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Review Article

EXPROPRIATION IN THE FORMER AND CURRENT LAW OF THE REPUBLIC OF SERBIA

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Abstract. *In this paper, the author provides a chronological overview of legal texts and judicial practice concerning the institute of expropriation, starting from the first regulations in the 1866 until the present day. Over time, the institute has sustained numerous changes in its legal regulation as well as in the legal and theoretical understanding of its substance, content and prominent features. Considering that expropriation implies a limitation to the right of ownership imposed in the public interest, in different historical periods this institute was adapted to the regime and ideology of the time, which implies that it had a slightly different character and purpose than it has today. The analysis of case law on this matter reinforces the author's views on the issues concerning the abuse of power, the violation of legal certainty, the violation of basic human rights and constitutional guarantees.*

Key words: *expropriation, de-expropriation, ownership right, statutory limitations, administrative decision, enforcement, just compensation, public interest.*

1. INTRODUCTION

Historically speaking, the statutory limitations imposed on citizens' ownership rights and other property rights have been part of different legislations since ancient times, the only difference being the manner of implementing certain measures. In some historical periods, the limitations on the ownership right and other property rights were imposed in the public interest only, in the course of an informal administrative proceeding and frequently without due compensation. In contrast, today these measures may be undertaken only in cases explicitly prescribed by the law, in the course of a prescribed administrative proceeding which ensures the protection of the individual's rights and a fair compensation.

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As a rule, our legal system guarantees the inviolability of the right of ownership to property which is subject to this right under the law. In this regard, Article 58 of the Constitution of the Republic of Serbia[1] guarantees the peaceful tenure of person's own property and other property rights acquired under the law. The right of ownership may be revoked or restricted in the public interest established by the law, in exchange for a compensation which may not be lower than the market value. Under the Constitution of the SFRY, private individuals had the right to own residential buildings and premises (flats) used for their personal and family purposes, immovable property (real estate) and arable land. Yet, the Constitution of the SFRY made allowances for imposing certain limitations in the public interest; in case of a conflict between a public and a personal interest, the dispute was resolved by administrative authorities.

The administrative limitations on the individual's right of ownership included:

- expropriation,
- arrondation (restructuring of land) and comassation (consolidation of land), and
- measures aimed at ensuring the cultivation of agricultural land (Milkov, 1988, p. 295).

1.1. The notion and the historical development of the concept of expropriation

Expropriation is a confiscation of private property or a limitation imposed on the ownership right, which implies a forced transformation of some real estate from private ownership into public (societal) ownership, which is usually done in the public interest and in exchange for some compensation.

In the period of liberal capitalism, state interventions in private property ownership were rather infrequent; they were always constrained to a particular case and, as a rule, they affected only the real estate. The state-provided compensation for the expropriated property covered the full value of the real estate, including fixtures and usufructs. At that time, expropriations included the confiscation of some private property for the purpose of satisfying some public interest and its transformation into public property by an administrative act; thus, the right to use the private property was transferred to a public company whereas the property owner received full compensation.

The concept of expropriation changed after the First World War. A significant development in this area was introduced by the Weimar Constitution. Apart from providing guarantees on property ownership, it laid down the terms and conditions for the expropriation of real property, which could be undertaken only in the interest of the community and as prescribed by the law. The expropriation was exercised in exchange for an *adequate* compensation, unless otherwise provided by the law. In comparison to the preceding period, under the Weimar Constitution the expropriation could be effected not only by an administrative act but also on the basis of the applicable law in the course of a special administrative proceeding. In the period before adopting the Weimar Constitution, the state always provided ***full compensation*** for the expropriated property; after its adoption, the property owners received ***adequate compensation.*** When it comes to the compensation amount, the injured party (property owner) was entitled to initiate a legal action before a competent court or some other administrative authority. Moreover, the concept of

[1] Službeni glasnik Republike Srbije (Official Gazette of the Republic of Serbia), no. 98/06; (The Official Gazette of RS is a public institution that publishes and prints "The Official Gazette").

expropriation was expanded by introducing some other objects of expropriation. Thus, the property which was eligible for expropriation included immovables in private ownership; for expropriation purposes, realty was considered to include the land, buildings/premises and other construction facilities/ (Stojanović, 1983, p. 402).

As far as the Serbian legislation on expropriation is concerned, the first regulations governing the methods, procedures and the compensation for the expropriated real estate were adopted in the Principality of Serbia in 1866; after being subsequently modified and amended, these legal provisions were in use until World War II. After the Second World War, the first legislative act on this issue (the Basic Law on Expropriation of FRY) was adopted in 1947; it was subsequently amended several times.[2] A new Expropriation Act was enacted in 1984,[3] which was subsequently amended in 1987, 1989, and 1990. Finally, in 1995, Serbia adopted the latest Expropriation Act[4], which is still in force. This Act was subsequently amended and supplemented several times; the latest changes on the issue of determining the amount of compensation for the expropriated property have been introduced only recently.

In this paper, the author will analyze the provisions of the 1947 Basic Law on Expropriation and the current 1995 Expropriation Act. The 1984 Expropriation Act and its subsequent amendments are regarded as transitory provisions between the two legislative acts.

1.2. Types of expropriation

The 1947 Basic Law on Expropriation envisaged full or partial expropriation. Full expropriation includes the confiscation of property or the right to property from its owner or holder whereas partial expropriation implies an easement or the right to lease the owner's property.[5] Private property may also be temporarily appropriated for the purpose of undertaking some construction works, without depriving the owner of title to property. Once the objective of this temporary appropriation is accomplished, the temporary appropriation ceases to exist. Given the fact that the expropriation of a part of some real estate may render the remainder of the estate useless, this legislative act provided that the property owner was entitled to file a request seeking expropriation of the remainder of the real estate.

The current Expropriation Act (1995) envisages full expropriation, partial expropriation (establishing an easement on realty or a lease of land for the specified period of time) as well as a temporary appropriation of land. In this Act, the lease of land and a temporary appropriation of land are subject to a time limit not exceeding three years. The Basic Law on Expropriation did not prescribe a time limit and the administrative authorities had a discretionary power to determine it in the course of an administrative proceeding. Yet, this process was prone to abuse, primarily owing to the imprecise and ambiguous provision on "*using the land as long as it is needed*". The current Expropriation Act includes a provision which is aimed at protecting the owners and their temporarily or partially ex-

[2] Službeni glasnik FNRJ (Official Gazette of the Federal Republic of Yugoslavia), no. 28/1947).
[3] Službeni glasnik SRS (Official Gazette of the Federal Republic of Serbia) no. 40/84, 53/87, 22/89, 6/90, 15/90.
[4] Službeni glasnik Republike Srbije (Official Gazette of the Republic of Serbia), no. 53/1995.
[5] Osnovni zakon o eksproprijaciji, Službeni glasnik FNRJ, br. 28/1947 (Article 7 of the Basic Law on Expropriation, the Official Gazette of the Federal Republic of Yugoslavia no. 28/1947).

propriated property; under that provision, the temporary user of the expropriated land shall restore the land to its original condition after the expiry of the specified period of time or in case the real estate is no longer needed for a specific expropriation purpose.

The current legislation also stipulates that the expropriation of the remainder of the property will be performed if the property owner has no economic interest in or benefit from using the remaining property, or if the property is too difficult or impossible to use in the given circumstances. In the Basic Law on Expropriation, the term "useless land" was a legal standard which was also subject to the discretionary power of the competent administrative authority.

1.3. The expropriation proceedings

The first stage in the expropriation proceedings is the process of establishing the (general) public interest, which implies a decision whether a construction of some facility or other works in a particular location may be regarded as a matter of public interest. The public interest is a legal standard which is laid down in rather flexible and broad terms; it is determined and laid down at the discretion of competent authorities in each particularly case and according to specific needs. A motion for assessing a public interest is submitted by a prospective expropriation user, who is required to indicate the specific purpose for seeking expropriation. Acting upon this motion, the Government shall issue a statutory decision which may be subject to an administrative action in the first instance only (given that such decision is not subject to appeal). The administrative action has no impact on the expropriation proceedings.

The 1995 Expropriation Act was subsequently amended by the 2009 Act Amending and Supplementing the Expropriation Act,[6] which introduced some changes in the process of assessing the public interest. The expropriation user is entitled to submit a motion for establishing the public interest in expropriation. The motion is submitted through the Ministry of Finance, which is also eligible to decide on this motion (regardless of the fact that the legislator has retained the earlier solution where the competent Government authority was authorized to decide on this motion). It is a specific precedent in the legal theory and practice in general. Such a confusing legal solution gives rise to the following question: what happens if each body of authority comes to a decision which conflicts with the decision of the other body? Which of the two solutions will apply then? In a large number of cases, the Serbian Supreme Court held the claims to be justified and annulled the Government assessment of the public interest, mostly due to a violation of the rules of administrative procedure. Namely, the Supreme Court held that the parties were to be allowed to participate in the proceedings on assessing the public interest.[7]

This Act also provides that a decision on approving the motion for establishing a public interest must be published in the Official Gazette of the Republic of Serbia; moreover, the parties are considered to be delivered the decision on the date of its publication therein. On the other hand, this Act provides that, the competent administrative authority has a discretionary right to reach a decision on the assessment of the public interest even

[6] Službeni glasnik Republike Srbije, 20/2009 (Official Gazette of the Republic of Serbia, no. 20/2009; the Act came into force on 27.03.2009).

[7] The Supreme Court judgment (U. no. 1910/2002 of 13.11.2002. Paragraflex.

without hearing the parties in case it is ***not*** *absolutely necessary* to provide the public hearing. As the parties are not provided the opportunity to participate in the proceeding on the mandatory basis, they are most unlikely to be aware that the proceedings are underway. The party is given the opportunity to initiate an administrative action within 30 days from the decision delivery date. However, given the fact that the party has not been summoned to attend the public hearing nor officially informed that the administrative proceeding is underway, there is a question how the party will know that the final decision has been rendered and published in the Official Gazette of the Republic of Serbia, after which he/she may initiate an administrative action to protect his/her rights.

Under the former legislation, the expropriation user was a socio-political community, a local community unit, a self-managed interest community unit, or an organization of associated labour. The current legislation provides that the expropriation user may be the Republic of Serbia, autonomous provinces, cities and towns, municipalities, public and state funds, and public companies. In the latest amendments, the range of users has been expanded; thus, under the new legal provision, expropriation may be carried out on behalf of other economic entities (companies) which are established by public companies and joint stock companies (with the majority state capital in the company ownership structure) whose founder is the Republic of Serbia, an autonomous province, a city, a town or the municipality of Belgrade. During the expropriation proceeding, the public interest may impose the need to establish an easement. An expropriation user is entitled to use the expropriated real estate only for the explicitly stipulated expropriation purpose; otherwise, the former owner is entitled to seek de-expropriation.

The expropriation proceeding is initiated by the expropriation user who files a petition for expropriation. However, this petition may be filed only after the user has submitted a prior motion for establishing the public interest and after the Government has determined that the public interest does exist. In particular, the decision on granting the petition of the expropriation user shall include:

- designating the legislative/statutory act which contains a provision/decision on the public interest in expropriation;
- designating the expropriation user(s);
- designating the real estate which is to be expropriated;
- designating the real estate owner and his place of residence;
- designating the construction object (buildings or facilities) or works whose development has imposed the need for the expropriation of a specific real estate;
- the obligation of the user of the expropriated property to pay compensation;
- the obligation of the owner of the expropriated property to enable the user to take possession of the expropriated real estate (Milkov, 1988, 299).

Pursuant to the current legislation, the user has the right to take possession either on the date when the decision on compensation becomes final and effective or on the date of entering into a compensation agreement. In exceptional cases, upon the user's request, the competent ministry department may decide to devolve the property to the user but it may not be done before the decision of the second-instance authority has been issued. There is a significant difference between this legal solution and the former one contained in the Basic Law on Expropriation, where the user took possession immediately after the property inventory and exert evaluation had been completed (and even sooner, in cases in-

volving a public interest). Given the fact that taking possession implies a transfer of title (right of ownership) or a cadastral note on establishing an encumberance, the property owner was thus prevented from any further use of the expropriated property. The transfer of title to real property is based on the individual act of the competent administrative authority in each specific case. After the property inventory has been made, the property owner cannot make any repairs, renovations or improvements for the purpose of increasing the compensation amount, unless these activities and expenses thereof have been absolutely necessary.

The expropriation user may abandon the petition at any point before the decision becomes final; then, at the request of the user and the former property owner, the final decision on expropriation will be either annulled or modified. At the request of a former property owner, the decision will be annulled if the expropriation user has failed to perform a substantial part of works (which were the purpose of expropriation) within a period of three years from the moment of taking possession. The Basic Law on Expropriation did not contain this particular or any similar provision; for this reason, the judicial practice included numerous cases which were resolved in favour of the expropriation user given the fact that the competent authorities had a discretionary power to qualify the former owners' appeals/claims as unjustified.[8]

The 2009 Act Amending and Supplementing the Expropriation Act has provided a more extensive range of expropriation users, which has expanded the scope and purpose of the public interest as well as the areas which may be subject to the assessment of the public interest. Accordingly, the Government may consider it to be in the public interest to expropriate some real property which is covered either by an agreement on joint investment in a joint-stock company or by an association agreement on establishing a joint stock company which has been signed by the Republic of Serbia; the real estate is essential for securing the non-financial investment of the Republic of Serbia in that company or for covering a relevant action plan. As there are no specific criteria and constraints, it means that the object of expropriation may be any real estate providing that it has been entered into the joint investment agreement or the association agreement as a result of the contracting parties' freedom of choice.

1.4. The compensation for the expropriated property

The compensation for the expropriated property shall be established after the decision on expropriation has become final, and it may be determined either by agreement or in a contentious procedure before a competent court.

Unlike the Basic Law on Expropriation which stipulated that the property owner shall receive just compensation for the expropriated property which equals the market value of the real estate on the valuation date, the current Expropriation Act envisages that the owner of the expropriated property shall receive compensation which may not exceed the market value of the real estate. The compensation for the expropriated property shall be determined in monetary units but, at the request of the property owner, the monetary equivalent may also be exchanged for some real estate which (in terms of its use, quality

[8] This attitude comes from the analysis of court documents enacted on the basis of the Basic Law on Expropriation in the Municipality of Vranje; source: Vranje Historical Archives.

and value) corresponds to the value of the expropriated property, in case where the expropriated property is the major source of owner's existence and income. The Basic Law on Expropriation provided that, in addition to the monetary compensation, the owner could also be paid out in government bonds or by exchanging the expropriated property for some other real estate. The monetary compensation was equal to the average exchange value of the specific real estate on the valuation date. Taking this into consideration, the average exchange value of some property is the market value of the property, unless the property is subject to restrictive commercial practices.

Under the Basic Law on Expropriation, the expropriation issues were decided by a competent commission which applied the following criteria in establishing the compensation amount for agricultural land:

1. determined the average annual yield of wheat and corn (or other crops) per 1 *dekar;*
2. multiplied this amount by the price of wheat and corn per kilo;
3. divided that amount by two in order to the average value; and
4. finally, multiplied this value by the size of the plot.[9]

However, if the immovable property was a source of existential income for the property owner and his family, the property owner would not receive a monetary compensation but he would rather be given a property of the same value. In reality, it was quite common that the property owner was given a property of a much lower quality, smaller in size and, therefore, much less valuable. The district courts and the Supreme Court often refused the property owners' appeals as unjustified and confirmed the decisions of a city or a county commission.[10] In assessing the compensation amount for construction land and buildings, the commission used the following process:

1. determined the value of useful materials from this object;
2. determined the value of workforce necessary for building a residential facility similar to the one which has been expropriated;
3. once the final decision had been issued, the expropriation user was required to deposit the expropriation (compensation) amount with the competent court.

The analysis of the judicial practice of that time shows that the cases involving a compensation agreement were quite rare. In case there was such an agreement, the expropriation pertained to the construction of residential buildings.[11] In certain cases, the expropriation user was allowed to take possession even before the decision had become final and effective. The expropriation user often started construction works in the backyard of the expropriated property, practically forcing the owner to vacate the premises (due to the unbearable living conditions) even though he/she had not been provided an adequate temporary accommodation by the expropriation user. Under the law, the expropriation user was not obliged to provide housing for the property owner who had already found some accommodation; consequently, this provision was subject to abuse. Thus, the user took advantage of the provision allowing him/her to take possession even before the

[9] Addendum to the administrative decision on expropriation, in re: *Olga Pogacarevic*, issued on 13.03.1950, source: The Historical Archives, Vranje,

[10] Decision on Appeal, in re: *Pogacarevic,* no. 3363 of 12.06.1954; source: the Historical Archives, Vranje

[11] Administrative record (minutes) on assessing the compensation amount for expropriated buildings and the transfer of administrative land no.465-43/77-07 of 13.09.1977; source: the Historical Archives, Vranje

decision on expropriation became final; it was beneficial for the user in terms of avoiding the obligation to provide residential premises to the owner. Another typical problem was the payment of compensation by issuing government bonds, whose value deteriorated over time and which eventually became worthless given the fact that they were not subject to revalorization. As for the monetary compensation, there was no legal requirement on issuing a reception note as proof that the compensation had been paid; this could lead to a further abuse because the user was not obliged to deposit any compensation amount with a competent court, except in case of a construction project.

Under the current Expropriation Act, there is a general rule that the compensation for the expropriated arable land may include an exchange for any other suitable land, which may be effected at the request of the person (property owner) who has been using the expropriated land as the major source of income and survival. Yet, it remains unclear why the (2009) Act amending and supplementing the Expropriation Act provides that the compensation for expropriating agricultural land for the purpose of constructing infrastructural facilities may also include some other suitable agricultural land of the same type and quality, or some real property of a corresponding value in the same area or in the vicinity of the owner's expropriated property; in case the user is unable to provide such compensation, the owner of the expropriated land should be given a monetary compensation. Pursuant to this provision, the owner of the expropriated agricultural land shall be given title to some other suitable land regardless of whether the income from the land is the basic source of income and survival and whether he has filed such a request.

Under the current legislation, the users involved in exploitation of mineral resources are not obliged to provide the former owner of a residential building, apartment or commercial property with another property of the same kind but the municipality is obliged to grant a building plot to the former owner within the scope of the overall compensation. Yet, there is an opportunity for abuse because the criteria for granting building plots (on this basis) remain unregulated.

Under the Obligation Relations Act, the compensation amount established by such an administrative decision is subject to the statutes of limitation. Thus, the owner who has failed to seek the compensation payment within the prescribed time limit is not entitled to re-submit a new request for establishing and collecting the compensation amount.

1.5. De-expropriation

If *expropriation* is defined as a confiscation and dispossession of the owner's property for the purpose of accomplishing a public interest, *de-expropriation* may be defined as a return of the expropriated property to its owner, either at the owner's request or because there is no longer a need for using this property (in case of partial expropriation or in case the property is no longer used for the intended expropriation purposes). The process of de-expropriation will be carried out only if it includes the entire property; thus, it is not possible to de-expropriate a part of an already expropriated cadastral plot.[12] The de-expropriation implies an obligation to determine the adequate compensation amount which the real estate owner is obliged to pay to the user. The value of the de-expropriated

[12] The Supreme Court judgment (U. no. 5356/2005 of 26.4.2006), Paragraflex.

property is determined by competent courts, which are first required to determine the compensation amount in proportion to the market value of some real estate at the time of expropriation in order to be able to determine the compensation amount in line with the current market value. The provisions of the Obligations Act apply in determining the compensation for de-expropriation.

2. CONCLUSION

Considering the aforesaid, expropriation is an instrument for restricting the citizens' ownership right and other property rights which is carried out in the public interest in the course of an administrative proceeding strictly prescribed by the law. However, our post-war practice shows that even the prescribed administrative procedures and statutory limitations are subject to abuse by those who are in charge of decision-making processes and in possession of economic power.

The legislative framework provides broad discretionary powers to the state authorities in determining the (general) public interest as well as in evaluating the amount and the form of compensation. However, as there are no restrictions, the discretionary right of administrative authorities is subject to abuse. The right of ownership, which is guaranteed as one of the fundamental human rights, is at risk as it is subject to the arbitrary decision of those entrusted with decision-making powers. Moreover, judging by the latest changes, it is still uncertain which legal solution apply considering that there are two authorities entitled to reach the decision on expropriation. On the other hand, the legal provisions contain numerous inconsistencies and (accidental or deliberate) flaws which are largely in favor of the expropriation user. As an illustration, the expropriation user is not obliged to provide suitable housing for the property owner who has already vacated the premises (as a result of nuisance). There is a huge drawback in the 2009 Act Amending and Supplementing the Expropriation Act, which provides that the competent authority can make a decision on expropriation even without hearing the parties (unless it is considered to be absolutely necessary). On the other hand, the same Act provides that a decision on establishing the public interest shall be published in the Official Gazette of the Republic of Serbia and that the publication date shall be taken as the delivery date; thus, the parties are entitled to initiate an administrative action even though they have not been officially informed that proceedings are underway. This provision is utterly absurd not only because it comprises inconsistent and contradictory wording but also because it is entirely contrary to the rules of the prescribed administrative procedure.

As far as private property is concerned, the true nature and effect of expropriation is reflected in restricting or revoking the ownership right in the public interest. The state authorities are vested with discretionary powers to hear disputes on the conflicting public and private interests, and to decide what the public interest is in each particular case. Generally speaking, the private and public interests should have few points of reference; yet, expropriation goes deep into the private sphere and limits the rights of individuals. However, these limitations may be disregarded considering the fact that expropriation brings many positive effects into the legal system and the society as a whole. On the other hand, we shall by no means disregard the legal inconsistencies and flaws resulting in a violation of citizens' fundamental rights and constitutional guarantees of legal certainty.

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EKSPROPRIJACIJA U RANIJEM I VAŽEĆEM PRAVU REPUBLIKE SRBIJE

Milica Stojanović

Autor u radu hronološki analizira zakonske tekstove i sudsku praksu vezanu za institut eksproprijacije, počevši od prvih propisa iz 1866. godine pa do danas. Došlo se do saznanja da je ovaj institutu tokom vremena pretrpeo mnogobrojne promene kako u zakonskom regulisanju tako i u pravno-teorijskom poimanju suštine, sadržine i obeležja. Može se izvesti zaključak da je ovaj vid ograničenja prava svojine u javnom interesu kroz istoriju imalo nešto drukčiji karakter i cilj prilagođen tadašnjem režimu i ideologiji od onoga koji je nama danas poznat. Analiza sudske prakse samo je učvrstila stavove autora po pitanju zloupotrebe moći, narušavanja pravne sigurnosti, kršenja osnovnih ljudskih prava i ustavnih garancija.

Ključne reči: *eksproprijacija, deeksproprijacija, ograničenje prava svojine, rešenje, prinuda, pravična naknada, javni interes*

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