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Corresponding author: nedeljko.krajsnik@gmail.com

INSTITUTE OF FACTUAL EXPROPRIATION

Nedeljko Krajsnik

Law Office

e-mail: nedeljko.krajsnik@gmail.com

***Summary:** In this paper, the author pointed out an unusual legal phenomenon that has occurred in practice, and that is the seizure of real estate by public authorities and limiting or depriving individuals of property rights, without prior procedure prescribed by law and without compensation to the owner of the property, justifying it in the general interest. Since an individual is not able to oppose such behavior of public authorities, the only way to protect is to go to court, but there is another problem, because no law defines such a legal situation. However, the courts took over the role of interpreters of positive legal regulations and took the position that in this case it was a de facto expropriation, and through case law they defined this institute and practically equated the rights of individuals with persons whose property is expropriated in regular proceedings. most importantly, they took the position that the right to hope due to confiscated real estate does not become obsolete.*

***Keywords:** public interest, property rights, expropriation, factual expropriation*

INTRODUCTION

One of the basic human rights is the right to property, which is protected by numerous international legal instruments, such as The Universal Declaration of Human Rights was adopted at the United Nations General Assembly on December 10, 1948 - (“Everyone has the right to own property alone and in association with others, and that no one shall be arbitrarily deprived of his property”), Convention for the Protection of Human Rights and Fundamental Freedoms, adopted by the Council of Europe on 4 November 1950 - (“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public

interest and subject to conditions provided by law and general principles of international law “), The International Covenant on Civil and Political Rights adopted by the United Nations General Assembly on 16 December 1966 - (“All are equal before the law and are entitled without any discrimination to equal protection of the law. In this regard, the law must prohibit all discrimination and to provide all persons with equal and effective protection against all discrimination, in particular as regards race, color, sex, language, religion or belief, national or social origin, property, birth, etc.), etc.

We will briefly review the protection of property rights as defined by the Convention for the Protection of Human Rights and Fundamental Freedoms, given that this convention also establishes a court that guarantees the protection of prescribed rights, the European Court of Human Rights, based in Strasbourg.

Protocol I to the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted in Paris in 1952, defines Article 1 as the right to property, ie the protection of property in such a way that: *“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The foregoing provisions shall not, however, in any way affect the right of the State to apply such laws as it deems necessary to control the use of property in accordance with the general interest or to ensure the collection of taxes or other contributions or penalties.”*

From the very definition, it is clear that the right to property, as an individual legal interest of an individual, has guaranteed protection, but with exceptions in relation to the general interest, respectively in the convention guaranteeing protection of rights, the state is left with the right to deny the same right. However, in order for the state to deny this right, it must first be defined by law, so the restriction of an individual right must be in the general interest.

One of the procedures by which the state enables the restriction of an individual's right to property is the expropriation procedure, which in the general interest excludes real estate from an individual, thus denying him the right to property without his will, but provided that the individual receives adequate satisfaction, usually in money.

However, despite the legally defined procedure of deprivation or restriction of property rights through positive legal legislation, in practice it happens that the state through institutions owned by it, to build goods in the general interest, deprives or

restricts the right of an individual without prior procedure and without adequate compensation for revoked or limited right.

In such a situation, an individual is forced to seek protection of his rights in court, proving the rights he had and which was limited or taken away by the actions of state institutions in the public interest, without a procedure and adequate compensation, which is the topic of this paper.

1. THE CONCEPT OF EXPROPRIATION

Expropriation is an administrative-legal way of acquiring property by the state as a user of expropriation, ie a legal institute by which the state authoritatively encroaches on the property rights of an individual deprives or restricts those rights in its favor or in favor of someone else, in general. public interest, for the purpose of construction of facilities, or performance of other works of general interest, with compensation.

This institute exists in the legal systems of almost all countries, and the specificity of the countries of the former SFRY is that the laws from the earlier period and the former joint state are almost identical, so now we have several states that have almost identical laws in many areas of law, in this case the Law on Expropriation, which identically, with minor differences due to adjustments and corrections in the past period, regulates this important institute in all countries in this area (the so-called “countries of the Western Balkans”).

Thus, the specificity of the institute of expropriation is that the state from the position of government decides to whom and to what extent it will limit or deprive the right of ownership of real estate, which is preceded by determining the general interest, ie deciding which objects are of general interest.

In the light of the international legal admissibility of expropriation, the presumption of fairness is taken, by basically replacing one property with another (whereby the previous owner, ie the holder of real estate rights, ceases to be the holder of property rights with fair monetary compensation) or acquiring ownership of some another property.

In this regard, international documents protecting the rights of the individual (for example, the aforementioned European Convention for the Protection of Human Rights and Fundamental Freedoms) allow expropriation as a way of restricting one of the guaranteed basic human rights, but we are provided that the procedure is prescribed by law, that it be carried out exclusively for the purpose of realizing a specific public interest and, perhaps most importantly, if this restriction or deprivation of rights is accompanied by appropriate compensation. This compensation must include compensation for the fair market value of the real estate on which the right is limited or revoked, in order to establish fairness, ie reciprocity of the rights that the former owner had and those given to him in the expropriation procedure. In short, a balance of general and individual interest must be struck in each case

Expropriation of real estate is done for the needs of the user of expropriation, in such a way that the previous owner of the property loses the right of ownership, and the new owner establishes that right, in such a way that the expropriation acquires the right to use the property for the purpose of expropriation. it must be in the public interest. The user of expropriation can only be a public authority, which is the state or a unit of local self-government.

Therefore, in order to start the expropriation procedure, the general interest must be determined, which defines which public good must be built and in which area, and who will be the user of expropriation, and who will be the investor of that project.

The public interest is determined by a decision made by the highest executive body, the Government, and this decision must be published in the Official Gazette, which is considered to be publicly announced and accessible and known to all. The public interest usually includes various infrastructure projects, such as the construction of roads, airports, water supply, sewerage, regulation of watercourses, construction of settlements and the like.

The expropriation procedure is a strictly formal procedure defined by the law to the smallest detail, so in essence there should be no controversial issues, but of course this is never the case in practice, because there are often situations that can not fit into regulations, due to specifics each individual case, and most often it is a large number of cases in which a large number of different problems occur.

2. EXPROPRIATION PROCEDURE

2.1. Determining the general interests

Before submitting a proposal for determining the general interest for the construction of facilities or performance of works to the Government, the expropriation beneficiary is obliged to prepare and submit an expropriation plan in accordance with the spatial plan. The expropriation plan must contain a study prepared on the basis of and in accordance with the conditions of spatial planning, and the expropriation plan shall be accompanied by data on the owners whose real estate is being expropriated. The expropriation plan is exposed to public inspection at the seat of the local self-government unit in whose area the facility is intended to be built or works of general interest are performed, within 15 days, and within that period objections can be given to the body that determined the conditions for arranging the space.

After these activities, the proposal for determining the general interest in the construction of facilities or works is submitted to the Government through the administrative body for property and legal affairs, and the Government makes a decision on determining the general interest in construction or works, published in the Official Gazette.

2.2. Submitting a proposal for expropriation

Since the general interest for the construction of the facility or the execution of works has been determined, the user of expropriation submits a proposal for expropriation to the administrative body responsible for property and legal affairs according to the location of the real estate proposed for expropriation. The proposal for the expropriation of real estate must specify the user of the expropriation, the real estate for which the expropriation is proposed, the owner of the real estate and the facility or works for which the expropriation is proposed.

After receiving the proposal for expropriation, the competent administrative body, ex officio, without delay informs the owner that the proposal for expropriation of his real estate has been submitted, with a warning that he is not entitled to reimbursement of costs for investment in land and buildings made after he has been notified in writing by the administrative body of the submitted proposal for expropriation, except for those costs that were necessary for the regular use of real estate.

Expropriation will be recorded ex officio in land registry and other public records in which data on real estate are kept, after which the alienation of real estate in respect of which expropriation was recorded, as well as changes in other relations on real estate, has no legal effect on the expropriation user.

2.3. Decision on expropriation

The decision on expropriation is made by the administrative body after the procedure in which the hearing of the owner of the real estate to be expropriated is obligatory. If there is a discrepancy between the land registry and the factual situation on the real estate, the right of ownership of the real estate will be discussed as a preliminary issue.

The decision on expropriation contains the code of the act determining the general interest, the designation of the expropriation user, the designation of the object or works for the construction of which the real estate is expropriated, the designation of the expropriated real estate, the designation of the real estate owner, the owner's obligation to hand over (payment of compensation) and the deadline for possession.

For the procedure of determining compensation, it is important to point out that the right to compensation is determined for expropriated real estate, facilities and plantations, exclusively covered by the final decision on expropriation, according to the nature and purpose of these properties at the time of expropriation.

2.4. The procedure for consensual determination of compensation for expropriated real estate

After the decision on expropriation becomes final, the administrative body is obliged to schedule and hold an oral hearing without delay for consensual determination of compensation for expropriated real estate. The administrative body will try to reach an agreement on compensation, warning them of their rights and obligations under the law, and in order to prepare a hearing, the parties may submit their bids, and the administrative body will obtain written information from other bodies on facts that may be relevant.

Compensation for expropriated real estate is determined, as a rule, by giving another appropriate real estate that corresponds to the value of the real estate expropriated in the same municipality or city. If the owner of the expropriated real estate does not accept other appropriate real estate as compensation, or if the expropriation beneficiary cannot provide such real estate, a fair monetary compensation is determined, which cannot be lower than the market value of the expropriated real estate.

If the parties reach an agreement on compensation before the administrative body, it is entered in the record, which must contain all the information necessary to fulfill the obligations of the expropriation beneficiary, and is concluded when both parties sign the record in which the agreement is entered.

However, one of the most common problems in expropriation proceedings is the issue of the amount of compensation for expropriated real estate, because in many cases it is not possible to reach an agreement on the amount of this compensation between the expropriation beneficiary and the former owner, in a special court procedure, which is defined by the Law on Out-of-Court Procedure.

However, this type of problem eventually gets its solution through one of these two procedures, whether administrative or judicial, but one of the more serious problems that has arisen in the past is that the state, or institutions entrusted with the exercise of public authority, have limited or deprive individuals of property rights, build facilities of public interest without prior procedure provided by law, without a formal determination of public interest, and most importantly, without compensation to property owners for their reduced or revoked property rights.

In practice, such treatment is called “factual expropriation”.

3. FACTUAL EXPROPRIATION

The concept of factual expropriation is not known in positive legislation, this term has been defined in practice, in the practice of courts, and as such is used in proceedings initiated by aggrieved property owners to protect their reduced or revoked rights.

In this paper, we will deal with the case law and the institute of factual expropriation in Bosnia and Herzegovina, as a negative example of abuse of power and force that the state has in relation to the individual, which is justified by the general interest..

Thus, as we have already stated in the previous chapter, the expropriation procedure is a strictly formal procedure and consists of two separate procedures: the first is the procedure of expropriation of real estate in which it is determined which real estate is expropriated, for what purpose evidence is provided, in the sense of determining the type of real estate, quality, content, etc., which is done through obtaining the findings and opinions of experts of the relevant profession; the second procedure, or the second part of the expropriation procedure, is the procedure of consensual determination of compensation for expropriated real estate, which is initiated after the decision on expropriation becomes final, and in this part of the procedure an agreement on compensation is concluded between of expropriated real estate, according to the decision on expropriation. If no agreement is reached, the case is referred to the competent court to determine fair compensation in out-of-court proceedings, according to the rules of out-of-court court proceedings.

From this it is clear that the expropriation procedure itself is a very complex procedure, it has its own strict and predefined rules and procedures, so when all this is taken into account, it is very difficult to say that “actual expropriation” took place without none of the required procedures occurred or implemented.

Yet, the court practice has defined this term out of the need to classify or equate actions that have taken place, which do not have their basis in legally defined procedures, with the procedure that has a legal basis, so that the injured party can be provided with legal protection. In other words, the jurisprudence equated the rights of an individual whose right to property was reduced or revoked in a regular expropriation procedure with an individual whose same right was reduced or revoked without a previous expropriation procedure and determining fair compensation for the revoked right.

Following the above, the definition of “factual expropriation” was defined, which this institute defines as *confiscation of possession from the property owner for the construction of buildings or other works of public interest, without a previous expropriation procedure in front of the competent administrative body and without determining fair compensation to the owner for occupied real estate.*

This definition, although not derived from legal provisions, is more or less used by all courts when resolving this type of dispute.

4. BASIC CHARACTERISTICS OF FACTUAL EXPROPRIATION

Just from the definition of factual expropriation, the basic characteristics of this institute can be determined, and they are:

- Confiscation of possession from the property owner for the construction of facilities or the performance of works of public interest;
- Absence of legal basis for this type of action by the state or state-owned institutions;
- Absence of a decision on determining the general interest for the construction of facilities or undertaking works of general interest;
- Absence of administrative procedure for reduction or deprivation of property rights, and thus lack of decision on expropriation of real estate;
- Lack of fair compensation for confiscated / expropriated real estate.

When looking at the above characteristics, it can easily be seen that they are in complete contradiction with the basic characteristics of the expropriation procedure, so that they represent the exact opposite of the procedure defined by this law.

But, as the court practice sought a way to equate this procedure with the already existing and legally defined expropriation procedure, the term “factual expropriation” was adopted, for the simple reason of finding a way to deprive property owners who have been illegally deprived of property rights to real estate in the general interest, equal to the owners of real estate whose same right was taken away in the legally defined expropriation procedure, more precisely to ultimately equalize their rights.

The owner of the real estate according to which the factual expropriation was carried out is not formally deprived of the right of ownership, because he remained the holder of that property right in public records due to the lack of grounds for change of ownership, but he is *de facto* deprived of that right, because he cannot use the right in the way guaranteed to him by international conventions, the constitution and the law. Therefore, one of his basic human rights has been violated, and this cannot be justified by the public interest, because, among other things, the European Convention for the Protection of Human Rights and Fundamental Freedoms defines when and under what conditions a state can restrict and deprive individual rights.

As the introduction of the “factual expropriation” institute equated the deposited owner of the real estate with the owner of the real estate from whom the real estate was exempted in the regular expropriation procedure, he was thus guaranteed the right to

fair compensation for confiscated real estate. Since in the actual expropriation procedure it is not possible to restore the previous situation, because the public interest has an advantage over the individual, it is possible for the deposited owner to demand fair compensation for confiscated real estate, according to the same rules as this compensation in the expropriation procedure: in allocating other immovable property of the same or similar characteristics and in a similar location as the immovable property confiscated, or compensation in cash, in an amount that may not be less than the market value of the confiscated immovable property. In practice, the fee is usually determined in cash.

And perhaps the most important position taken by the courts in cases of “factual expropriation” is that the right to compensation does not become obsolete, because in these cases it is not a matter of compensation for damages, as a legal institution that has defined deadlines in which compensation for damages can be claimed, but it is essentially a request for compensation of property, which, according to the Law on Real Rights, does not become obsolete..

5. JUDICIAL PROTECTION IN CASES OF FACTUAL EXPROPRIATION

As we have already stated, the institute of “factual expropriation” originated, defined through court practice, it does not exist in positive legal regulations, which in itself means that the courts have taken on the role of interpreters of the law and taken the position that owners who have been factual expropriated have the right to judicial protection of their violated rights, specifically property rights on real estate.

Perhaps it would be more correct to say that these owners are the only ones entitled to judicial protection in these cases, because there is no other procedure they could initiate in order to exercise or protect their right. Here, we primarily mean the administrative procedure, specifically the expropriation procedure which, logically speaking, should be initiated in these cases. But, as the expropriation procedure is a strictly formal procedure whose rules are prescribed by law, these same legal provisions define that the procedure can be initiated only by the expropriation user, so the owner of the real estate is doomed to the impossibility of conducting this procedure. Hypothetically, the expropriation procedure could be initiated by the expropriation user

by determining the general interest and submitting a proposal for expropriation, but this did not happen in practice. Even if there was a will for that, the procedure would have to be suspended, because it would determine that the real estate for which expropriation is requested, has already been put to use, ie that a facility or works of general interest have already been built or performed on it. Since the expropriation procedure is a previous procedure for the construction of facilities or the performance of works of general interest, then this procedure loses its meaning and cannot be carried out if the real estate has already been brought to that purpose.

Here we will mention the Constitutional Court of BiH, which first defined the term “factual expropriation”, took the position that the owner whose rights are inherited by illegal actions of public authorities has the right to protection of these rights in the form of fair compensation for confiscated real estate. the law does not become obsolete. This position of the BiH Constitutional Court was later “elaborated” by other courts, primarily the Supreme Court of the Republika Srpska and the Supreme Court of the Federation of BiH, which defined this institute in more detail in their decisions and equalized the rights of owners whose property was illegally confiscated. goods, with the owners whose property was confiscated in the regular expropriation procedure..

In several of its decisions, the Constitutional Court of BiH pointed to the legal understanding harmonized on January 30, 2014 at the Panels for Unification of Judicial Practice in the Civil Field. The mentioned Panels discussed cases of construction of facilities of public interest or performance of other works of public interest, which result in complete or partial deprivation of property rights of natural or legal persons in real estate, although there is no decision on confiscation or decision on determining public interest and a decision on expropriation. Thus, the cases discussed by legal theory and case law under the notion of factual deposit, ie the so-called factual expropriations. The legal understanding that the request for financial compensation due to the factual expropriation is not obsolete has been harmonized. Namely, it was pointed out that in the case of factual expropriation, natural or legal persons were deprived of property rights, so the basis of the lawsuit is in fact a request for restitution. Since the return and restoration of the previous condition is not possible due to the conversion of the former property, the plaintiffs have the right to seek compensation for the confiscated real estate.

The Constitutional Court of BiH has pointed out these views in several of its decisions in which this issue is decisive, and here we will mention the mentioned

decisions no. Ap-2986/11, Ap-2988/11, Ap-1706/12, Ap-2919/11, Ap-4875/13, as well as many others. All these decisions can be found on the website of the Constitutional Court of BiH, <http://www.ustavisud.ba/>

At the session of the Civil Administrative Department of the Supreme Court of the Republika Srpska held on February 7, 2014, the same position was taken as at the Panels for Harmonization of Judicial Practice in Civil Field from January 30, 2014, ie in cases of factual expropriation in cases of actual expropriation, the right of the owner to demand payment of compensation for confiscated real estate not become obsolete, because it is not a right to compensation, so there is no place to apply the provisions of the Law on Obligations which define deadlines for expiration of this request.

So, one specificity has happened with the institute of “factual expropriation”, and that is that the positive legal legislation does not know this institute, but it obviously happens in practice, and not so infrequently. What is worse, it happens on the part of the public authorities, who should, in essence, suppress such behavior, or reduce it to the legal framework. This is where the disproportion in the ability of the individual to protect their guaranteed rights is reflected in relation to public authorities, who take it upon themselves to deny the guaranteed rights of individuals, justifying it in the public interest.

For this reason, in these proceedings, the courts reacted and took a stand, ie took on the role of interpreter of regulations, and established a kind of rules for acting in such cases, to protect the rights of individuals in relation to public authority. We can say that this is a very rare case that the courts have so actively involved in the consideration of obviously serious issues that have arisen in practice, and are not foreseen and defined by positive legal regulations. Not to exaggerate, but we can almost say that the courts of the highest instance have taken on the role of legislators and filled the legal gap in this field, which is commendable.

CONCLUSION

Several international conventions have protected one of the basic human rights, namely the right to property, but these same international acts prescribe cases when an individual's right may be restricted in the general interest, and at the same time prescribe conditions under which an individual may be restricted or deprive the right in the general interest, above all with adequate satisfaction for the same.

All states have more detailed conditions for restricting or depriving an individual of the right of general interest through systemic laws, specifically in our case through the Law on Expropriation, which is a very complex and detailed law that precisely defines the rules and ways to reduce one's rights or confiscated, and how compensation is made for that lost right.

However, in practice, the opposite happens, ie it happens that the state, through institutions entrusted with the exercise of public authority, without prior implementation of procedures prescribed by law and without providing fair compensation, limits or deprives an individual of property rights and builds or performs works in general. interest. Such conduct is called “factual expropriation” and as such is not defined by any positive legal regulations, but it is therefore defined in court practice, through decisions of the highest courts.

The reason for defining the term “factual expropriation” is to enable compensation of individuals from whom the state from the position of force, with the justification to act in the public interest, deprived of property without compensation, or equalization of individuals whose property rights are limited or taken away without expropriation procedure, with individuals whose same right has been restricted or revoked in the regular expropriation procedure.

The most important characteristic of the institute of factual expropriation is that the right to fair compensation of an individual does not become obsolete, because it is not about damages, but about property compensation, and that the individual against whom factual expropriation was made, puts in the same position and has the same rights to compensation as an individual whose right to property is limited or taken away in the regular expropriation procedure.

At the institute of “factual expropriation” we can praise the actions of the courts that defined it as such and enabled individuals to protect their rights, although the legislator failed to do so for this type of procedure.

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