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EXPROPRIATION AS A LEGAL INSTITUTE IN THE ADMINISTRATIVE LAW OF THE REPUBLIC OF SERBIA

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Abstract: Expropriation is one of the most complex institutes of administrative law, in which two fundamental legal principles collide: the protection of private property rights and the realization of the public interest. In the Republic of Serbia, this institute is regulated primarily by the Law on Expropriation of 1995, with subsequent amendments, as well as by constitutional guarantees which ensure that no citizen may be deprived of immovable property without a legal basis and without compensation that may not be lower than the market value. This paper analyses the legal nature, types, prerequisites of legality, procedure and compensation in expropriation proceedings under Serbian law, with reference to European standards for the protection of property under Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Particular attention is devoted to the institute of de facto expropriation, which has been developed by judicial practice and which represents a significant expansion of the legal protection of owners of immovable property.

Keywords: expropriation; public interest; compensation; right to property; de facto expropriation; administrative procedure.

1. INTRODUCTION

The right to private property represents the cornerstone of every democratic legal order and the foundation of a state's market economy. At

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the same time, state authority inevitably encounters the need, for the purpose of satisfying general and common needs, to restrict certain rights over private property or to transfer them entirely into public hands. It is precisely at this intersection of private and public interests that one of the most interesting legal institutes arises – expropriation.

The word "expropriation" derives from the Latin words *ex* – "out of" – and *proprius* – "one's own" – so that, in a literal translation, it denotes the "taking away of ownership." In the legal sense, it refers to the compulsory taking or restriction of the right of ownership over immovable property in favour of public authority or another holder of public powers, with compensation for the appropriate damage caused to the former owner.

Unlike confiscation, which constitutes a punishment, that is, the taking of property without compensation, expropriation is a legally regulated procedure in which each party exercises its rights and obligations.

In the legal system of the Republic of Serbia, the institute of expropriation is regulated at several levels: constitutional, statutory and by-law. At the constitutional level, the provisions of Article 58 of the Constitution of the Republic of Serbia guarantee the protection of the right to property, with an explicit provision that the deprivation or restriction of property rights may be carried out only in the public interest, established on the basis of law, and with compensation that may not be lower than the market value.

At the statutory level, the principal regulation is the Law on Expropriation of 1995, whose provisions elaborate the entire procedure. In addition, this matter is directly or indirectly influenced by a number of other regulations, including the Law on Planning and Construction, the Law on Public Roads, the Law on Public Property and numerous other special laws.

The subject of this paper is a comprehensive analysis of the legal institute of expropriation within the administrative-law system of the Republic of Serbia, with reference to European standards for the protection of property. The paper proceeds from positive legal regulations and also includes an analysis of case law, particularly the case law of the Supreme Court and the Administrative Court in Serbia, as well as certain positions of the European Court of Human Rights in Strasbourg.

2. LEGAL NATURE AND CONSTITUTIONAL FRAMEWORK OF EXPROPRIATION

Viewed from the perspective of its legal nature, expropriation represents an administrative-law procedure for the compulsory transfer of rights in the public interest. It is a special form of restriction of the absolute right of ownership, which traditionally includes the right of use, the right of disposal and the right to enjoy the fruits of property. Through the expropriation procedure, the state or another legal entity authorized by law enters into a direct legal relationship with the private owner of immovable property and, through the application of "coercion" ensured by the legal order, modifies, restricts or completely extinguishes that right.

In the procedure, three prerequisites for the legality of expropriation must be fulfilled: 1) the existence of a public interest; 2) the conduct of a lawful procedure; and 3) the payment of fair compensation. These prerequisites arise from constitutional guarantees and the general principles of administrative law. Without the fulfilment of all these prerequisites, an act of expropriation is null and void or unlawful, while the owner of the immovable property enjoys full legal protection.

The Constitution of the Republic of Serbia of 2006, in Article 58, contains a guarantee of the peaceful enjoyment of property and of rights acquired on the basis of law. It establishes that the right of ownership may be restricted or taken away only if this is in the public interest established on the basis of law, and with compensation that may not be lower than market value. This constitutional norm represents the direct application of Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, hereinafter: the ECHR, which the Republic of Serbia ratified by the Law on Ratification in 2003.

In the doctrine of administrative law, two basic conceptions of the legal nature of expropriation may be distinguished. The first treats it as a purely administrative-law relationship. The second, mixed conception, recognizes that, in the part concerning the determination of compensation, administrative law and civil law interpenetrate. The Law on Expropriation of 1995 adopts the mixed conception, which in practice means that the administrative procedure is conducted before an

administrative authority, namely a local self-government unit – municipality, city or the City of Belgrade – while, in the event of disagreement concerning compensation, the matter passes before the competent court of general jurisdiction.

It is important to emphasize that, soon after the ratification of the ECHR, the Constitutional Court of Serbia developed case law concerning the protection of property rights in the context of expropriation. In numerous decisions on constitutional appeals, the Constitutional Court affirmed the right to fair compensation and the obligation to conduct a lawful procedure, thereby strengthening the constitutional-law standard within the system of protection of ownership rights.

3. TYPES OF EXPROPRIATION

The Law on Expropriation of 1995 distinguishes between two basic types of expropriation: full and partial expropriation. In the case of full expropriation, once the decision on expropriation becomes final, there is a complete change in the holder of the right of ownership over the immovable property, whereby the former owner fully loses all ownership powers. This is the most common form of interference with the right of ownership and, consequently, the one that requires the highest level of protection for the owner.

Partial expropriation represents a restriction of the right of ownership without its complete deprivation. The law provides for three forms: 1) the establishment of an easement over immovable property; 2) the establishment of a lease over land for a fixed period of time; and 3) the temporary occupation of land, which may last for a maximum of three years. Temporary occupation is ordered for the accommodation of workers, materials, machines and similar needs related to construction, and it is revoked as soon as the need for which it was ordered ceases to exist, with an obligation to return the land to its previous condition.

A special form of partial expropriation is the establishment of real easements – such as the right of passage, the right of transport, the right to draw water, the installation of facilities for the transmission of electricity and similar rights – on land in state or public ownership in favour of legal entities. The establishment of a lease is provided for when, having regard to its purpose, the land will be used only in a limited

manner, for example, for the exploration of mineral resources, the use of quarries or the extraction of clay.

4. *DE JURE* AND *DE FACTO* EXPROPRIATION

Contemporary case law, following the precedents of the European Court of Human Rights, also recognizes the distinction between formal, or de jure, and de facto expropriation. Formal expropriation implies the conduct of a procedure prescribed by law, accompanied by the adoption of a decision on expropriation. De facto expropriation exists where the compulsory taking or restriction of rights over immovable property has been carried out without a formal procedure, but where the same effect has been achieved in fact, since the owner has been deprived of the use of his or her property. A detailed analysis of this institute follows in a separate chapter of the paper.

Public interest is the *sine qua non* of every lawful expropriation. Without an established public interest, the decision on expropriation is null and void, as expressly provided by Article 30 of the Law on Expropriation of 1995. This strict rule is fully justified, since otherwise there would be no legal basis for interference with the right to private property. In addition, the public interest must be concrete and real, not merely declaratory. The case law of the European Court of Human Rights has adopted a firm position on this issue.

The Law on Expropriation of 1995 distinguishes between two methods of establishing the public interest: 1) by law; and 2) by a decision of the Government in accordance with the law. The Government may establish the public interest for expropriation if the construction of facilities is necessary in the fields of education, health care, social protection, culture, water management, sport, transport, energy and communal infrastructure, for the needs of state authorities and local self-government bodies, for national defence, as well as for the construction of housing intended for socially vulnerable persons.

The Government may also establish the public interest if this is necessary for the exploitation of mineral resources, environmental protection and protection against natural disasters, including the construction of the necessary facilities. The public interest may also be established for the purpose of acquiring undeveloped land for the

relocation of settlements or parts of settlements. In addition, the Government may establish the public interest in order to secure a non-monetary contribution of the Republic of Serbia to a company established on the basis of a joint investment agreement.

A proposal for establishing the public interest, submitted to the Government through the Ministry of Finance, must contain information on the immovable property, the type of facility or works, an excerpt from the relevant planning document and, where necessary, an excerpt from the joint investment agreement. The Government is required to decide on the proposal within 90 days. An administrative dispute before the Administrative Court may be initiated against the Government's decision on the proposal for establishing the public interest within 30 days.

The requirement of the existence of an appropriate planning document is also crucial, since the public interest may be established only if the relevant planning document has been adopted in accordance with the law. This represents an important link between the urban-planning and construction system, on the one hand, and the administrative-law system, on the other, as well as a substantive limitation against arbitrary intervention by the executive authority into citizens' rights.

Before the initiation of the formal procedure, a legal entity intending to submit a proposal for expropriation may request permission to carry out preparatory actions on a particular immovable property. In practice, this would include land examination, surveying and similar activities. The proposal for permission to carry out preparatory actions is submitted to the Ministry of Finance, and it must specify the purpose, the immovable property on which the actions are intended to be performed, the owner, the nature and scope of the actions, as well as their duration.

If the applicant makes it probable that the preparatory actions are necessary for the purposes determined by law, the Ministry of Finance will permit them, while first ensuring that they are not carried out at a time unsuitable for the owner. The legal entity in whose favour the preparatory actions are permitted is obliged to pay the owner compensation prescribed by law. The decision granting permission may not authorize the performance of construction or other similar works, which constitutes a clear boundary separating preparatory measures from the expropriation procedure itself.

The expropriation procedure is initiated by a proposal submitted by the beneficiary of expropriation. The proposal is submitted to the municipality on whose territory the immovable property is located, within one year from the date on which the public interest was established. On behalf of the Republic of Serbia, the proposal is submitted by the State Attorney's Office, while on behalf of a local self-government unit it is submitted by the competent public attorney. Along with the proposal, the beneficiary is required to enclose: 1) an excerpt from the real estate cadastre; 2) a certified excerpt from the planning document; 3) proof that the public interest has been established; and 4) a bank guarantee for the amount of compensation.

The bank guarantee remains valid until the compensation is paid and contains a clause on indexation in accordance with the increase in retail prices, thereby securing the real value of the compensation. The municipal administrative departments competent for property-law matters conduct the procedure and issue the decision. Before issuing the decision, the department is required to hear the owner of the immovable property regarding the facts relevant to the matter. The decision approving the proposal must, in particular, contain an indication of the beneficiary, a description of the immovable property, the owner, the purpose, the deadline for handover, and the obligation of the beneficiary to submit a written offer of compensation within 15 days from the date on which the decision becomes final.

An appeal against the first-instance decision is submitted to the Ministry of Finance. An administrative dispute before the Administrative Court may be initiated against the second-instance decision. A decision on expropriation issued without a decision establishing the public interest is absolutely null and void. This sanction of nullity indicates the exceptional seriousness of this procedural requirement.

The beneficiary of expropriation acquires the right to take possession on the day when the decision on compensation becomes final, or on the day when the agreement on compensation is concluded. Exceptionally, the Ministry of Finance may approve the handover of possession before the decision on compensation becomes final, but not before the second-instance decision, and only if it assesses that this is necessary due to the urgency of the construction of a particular facility. If the beneficiary takes possession before the decision becomes final and the proposal for

expropriation is ultimately rejected, the beneficiary is obliged to return the immovable property to the owner and compensate the owner for damage.

The beneficiary may withdraw from the proposal before the decision becomes final. A final decision may be annulled or amended upon the joint request of the parties, and upon the request of the former owner if the beneficiary, within three years, or within six years in the case of exploitation of mineral resources, has not carried out substantial works on the facility for the construction of which the expropriation was performed. This possibility of de-expropriation represents an important guarantee that the owner's right will not be denied without the actual realization of the project.

The right to compensation is an essential component of every lawful expropriation and a fundamental guarantee of constitutional protection of the right of ownership. Without compensation, or with compensation lower than market value, expropriation turns into confiscation, that is, into a legal situation that no order based on the rule of law can permit. The Law on Expropriation of 1995 is therefore explicit in prescribing that the former owner has the right to compensation that may not be lower than market value.

Compensation is, as a rule, determined in money, although the law also provides for alternative forms. For the owner of arable agricultural land for whom income from that land is a condition of subsistence, compensation is, at his or her request, determined by transferring ownership of other corresponding land of the same culture and class. The same applies to compensation for the owner of a residential building or apartment: at the request of the former owner, the beneficiary is obliged to transfer ownership of another residential building or apartment of corresponding structure and area.

A mortgage established on the expropriated immovable property is transferred to the immovable property given as compensation or to other personal property of the owner of corresponding value, thereby protecting the rights of mortgage creditors. All submissions and decisions in the procedure are exempt from the payment of fees, which removes a financial obstacle to the exercise of the former owner's rights.

The amount of monetary compensation is determined according to the market price of the immovable property. When determining the market price, the circumstances at the time of concluding the compensation

agreement are taken into account. If no agreement has been reached, the circumstances at the time of the adoption of the first-instance decision on compensation are taken into account. If the beneficiary has taken possession before the decision becomes final, the former owner has the right to choose whether the compensation will be determined according to the circumstances at the time of handover or at the time of the adoption of the decision.

The assessment of the market price of land is carried out by the authority competent for determining the tax on the transfer of absolute rights over immovable property. Case law, however, has established that this assessment represents only the minimum value of compensation, and that the court may determine a higher market price on the basis of the findings of a construction expert, taking into account all relevant parameters and corrective factors. Namely, the Law on Expropriation does not exclude the determination of market value by expert evaluation.

Where the subject of compensation is a vineyard, orchard or forest, the law prescribes specific assessment methodologies that include the value of the land, non-depreciated investments and projected yield for the period until the new plantations reach full productivity. Compensation for a mature forest is determined on the basis of market prices of forest assortments, reduced by production costs.

Of particular importance is the provision that permits the determination of compensation above the market price. Taking into account the material and personal circumstances of the former owner, such as the number of household members, health condition, monthly income and similar factors, the authority may determine compensation higher than the market value if these circumstances are of essential importance for the owner’s subsistence.

After the decision on expropriation becomes final, the municipal administrative department competent for property-law matters is obliged to immediately schedule a hearing for the consensual determination of compensation. The beneficiary is required to submit a written offer within a period not exceeding 15 days. The compensation agreement is entered into the record and has the force of an enforceable instrument, enabling the party in whose favour the agreement was concluded to obtain payment directly, without initiating separate enforcement proceedings.

If no agreement is reached within two months from the finality of the decision, the department is obliged to submit all case files to the competent basic court for the determination of compensation. If the department fails to do so, the parties may apply directly to the court. Case law has taken the position that the right to judicial protection in proceedings for determining compensation is not subject to limitation, thereby enabling owners to obtain legal protection regardless of the passage of time.

In areas affected by earthquakes, floods, fires, environmental accidents or other large-scale natural disasters, a special procedure for carrying out expropriation is provided. The areas in which this special procedure will apply, as well as the period of its application, are determined by the Government. The *ratio legis* of these provisions is to ensure a faster implementation of the procedure in crisis situations, when urgent intervention is required, without abolishing the right to compensation.

Within the framework of the special procedure, land may also be temporarily occupied for the purpose of placing temporary facilities, such as business premises, accommodation for residents and property, and similar needs. A characteristic feature of this procedure is that an appeal lodged against a decision on the temporary occupation of land does not suspend the enforcement of the decision, since the urgency of intervention must be ensured in order to protect the life and property of citizens.

On the basis of a final decision on expropriation, the beneficiary may request the handover of the immovable property in order to bring it into the intended use. In urgent cases, the municipal assembly may decide that the handover is to be carried out even after the adoption of only the first-instance decision. If a residential building or business premises are expropriated, the beneficiary is obliged to provide the former owner and the tenant with appropriate accommodation within a period not exceeding six months from the date of eviction.

Administrative transfer of rights is a special legal institute defined by the Law on Expropriation of 1995 as the taking away or restriction and transfer to another holder of rights over immovable property in state ownership, where this is required by the public interest. The decision on administrative transfer is issued by the municipal administrative department competent for property-law matters.

The public interest in the case of administrative transfer is established in the same manner as in the case of expropriation of

immovable property. A decision on administrative transfer issued without a decision establishing the public interest is likewise null and void. Unless otherwise provided by the Law on Expropriation, the provisions on regular expropriation apply accordingly to administrative transfer.

Unlike classical expropriation, which applies to immovable property in private ownership, administrative transfer is an instrument for reallocating rights over state property, for example, the transfer of the right of use from one public enterprise or authority to another beneficiary in the public interest. This institute enables a more rational use of public property without the need to conduct a full procedure for acquiring property from a private individual.

De facto expropriation represents one of the most complex and topical legal institutes of contemporary administrative law in Serbia. It refers to situations in which the compulsory taking or restriction of rights over immovable property has been carried out without the formal procedure prescribed by the Law on Expropriation, without prior establishment of the public interest by a Government decision, without the adoption of a decision on expropriation, or without the payment of compensation.

A typical example of de facto expropriation is the construction of a public road, street, water-supply system or another public good on privately owned land without the prescribed procedure having been conducted. The owner is de facto deprived of the right to use his or her property, while formal legal protection through the administrative procedure is unavailable, since no administrative act has been adopted. Unfortunately, such practice is particularly common in rural and suburban areas.

Domestic case law long hesitated regarding the legal qualification and the basis of the claim in cases of de facto expropriation. In 2016, the National Assembly of the Republic of Serbia adopted an Authentic Interpretation of the provisions of the Law on Expropriation (*Official Gazette of the RS*, No. 106/2016), by which an attempt was made to limit the application of the Law to cases without a decision on expropriation. This authentic interpretation, however, encountered criticism from the Constitutional Court and higher judicial instances, which continued to recognize the owner’s right to compensation in cases of de facto expropriation.

The Supreme Court of the Republic of Serbia has taken the position, in several significant judgments, that compensation for de facto expropriated land is *sui generis*, meaning that it is not compensation for damage, but rather a substitute for the real immovable property owned by the injured party (Supreme Court, Rev 1 54/2023, 2023). When determining the amount of compensation, the principle of market value is applied, and the competent courts determine compensation on the basis of the findings and opinion of a construction expert. In its decision Už 1189/2021 of 2023, the Constitutional Court confirmed that, in the event of the taking of property without a conducted procedure, the owner must be required to undertake legal measures against the beneficiary, precisely by bringing an action for compensation.

For legal theory and practice, a particularly important question is whether the failure to implement planning documents within an unreasonably long period of time may also constitute a violation of the right to peaceful enjoyment of property. In decision Rev 16548/2023 of 2024, the Supreme Court indicated that the adoption of planning documents and their non-implementation over an unreasonably long period may violate the owner's right to peaceful enjoyment of property within the meaning of Article 58 of the Constitution and Article 1 of Protocol No. 1 to the ECHR. In doing so, case law took an important step toward an expanded understanding of the protection of property rights.

5. EUROPEAN STANDARDS FOR THE PROTECTION OF PROPERTY

Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, 1950/2003) guarantees the right to the peaceful enjoyment of possessions. This norm proclaims that every natural and legal person is entitled to the peaceful enjoyment of his or her possessions, and that no one may be deprived of his or her possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The significance of this provision for the system of protection of owners in expropriation proceedings is fundamental.

The European Court of Human Rights in Strasbourg has developed extensive case law interpreting this norm. The Court distinguishes three

basic forms of state interference with property rights: 1) complete deprivation of property, whether de jure or de facto; 2) regulation of the use of property; and 3) the general principle prohibiting interference. In the case of complete deprivation, regardless of whether a formal procedure has been conducted, the European Court of Human Rights consistently finds a violation of Article 1 of Protocol No. 1 if the owner has not been adequately compensated (Council of Europe, 2019).

In numerous judgments against Serbia, the European Court of Human Rights has found violations of property rights. The Court emphasizes that the absence of appropriate compensation for taken property in an amount consistent with the value of the immovable property constitutes a disproportionate interference by the state with ownership rights. Likewise, if the owner receives no compensation at all for the taken immovable property, the violation of the right to the peaceful enjoyment of possessions is even more serious. The European Court of Human Rights uses the term "de facto expropriation," considering that the violation continues until a fair balance of interests is restored, that is, until the owner is adequately compensated.

The following key principles for the lawfulness of expropriation emerge from the case law of the European Court of Human Rights: 1) a legal basis, meaning that the interference must be provided for by law that is accessible and precisely formulated; 2) a legitimate aim, meaning that a legitimate public interest must exist; 3) proportionality, meaning that a fair balance must be struck between the requirements of the public interest and the rights of the owner; and 4) fair compensation, because without compensation proportionate to the value of the property taken, proportionality cannot, in principle, be achieved.

The domestic legal system generally satisfies these standards at the normative level, although in practice there are cases of failure to comply with statutory obligations, particularly with regard to the timely payment of compensation and deviations in procedures for determining market value. Continuous monitoring of the case law of the European Court of Human Rights in cases against Serbia, and the adjustment of domestic judicial practice to those standards, represents a necessary task for both the judiciary and the legislature.

6. CONCLUSION

The analysis of the legal institute of expropriation in the administrative law of the Republic of Serbia confirms its exceptional complexity and significance within the system of protection of the rights of owners of immovable property. This institute represents the substratum of the tension between two equally important legal principles: the protection of private property and the progress of the community through the realization of public interests. Resolving this tension requires not only a high-quality normative framework, but also its consistent application in the practice of administrative authorities and courts.

The positive-law framework in Serbia, founded on the Constitution of 2006 and the Law on Expropriation of 1995, regulates this matter in principle in an acceptable manner. The trinity of constitutive prerequisites, represented by the public interest, lawful procedure and fair compensation, is clearly established. Mechanisms of legal protection through administrative appeal, administrative dispute and civil actions provide owners with multi-level protection, while the Constitutional Court and the European Court of Human Rights act as higher-level instances.

Nevertheless, the normative framework alone is not sufficient. The practice of informal interventions, particularly in the field of the construction of roads and communal infrastructure, testifies to the need for stronger enforcement of the prescribed procedure and greater awareness of citizens' rights. The institute of de facto expropriation, developed by judicial practice, represents an important instrument of legal protection, but at the same time it is also a symptom of systemic failures in the implementation of the Law.

From the standpoint of compliance with European standards, domestic law satisfies the formal requirements of Article 1 of Protocol No. 1 to the ECHR. However, procedural deficiencies in practice, particularly delays in the payment of compensation and deviations in the methodology for determining market value, remain subject to criticism by the European Court of Human Rights.

Future legal development should move in the direction of: 1) regulating de facto expropriation directly in the Law; 2) shortening procedural deadlines and introducing effective sanctions for delays in the

payment of compensation; 3) unifying case law regarding the methodology for determining the market value of immovable property; and 4) creatively applying European standards for the protection of property in domestic courts, without a merely formalistic application of norms.

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