle of *due process of law*, *of the right to ample defense*, ensured in items LIV and LV of article 5 of the Federal Constitution.

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[28] Cf. SILVA, Vasco Manuel Pascoal Dias Pereira da. *In search of the lost administrative act*. Coimbra: Almedina, 2003. p. 11 et seq.

[29] On the topic, see my own work: "O processo administrativo como instrumento do Estado de Direito e da democracia". *In*: MEDAUAR, Odete; SCHIRATO, Vitor Rhein. *Atuais rumos do processo administrativo*. São Paulo: Courts Magazine, 2010. p. 9 et seq.

Yet, although it is 35 years old, no concentrated or diffuse control of the norm are on the horizon. Regarding the regulatory purposes in force, the starting point is the *act of declaring the public utility of a particular asset*.

Notwithstanding, article 8 of Decree-Law no. 3,365/1941 provides that a declaratory act of public utility may arise from the Legislative Branch. In this hypothesis, *a law, with concrete effects, determines the public utility of a private asset*, replacing the administrative act with a legislative measure. This is an unusual, but not unprecedented, situation.[30]

Declaration of the utility of a given asset must necessarily contain a detailed description of the property in question, as well as—and crucially—a clear and compatible assessment of the public utility concerned and the grounds for expropriation. Again, on what is set out in subsection II.1, it is the burden of the expropriating authority to demonstrate, in an incontrovertible way, the *proportionality* of expropriation in view of the specific circumstances.

Furthermore, in theory, any and all private assets may be subject to expropriation, movable or immovable, tangible or intangible. Public utility—properly established and justified—takes precedence over individual property rights, in the final analysis.

Indeed, public assets may also be subject to expropriation. As determined by § 2 of article 2 of Decree-Law no. 3,365/1941, the Union may expropriate assets from states, the Federal District or municipalities, and states may expropriate assets from municipalities, *provided there is express legislative authorization from the expropriating entity*. All procedural rules applicable to the expropriation of private property are applicable to the expropriation of public property.

Once the public utility of a given asset has been established, the practical process begins, which, as mentioned, may be carried out by public authorities or designated private entities, as described in subsection II.2. These steps originate in the administrative sphere and move to the judicial level. The limit for initiating material acts of expropriation is five years from the ruling on public utility (article 10 of Decree no. 3,365/1941).

To this end, the first practical step, according to articles 10, 10-A and 10-B of Decree no. 3,365/1941, is an *attempt at amicable expropriation*. The official responsible should seek an agreement with the expropriated citizen, offering them a certain amount of money in compensation. If a settlement is

[30] See, for example, Federal Law no. 2,874, of September 19, 1956, which determined the expropriation of a considerable portion of land in the state of Goiás for the construction of the new federal capital, Brasília.

reached, expropriation may proceed with the transfer of the property to the expropriating authority.

It should be emphasized that any agreement does not equate with a legal purchase or sale transaction. Indeed, an expression of will (unnecessary in light of the expropriating power of the State) does not involve the alienation of property but concerns the indemnifiable value. In a bilateral and onerous legal transaction, there is no such consideration[31]

The settlement offer will be made through notification in accordance with article 10-A of Decree no. 3,365/1941, with a deadline of 15 days. Failure to respond implies rejection of the proposal. In this case, although the Decree does not take a position on the matter, it is clear that a revised offer may be made, seeking compromise.

In this respect, Federal Law no. 13.867, August 26, 2019, allows for the possibility of mediation and arbitration, provided for in the new article 10-B of Decree no. 3,365/1941, as an alternative to the judicial expropriation process. In this case, the public authority and expropriated party may negotiate, in accordance with Federal Law no. 13.140, June 26, 2015, or seek arbitration, in accordance with Federal Law no. 9.307, of September 23, 1996, to close the matter. This, then, is considered an alternative means of dispute resolution.

If an agreement is not reached or mediation fails, the issue will move to the judicial phase, triggering an expropriation process. It should be noted that, if arbitration is used, there will be no legal proceedings, given the jurisdictional competence of the Brazilian arbitration courts.

2.3.2 The judicial expropriation process

Regarding the judicial process, there is another clearly unconstitutional aspect of Decree-Law no. 3,365/1941: the issue of jurisdictional control of the decision on public utility. As determined by article 9 of the Decree-Law "the Judiciary is prohibited, in the expropriation process, from deciding whether or not cases of public utility are justified". According to this rule, in the context of the process, it is only lawful to discuss the value in question, never the cause.

It appears clear, then, that the rule in question is unconstitutional, since it violates the provisions of item XXXV of article 5 of the Federal Constitution,

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[31] Cf. JUSTEN FILHO, Marçal (Org.). *Curso de direito administrativo*. 13. ed. São Paulo: Revista dos Tribunais, 2018. p. 551.

which concerns the inalienability of judicial control. Consideration of the merits of expropriation would seem to be inherent to the process itself, especially considering the content of subsection II.1.

Indeed, although, strictly speaking, it is not possible to discuss the merits within the scope of the expropriation process, it is entirely possible to file a specific legal petition, which means that the public utility declaration is, in fact, subject to review. However, despite the potential for review, a considerable burden is placed on the citizen, who will have to go through more than one legal process in defense of ownership, demonstrating the unconstitutionality of article 9 of Decree-Law No. 3,365/1941.

Given this consideration, it follows that the expropriation process has its own procedures, determined by articles 11 and following Decree-Law no. 3,365/1941, with only supplementary application of the Code of Civil Procedure. The expropriation action will be filed at the court where the property is located, and its object will be the value of compensation due to the individual in question.

Once the action has been filed, the competent court will appoint an expert to accurately determine the value of the property, to correctly determine the amount due. Where possession of the property is urgent, the public authority may deposit in court the amount it considers adequate and request provisional seizure.

In accordance with the provisions of § 1 of article 15 of Decree-Law no. 3,365/1941, provisional expropriation will be granted if the public authority pays a deposit: (i) for the amount offered under the terms of article 10, if this is greater than 20 times the rental value of the property;[32] (ii) an amount equivalent to 20 times the rental value of the property, if the offer made under article 10 was a lower amount; (iii) the cadastral value of the property, for purposes of assessing real estate taxes, if there was an update of this value in the immediately preceding fiscal year; or (iv) the amount set by the judge, if there was no update mentioned in the previous item.

Evidently, the rule of provisional expropriation determined by article 15 of Decree-Law no. 3,365/1941 only applies to real estate, as, here, possession is transferred directly to the public authority for the purposes of satisfying the respective public utility.

Once the deposit has been made and the order for provisional possession issued, the public authority assumes ownership and may carry out procedures that may be necessary, including demolition of existing buildings on the

[32] The rental value of a property is the reference used to calculate taxes, in accordance with article 4 of Decree-Law no. 137, of December 29, 1937.

expropriated site. In practice, expropriation is performed, despite the incomplete transfer of the property.

Especially in the case of urban properties, the provisions of Decree-Law no. 1,075 of January 22, 1970, must be observed, according to which a contradiction must be established regarding the value of the deposit necessary to allow the transfer. In the event of a lack of agreement between the public authority and the private party, the competent court must conduct an expert assessment to determine the amount to be paid by the expropriating entity.[33]

The process will continue until the competent court determines the value of compensation to be paid. At this point, if the amount is greater than that originally deposited by the government, the difference must be paid. Any credits owed by the public authorities, arising from the expropriation process, will be satisfied by means of court orders, in accordance with article 100 of the Federal Constitution.

2.4 Effects of expropriation

Expropriation is a form of *originating acquisition* of public authority right to property, widely recognized in case law.[34] In this regard, all obligations and burdens that pertain to the expropriated property disappear, judicial or conventional, and are not transferred to the expropriating public authority. For this reason, the Civil Code recognizes the right to share the indemnification paid in certain circumstances in which rights pertain to expropriated property, for example, Article 1.376 in relation to the holder of surface rights.

Furthermore, article 35 of Decree-Law no. 3,365/1941 expressly determines that the effects of expropriation are irreversible and that expropriated assets cannot be the subject of claims once incorporated as public property. Even if the expropriation is annulled, any losses will be settled as damages.

The instrument in question is the subject of major doctrinal and case study debate. As Odete Medauar mentions, the return of expropriated assets is recognized in case law, as is payment of compensation for losses and damages.[35] Furthermore, as Floriano de Azevedo Marques Neto observes, the scope of article 35 of Decree-Law no. 3,365/1941 should be limited to cases in which the

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[33] On the topic, see: Meduar, *Direito administrativo moderno*, *op. cit.*, p. 363.

[34] Among others, see: REsp 1.668.058-ES, of the Superior Court of Justice, reported by min. Mauro Campbell Marques, agreed on unanimously on 8/JUNE/2017, *DJe* 14/JUNE/2017.

[35] Cf. Medauar, *Modern administrative law*, *op. cit.*, p. 364.

expropriated property has been affected, since otherwise the expropriation is not consummated, rendered null and void.[36]

2.5 Zone Expropriation

Article 4 of Decree-Law no. 3,365/1941, notably, allows for expropriation of an area adjacent to that required for public works, justifying the withdrawal of respective property rights. In other words, instead of expropriating only the assets necessary for establishment of a certain public facility, ownership of a neighboring area is permitted, which may subsequently be sold on by the public administration.

The primary objective of zone expropriation is to allow public authorities to appropriate, in the name of the community, the real estate surplus value of properties adjacent to those in which a certain facility is located. This is due to the fact that exceptional real estate appreciation is common in the areas surrounding certain public facilities, such as those intended for urban mobility and parks. Thus, in zone expropriation, appreciation is harnessed by the public authorities for the benefit of the community, as with financing the implementation of public amenities.[37]

But despite its considerable value, to public authorities and social development, zone expropriation is rarely used in Brazil.[38] The best-known case, brought before and approved by the Federal Supreme Court (STF), was the implementation of a metro line in São Paulo in the 1970s,[39] However, in recent times, following the Federal Constitution of 1988 it has not been employed.

2.6 Indemnification type

The most controversial point regarding expropriation for public utility, at present, concerns payment of compensation. As will be discussed, the system provided for in the *process* of expropriation outlined by Decree-Law no. 3,365/1941, together with the system of credit payments handled by the

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[36] On the topic, see: MARQUES NETO, Florian. *Bens públicos*: função social e exploração econômica. O regime jurídico das utilidades públicas. Belo Horizonte: Fórum, 2010. p. 257-258.

[37] On this topic, Celso Mello is, again, instructive: MELLO, Celso Antônio Bandeira de. Obra pública a custo zero. *Revista Trimestral de Direito Público*, São Paulo, n. 3, p. 32 e ss, 1993.

[38] On the matter, see: Marques Neto, *Bens públicos*, *op. cit.*, p. 261.

[39] This is the case with RE 82.300/SP, ruled by the Supreme Federal Court on April 12, 1978, reported by Minister Rodrigues Alckmin.

Public Treasury as regulated by the Constitution, means that payment of any compensation due may be just, but not, as a general rule, a priori.

As determined by section XXIV of article 5 of the Federal Constitution, transcribed in section I, expropriation for public utility requires *fair and prior payment in cash*. The legal content of this instrument is self-explanatory: *a legal condition for expropriation is prior compensation, in cash,* which *reflects the full value of the property in question.* This implies, as Sérgio Ferraz points out, that the amount should cover *not only what the individual loses through expropriation of the assets, but potential gains arising from them i.e., profits accrued from regular use of the property*.[40]

Reimbursement should be calculated according to current market values, respecting potential gains obtained from a purchase and sale transaction, according to the conditions existing at a given time. *Furthermore, other potential values, arising from goodwill or mining exploration, must be added to the amount.* That is to say, compensation must include the market value of the asset and that of any other elements of economic exploitation of the expropriated asset.

In addition, any costs incurred by the individual arising from expropriation must be reimbursed, including legal fees and costs of experts and technical assistants.[41] Finally, all losses due to currency devaluation (inflation) and opportunity costs (interest) must be compensated.

As for the *moment* of expropriation, the Constitutional Text determines that payment must be *prior* and *in cash*. It is clear that *fair compensation is a legal condition for the exercise of expropriation*. In this sense, an assessment of the actual value of the property is required, including potential economic exploitation, with full payment in cash delivered to the party in question.

However, the reality existing in Brazil for decades is very different. As inferred from the expropriation procedure described in subsection II.2, Decree-Law no. 3,365/1941 allows the public administration to use "shortcuts" to avoid paying fair compensation before the expropriation.

Owing to the provisions of article 15 of the Decree-Law, it is lawful for the public authorities to assume provisional possession of the expropriated property, *while negotiating the appropriate value of expropriation*. Thus, it is enough to deposit in court an amount determined in accordance with §1 of the aforementioned provision, which will invariably be lower than the actual value of the asset. The explanation is simple: administrative records can never keep up with the

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[40] Cf. FERRAZ, Sérgio. *A justa indenização na desapropriação*. São Paulo: Revista dos Tribunais, 1978. p. 18 e ss.

[41] Cf. Medauar, *Direito administrativo moderno*, *op. cit.*, p. 356.

fluctuations of market prices. They are always out of date, and any value based on such records will be lower than the real figure.

Furthermore, other economic potentialities of the expropriated property, such as productivity or goodwill, are beyond the scope of these records, determined through highly technical and often slow assessments.

Given this scenario, in most cases,[42] the amount actually received by the citizen upon loss of the right to possession of property is considerably lower than the actual value that should be paid. Thus, according to the procedural discipline of Decree-Law no. 3,365/1941, after the public authority provisionally takes possession of the property, discussion of appropriate indemnification goes on.

In this regard, considering the procedural prerogatives of the Public Treasury (additional terms and necessary re-examination), before the decision is final, there is a lengthy legal process, which hinders prior payment of compensation. And, even in the final ruling, the right to full reimbursement is not satisfied, since chronological settlement is necessary, according to the court order procedure.

As determined by article 100 of the Federal Constitution, credits arising from final and binding judicial decisions are satisfied by *judicial orders*, registered by the competent court and settled in chronological order, from the moment budgetary resources are made available.[43]

Contingent on the number of outstanding court orders and the availability of budgetary resources, it is common for compliance with a court order to take several years, depending on the order of its registration.

So, in *lege lata*, the system is clearly unconstitutional, encouraging delay of payments due as compensation for expropriations. The public need for the expropriated property is addressed with possession of the asset, but the actual payment of the amounts due may only be made years after the expropriation, thus negating the right to *prior* compensation, as imposed by the Federal Constitution. In other words, it is, in practice, normal to carry out expropriations considering financial rates below the real value of the property,

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[42] Here, it should be noted, the major exception is the set of expropriations carried out by public service concessionaires. In order to avoid delays and lengthy legal proceedings, concessionaires seek consensual expropriations, commonly reaching mutually acceptable settlements with the expropriated party.

[43] According to § 5 of article 100 of the Federal Constitution, the president of the respective Court of Justice must determine the amount included in the budget for the payment of court orders, considering the availability of resources.

making the prescribed payments at a much later time than that determined by the Constitution.

Although the issue is still on the table, no solution is in sight. Quite the contrary, in fact. In accordance with Constitutional Amendment no. 114, of December 16, 2021, installment payments of court orders are authorized, thus extending the waiting time, considering the respective chronological sequence.

3. Social interest expropriation

Besides expropriation for public utility, regulated by Decree-Law no. 3,365/1941, discussed above, the Constitutional Text provides for *expropriation for social interest*, directed mainly at *agrarian reform*, among other secondary purposes.

Apart from the differences noted, the main point of distinction is *the reason for expropriation*: while for public utility the aim is to satisfy a public need, in social interest expropriation, social justice is sought through the equitable distribution of land among the population. In this case, no specific public initiative or project is involved, but a change in the social fabric.[44]

3.1 Hypotheses of suitability

The first part of article 184 of the Federal Constitution determines that (*verbatim*): "it is the responsibility of the Union to expropriate for the purposes of agrarian reform, in the social interest, rural assets which do not satisfy their social function". To this end, admissibility of expropriation for social interest depends on the existence of two elements: (i) a rural asset that fails to fulfill its social function; and (ii) the need for agrarian reform, i.e., demand for an equitable distribution of land.

Failure to comply with the *social function* of rural property is assessed by measuring productivity. Rural property is considered useful according to a *coefficient of use*, which measures its productivity based on total area, as regulated by Federal Law no. 8,629, of February 25, 1993. Authority to determine land productivity and whether its social function is met is vested in *Instituto Nacional de Colonização e Reforma Agrária* (Incra), a federal agency created by Decree-Law no. 1,110 of July 9, 1970.

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[44] Cf. SILVA, Virgil Afonso da. *Brazilian constitutional law*. São Paulo: Edusp, 2021. p. 221.

Agrarian reform, meanwhile, involves transferring ownership of unproductive rural land to landless rural producers. It is based on a register of workers maintained by Incra, according to criteria established in law.

Article 184, § 3 of the Federal Constitution determines provision of a specific law to regulate the special adversarial process observed in the judicial process of expropriation for agrarian reform purposes: the law in question being Supplementary Law no. 76, of July 6, 1993.

Not subject to expropriation for such social interest purposes are: (i) assets classed as small or medium-sized, provided the owner does not possess other land, and (ii) productive properties, in accordance with article 185 of the Federal Constitution.[45]

Besides the hypothesis stated in article 184 of the Federal Constitution, there are other *expropriation for social interest* scenarios, governed by Federal Law no. 4,132, September 10, 1962. The objective of expropriation for social interest under this law is to "promote the fair distribution of property or condition its use on social well-being", as detailed in article 1. According to this norm, cases of social interest are those determined by article 2, also identified in other clauses, such as cases of public utility determined by article 5 of Decree-Law no. 3,345/1961.

3.2 Expropriatory powers

Social interest expropriation competence varies according to the purpose of the asset. As expressly stated in Article 184 of the Constitution, *social interest expropriation for agrarian reform may only be carried out by the Federal Union*, with states, *the Federal District and municipalities prohibited from carrying out such actions.* Thus, it is the exclusive responsibility of the Federal Union, through Incra, to expropriate for agrarian reform purposes.

Other social interest cases, meanwhile, provided for in Law no. 4,132/1962, may be regulated by all federative entities, falling within the jurisdiction of the Union, states, Federal District and municipalities.[46] Thus, it is necessary

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[45] As Gilmar Ferreira Mendes notes, STF case law asserts that determination of productivity of a given rural asset is not viable in the case of occupation by social movement groups, as the level of productivity may be altered through the action of dispossession. Cf. MENDES, Gilmar Ferreira. *Direitos fundamentais e controle de constitucionalidade*: estudos de direito constitucional. São Paulo: Saraiva, 2012. p. 170-171.

[46] Cf. GARCIA, Jose Ailton. *Desapropriação:* comentários ao Decreto-Lei nº 3,365/41 e à Lei nº 4.132/62. São Paulo: Atlas, 2014. p. 231.

to interpret article 2 of Law no. 4,132/1962 in accordance with the Federal Constitution, granting that sections I, II, III and IV, which deal with agrarian form, can only be managed by the Federal Union.

3.3 The expropriation process

The process of expropriation for social interest varies, depending on the cause. In the case of *social interest expropriation for agrarian reform*, there is a special process, conducted by Incra.

The process begins with a ruling on the *social interest of a certain rural property*, where there is a clear failure to comply with its social function (article 184, § 2). Again, it is up to Incra to determine non-compliance with the social function and the President of the Republic to issue the respective social interest decree—here, too, an *administrative act of a declaratory nature*.

Once the Decree is issued, the judicial expropriation procedure follows, respecting the right to due process, governed by Supplementary Law no. 76/1993.[47] According to article 6 of the aforementioned text, after receiving the expropriation order, immediately or within 48 hours, possession is granted, allowing regularization of the area and its transfer to rural workers registered in the record kept by *Incra*.

There is no room for discussion on the declared social interest, in accordance with article 9 of Supplementary Law no. 76/1993, as the legal process serves only to define the compensation due. If there is an agreement on this value, it must be approved in a ruling. If no agreement is reached, an expert evaluation is arranged, and the competent court must set the amount due in a sentence issued at the evidentiary and judgment hearing or within 30 days of its completion, after the expert report and other determined procedures have been completed.

In the case of other hypotheses of social interest determined by Law no. 4,132/1962, subsidiary application of the procedural rite of Decree-Law no. 3,365/1941 applies, a process also initiated by a *decision on social interest* in the respective federative entity concerned. In this regard, see the previous discussion, in subsection II.3.

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[47] As expropriation is the exclusive responsibility of the Federal Union, the process is dealt with by the Federal Court, based on article 109 of the Federal Constitution.

3.4 Indemnification

Indemnification in cases of social interest expropriation will vary depending on the cause necessitating requisition of private property.

In the case of *social interest expropriation for agrarian reform*, under the terms of article 184 of the Constitution, *payment of the respective* amount will be in federal agrarian debt bonds, *redeemable within 20 years from the second year of issue*. These securities, issued only by the Federal Union, are part of its consolidated securities debt and follow the rules defined by article 20 of Decree no. 11,301, December 21, 2022. Recovery terms are defined at the time of issuance as five, 10, 18 and 20 years, in accordance with the criteria defined by Law no. 8,629/1993.

Here, we should note an exception to the obligation to pay fair, prior and monetary compensation, determined by the aforementioned item XXIV of article 5 of the Federal Constitution. Article 184 of the Federal Constitution identifies a *sanctioning function*, arising from failure to fulfill the social function of property. Thus, the Constitution itself authorizes that any indemnification due may be settled within 20 years.

However, useful and necessary property improvements must be compensated in cash and in advance. Aesthetic improvements fall under public debt security compensation.[48] This classification of improvements as useful, necessary and cosmetic follows the norms of article 96 of the Civil Code.

In other social interest expropriation scenarios, according to Law no. 4,132/1962, Decree-Law on. 3,365/1941 applies, including the definition and form of payment of the compensation.

3.5 Object of the asset

Social interest expropriation is peculiar in relation to the general rule of expropriation in the name of public utility. In the latter, the expropriated asset, in general, becomes public patrimony, definitively,[49] while in the case of the former, the general rule is that the expropriated property is transferred to third parties.

In the case of social interest expropriation *for agrarian reform purposes*, the asset must be transferred to third parties. Here, there is a two-step process.

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[48] Cf. Mendes, *Direitos fundamentais e controle de constitucionalidade*, *op. cit.*, p. 169.

[49] Of course, there are exceptions, such as expropriations carried out for the construction of public housing, in which the expropriated asset will be resold. See: Medauar, *Destinação dos bens expropriados*, *op. cit.*, p. 85 e ss.

The first involves the transfer of the right to use and direct possession of the property to rural workers registered in the Incra registry, the property remaining public. After a certain period and subject to legal conditions, ownership of the property is transferred to these workers.[50]

At any rate, the main object of the expropriated asset is transfer to third parties, as public patrimony on a transitory, temporary basis.

Regarding the other hypotheses of social interest expropriation provided for in Law no. 4.132/1962, transfer of the assets to third parties (as in items I to V) or retention by the public administration (items VI to VIII) are possible. Thus, the object of the asset will vary according to the social interest.

4. Urban planning law expropriation-sanction

A final type of expropriation provided for in Brazilian law, prescribed in § 4 of article 182, is the so-called *expropriation-sanction*, implemented by municipalities in the case of continuous and repeated non-compliance with the *social function of urban property*.

4.1 Hypothesis of suitability

The hypothesis of admissibility of the expropriation-sanction of urban planning law is restricted: it *may only occur when there is repeated and continuous non-compliance with the social function of urban assets*, as per item III of § 4 of article 184 of the Constitution.

As determined by § 2 of the same article, urban assets fulfill their social function *when used in accordance with what is determined by municipal policy, the so-called Master Plan*. This Plan is a mandatory municipal law for all municipalities with more than 20 thousand inhabitants, regulating, in detail, the use of urban land and guidelines to be followed.[51]

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[50] According to article 18 of Law 8.629/1993, the settlement of rural workers on expropriated land, in the context of agrarian reform, is affected by means of concessions of right of use, which are non-negotiable for a period of 10 years and granted free of charge. Subsequently, the concessions granted are converted into deeds of ownership. This division into stages is to avoid the commercialization of land utilized in the execution of an agrarian reform plan.

[51] According to José Afonso da Silva: "The Master Plan, an instrument for implementing urban planning function in Municipalities, is a general, all-encompassing plan whose function is to systematize the physical, economic and social development of the municipal territory, for the well-being of the local community". Cf. SILVA, José Afonso da. *Direito urbanístico brasileiro*. 5. ed. São Paulo: Malheiros, 2008. p. 139-140.

In this sense, expropriation may only be considered in the case of continuous and repeated non-compliance with the object of a particular urban property vis-à-vis the respective municipal Master Plan. Although specified, formally, in the 1988 Constitution, there have to date been no expropriation-sanction instances in Brazil.

Finally, it is important to emphasize that such expropriation concerns only *urban* assets (those in rural areas of the respective municipalities are excluded) not fulfilling their social function.

4.2 Expropriator competence

As the provisions of article 182 of the Federal Constitution make clear, only municipalities can carry out expropriation-sanctions of urban properties, as they fall under urban policy, a constitutional prescribed domain of municipalities, according to article 182 and article 30, item VIII, of the Federal Constitution.

However, the Federal District is also competent in this regard, as it embodies the constitutional powers of the states and municipalities, article 32, § 1, of the Federal Constitution. States and the Union do not have legal competence to manage the expropriation under discussion.

4.3 Expropriation process

The *urban planning law expropriation-sanction* is an exclusively administrative preserve, not requiring legal proceedings. Its main guidelines are set out in § 4 of article 182 of the Constitution, with further protocol outlined in the so-called City Statute (Federal Law no. 10,257, July 10, 2001).

As determined by articles 5, 6, 7 and 8 of the City Statute, the expropriation-sanction process has four stages: (i) notification of the owner of non-compliance with the social function of the asset;[52] (ii) granting of a period of one year for the owner to implement compulsory subdivision or alteration of the asset, with respect to the Master Plan; (iii) in case of non-compliance with the former, the municipality will increase the Urban Property and Land Tax (IPTU) rate for a period of five consecutive years for the asset in question; and (iv) in case of continued non-compliance with the social function after five years of progressive IPTU, expropriation of the property.

[52] § 1 of article 5 of the City Statute prescribes underuse of property as a parameter for non-compliance, where it is below the minimum limits determined by the Master Plan.

Thus, in the case of expropriation sanctions, the path followed until expropriation is only administrative, in lieu of any judicial decision to that effect.

Finally, the expropriation-sanction requires an express and specific provision in the law which approved the Master Plan. Therefore, even though it is provided for in the Constitution and in the City Statute, it must be expressly included in the municipal law.

4.4 Indemnification

As with social interest expropriation for agrarian reform, the expropriation-sanction also presents an exception to the rule of prior compensation. As determined by section III, § 4 of article 182 of the Federal Constitution: *Compensation for urban expropriation-sanctions is paid with public bonds issued by municipalities, with a restitution period of up to 10 (ten) years*.

Thus, as it is also a form of sanction for non-compliance with social utility, expropriation-sanctions do not allow for prior indemnification in cash. The amounts due, determined in accordance with the rule of § 2 of article 8 of the City Statute,[53] are paid in public bonds issued by the municipality.

Despite the parallelism between articles 182, § 4, and 184 of the Federal Constitution, article 182 presents considerable obstacles, since the issuance of public bonds by municipalities depends on prior and specific authorization from the Federal Senate, which does not apply to the bonds governed by article 184.

Therefore, for the expropriation-sanction to occur in practice, the entire period provided for in articles 5 to 7 of the City Statute (at least seven years, in total) must have passed, with specific authorization given by the Federal Senate for the municipality to issue the respective debt bonds.

4.5 Object of the expropriated property

As may be inferred from §§ 4º and 5º of article 8º of the City Statute, municipalities have a maximum period of five years to comply with the use determined by the Master Plan, directly or through concession or sale to a third party. In other words, there is a level of discretion regarding the object of the asset. It may be used directly by the public authority or transferred to a third party.

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[53] The said provision determines that the compensation will be determined according to the records used as a basis for ITPU assessment, without increases resulting from lost profits or other possible values.

Final considerations

Expropriation remains an oft used and relevant instrument for use by Brazilian public authorities. As we have seen, there are three main types, one of which has two subspecies, but, in practice, expropriation for public utility is most common, while social interest expropriation for agrarian reform are not infrequent. Expropriations for social interest governed by Law No. 4,132/1962 and the expropriation-sanction of urban planning law have rarely been used.

In this regard, it is worth noting that agrarian reform expropriation is provided for in the current Constitutional Text, with infra-constitutional norms enacted after 1988, and, therefore, complies more closely with the current constitutional order—even though specific points may be debated.

On the other hand, expropriation for public utility is supported, despite express constitutional provision (article 5, item XXIV), a rule that predates the Federal Constitution of 1988, established at a time when the Brazilian State was markedly authoritarian.[54]

Thus, the infra-constitutional discipline of expropriation for public utility is not, to all intents and purposes, in line with the current Federal Constitution. Public utility declarations lack an administrative guarantee of adversarial process and full defense, and expropriations without due compensation in full, therefore, violate the current Constitution.

Decree-Law no. 3365/1941 is of vital importance, with a high level of practicality for public authorities, since its unconstitutionality allow for faster expropriation, with lower initial costs. Yet, it is incompatible with a democratic state of law based on the fundamental rights of its citizens to take administrative actions which infringe on constitutional precepts. There is an urgent need to replace the infra-constitutional legislation on public utility expropriation. However, it seems, we are still a long way from resolving this.

[54] For reference purposes, the Constitution in force at the time of the enactment of Decree-Law no. 3,365/1941 was that granted in 1937, in support of the dictatorship of President Getulio Vargas.

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