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EXPROPRIATION IN A MATERIAL SENSE**

Abstract: *Expropriation as a legal institute is both narrower and broader than expropriation in a formal sense (formal expropriation). Expropriation in a formal sense implies a due legal process of revoking or restricting the ownership right in a particular legal case by the operation of the law. Formal expropriation generates the establishment of various legal institutes, one of which is expropriation in a material sense. On the other hand, expropriation as a legal institute emerges outside the scope of formal expropriation), which occurs within the framework of restricting one's private ownership, as a result of direct statutory regulation (legislation) in particular areas of the legal order, and a result of the legal regulation in particular cases in judicial and other legal proceedings. Expropriation in a material sense exists only in cases where the transformation of private ownership into public ownership occurs through expropriation in a formal sense, for the purpose of achieving a specifically designated general interest, including the possibility of return to the previous state of affairs (de-expropriation). De-expropriation takes place at the request of the former owner if it is established that the intended purpose of expropriation has not been achieved. In effect, the possibility of de-expropriation is the differentia specifica that separates expropriation in a material sense from other legal institutes related to expropriation in a formal sense, as well as from quasi-expropriation and other forms of revoking and restricting the private ownership right under the legal authority of the state.*

Keywords: *formal expropriation, expropriation in a material sense, quasi-expropriation, expropriation as a legal institute, de-expropriation.*

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1. Expropriation as a legal institute

Expropriation is a legal institute with highly complex structure and a broad application in the existing legal orders of European countries, involving numerous aspects of its manifestation and various legal regulation regimes. In line with the constitutional private ownership guarantees,¹ expropriation in a formal sense (formal expropriation), as an unavoidable element of *Rechtsstaat* (a legal state governed by laws), entails a legal process of revoking or restricting the ownership right in a particular case, for the purpose of achieving a public interest. The legal process includes: (1) establishing public interest for revoking or restricting the ownership right, (2) adopting an individual legal act on revoking or restricting the ownership right, and (3) establishing compensation for the expropriated real estate or restricted ownership right.

In the author's opinion, *public interest* is a regulatory determinant of a legal order and a static expression of general welfare! *General interest* is a dynamic expression of general welfare, while *private interest* is a dynamic expression of individual (private) goods. General interest should not be equalled with public interest, bearing in mind that the projected purpose of expropriation involving the characteristics of general interest may be (but does not necessarily have to be) in the public interest. Public interest as a regulatory determinant is woven into all the stages of legal regulation of expropriation, including the assessment of the projected purpose of expropriation, the expropriation enforcement procedure, and particularly the compensation of the owner of the expropriated real estate.

Expropriation in a formal sense implies establishing the actual public interest for revoking or restricting the ownership right in a particular case by assessing the projected purpose of expropriation in relation to other legal interests and legal goods. Thus, public interest is a regulatory determinant in balancing the opposed legal interests in the expropriation procedure. For instance, constructing a hospital (as an expression of general welfare) reflects a general interest and justified purpose for expropriation, but it is still necessary to assess whether constructing a hospital is in the public interest when compared to the interests of private real estates proposed for expropriation. If the answer to this question is negative, it means that expropriation is not in the public interest. However, it is established that the answer is affirmative, public interest (as a regulatory determinant) further implies making a lawful decision on expropriation and a valid decision on the compensation for the expropriated real estate. Thereby,

1 Article 58 of the Constitution of the Republic of Serbia (2006) guarantees a peaceful enjoyment of ownership and other property rights acquired by the law, stipulating that the ownership right may be revoked or restricted in the public interest established by the law, and with compensation which cannot be less than the market value.

if the decision on expropriation is justified by a reason which could not have a character of a general interest as an expression of general welfare (e.g. construction of a shopping mall or a complex of residential and commercial buildings in a specific area), it does not mean that the reason could not be in the public interest. Considering that such construction does not involve a general interest as an expression of general welfare, the initiation of an expropriation procedure would be impermissible in such a case. Yet, in order to ensure that the legal regulation would attain the character of public interest, the projected goal may be achieved in another legally permitted manner (e.g. through legal regulation of the use of real estate in public ownership and exercising free will to contract in terms of objects in private ownership) (Prica, 2020: 157-186).

Legal institutes of intrinsically complex structure or permanent nature often generate myriads of legal cases involving various forms of legal regulation of particular legal matter. The complexity of legal regulation is most prominently manifested in the legal regime of formal expropriation. In this area, we may observe a powerful transference of features underlying the legal regulation of expropriation, which may include: administrative matters (in proceedings for establishing the public interest and adopting a decision on expropriation), contractual matters (regarding the compensation for expropriated real estate), judicial matters (extrajudicial proceedings on compensation for expropriated real estate, and litigation on disputes concerning the legal relationship between the expropriating authority and the expropriated party), and administrative, contractual and litigation matters in de-expropriation procedure.

Formal expropriation generates the establishment of different legal institutes,² one of which is expropriation in a material sense. It means that expropriation in a material sense is narrower than expropriation in a formal sense. On the other hand, expropriation as a legal institute emerges outside the scope of formal expropriation, within the framework of restricting one's private ownership as a

² For instance, easements in general interest (administrative easements) are established in expropriation proceedings but these easements are further adjusted to the legal regime of easement, which is regulated under the Ownership and Real Property Relations Act, as the general legislative act regulating all easements in the Serbian legal order. It means that the relationship between administrative easements and typical civil law easements may be described as a relationship of a special legal institute *versus* a general legal institute. On the other hand, the legal regime of lease as a legal institute emanating from the Obligation Relations Act (ORA) cannot be applied to any lease in general interest, which is based on the expropriation procedure, bearing in mind that Serbian systemic legislative act on obligations excludes any possibility of applying general provisions to leases regulated otherwise by subject-specific legislation (Art. 568 ORA). Hence, administrative lease is a special legal institute whose relationship with the typical civil law lease cannot be defined in terms of a subject-specific legal institute versus a general legal institute.

result of direct statutory regulation (legislation) and a result of legal regulation of particular legal cases in judicial and other legal proceedings.

Quasi-expropriation refers to legal cases which emerge outside the scope of formal expropriation, but which rest on the legal grounds of expropriation in a formal sense. It distinguished such cases from the cases on revocation and restriction of private ownership right, which have a form of expropriation in a formal sense. Quasi-expropriation involves cases of legally permitted revocation and restriction of private ownership or other property rights, entailing the obligation to provide compensation. Thus, quasi-expropriation includes the forms of revocation or restriction of private ownership and property rights which are followed by compensation; the valid criteria for quasi-expropriation is the legal nature of expropriation as a legal instrument, i.e. its legal ground or the constituent elements of its legal regime.

The identification of legal institutes comes as a result of the functional analysis of relevant legal grounds, which reveals the correlation of legal grounds underlying the legal regimes in different areas of the legal order. In that context, the author posits that expropriation as a legal institute encompasses the entirety of legal matters and legal situations in different areas of the legal order (Prca, 2016: 83-365). Quasi-expropriation, expropriation in a formal sense, and expropriation in a material sense are correlated on the basis of the nature of the legal object, the legal case and the legal ground. The legal object is private ownership and related property rights, while the specific revocation or restriction of the ownership right has the character of a legal case. The legal ground is the excessive burden ("sacrifice") imposed on the titleholder of the ownership right, who is consequently entitled to compensation for the expropriated real estate. The compensation for expropriation aims to establish a balance between the opposed legal interests. In that context, it is important to clearly distinguish among expropriation in a formal sense, expropriation in a material sense, and quasi-expropriation, which is the focal point of examination in this paper.

2. Expropriation in a formal sense (Formal Expropriation)

Expropriation in a formal sense is envisaged as revocation or restriction of the private ownership right (in favour of general welfare), followed by compensation to the titleholder for the revoked or restricted ownership right. Historically speaking, the concept of formal expropriation emerged long before the creation of the liberal *Rechtsstaat*. But, it was only in the legal order of the liberal state that formal expropriation was fully established as a legal regime composed of goals, prerequisites, legal requirements, legal rules, and legal proceedings. Moreover, expropriation is a "shadow" that follows private ownership, as one

of the strong pillars of liberal *Rechtsstaat*. During the 19th and 20th century, the legal structure of expropriation experienced significant changes. Building upon its “beautiful youth” in the legal order of the liberal *Rechtsstaat*, expropriation reached its full maturity in the 20th century, gaining impressive presence in all European legal orders.

In the current European-continental legal orders, apart from the complete revocation of the ownership right (the so-called full expropriation), expropriation may also emerge in the form of restriction of the ownership right, by means of the legal institutes of easements, lease and temporary possession of land (the so-called incomplete expropriation). An additional feature in the existing European legal orders is the expansion of the legal regime of expropriation to other types of property; thus, besides immovable property (real estates), formal expropriation may include movable property, as well as individual property rights. For example, France allows the expropriation of patents for inventions pertaining to national defence and maritime cultural heritage (goods) located on a maritime property (Chapus, 1995: 618). Yet, the appropriation of movable property may only be allowed in case of urgency, whereby it produces the effect of requisition (as a special form of expropriation). The state of urgency is the only legal ground that can justify the expropriation of movable assets without undermining the *Rechtsstaat* doctrine.

When speaking about movable property as the subject matter (object) of expropriation, there are several forms of formal expropriation. First, considering the scope of expropriation, formal expropriation may be full and partial. The subject matter (object) of expropriation does not have to be the entire real estate; it can be one part of the estate if the general interest is met thereby. For example, in the expropriation of a real estate, it may be established that there is no need to expropriate the entire estate); as a result, the partition of the estate will ensue, and a newly created parcel of land will be designated as the subject matter (object) of expropriation. In the European-continental legal orders, as well as in Serbian law, the owner of the expropriated real estate is allowed, under the conditions prescribed by the law, to file a claim for expropriation of the remaining part of the immovable property.³

3 “In the legal order of the Republic of Serbia, the authority conducting the expropriation procedure is obliged to instruct the real property owner that he/she may file a claim for expropriation of the remaining part of the real estate. By acting otherwise, the authority substantially violates the rules of procedure; as a result, the first instance decision will be annulled in appeal proceedings” (Judgment of the Supreme Court of Serbia, U. 572/92 and U. 573/92, dated 10.6.1991, *Bulletin of judicial practice*, no. 1/1993, p. 69.)

The second form of formal expropriation are easements in general interest (administrative easements).⁴ For the purpose of exploration works, lease of land in general interest (administrative lease)⁵ can be established through formal expropriation, and provisional occupation of another's land may be allowed for the sake of public interest. As a specific form of expropriation in a formal sense, the transfer of public ownership from one public entity to another has taken root in Serbian law. It is the so-called administrative conveyance of ownership (formerly designated as societal ownership, now designated as public ownership).⁶

The subject matter (object) of expropriation in a formal sense is not the same in all legal orders; moreover, even if the subject matter of expropriation is the same, the legal character of individual forms of expropriation may vary in different legal orders. In France, for example, easements cannot be established in an expropriation procedure, which is possible in Serbian law and many other legislations. Similarly, French jurists commonly perceive the owner's claim for the expropriation of the remaining part of the real estate as an ordinary sale-purchase agreement, which does not fall within the concept of expropriation in a formal sense and expropriation in a material sense (Gjidara, 2008:102).

Furthermore, in the European legal orders, there is a need for several formal expropriation regimes. The basic formal expropriation regime is established by enacting the systemic legislative act on expropriation, which *inter alia* envisages a special legal regime of expropriation in extraordinary situations, for reasons of urgency (e.g. natural disasters). In France, for instance, the Environment Protection Act (1995) prescribes that the state may expropriate the land that is threatened by specific and substantial natural risks. In addition, bearing in mind that the legal regime of expropriation with a foreign element is based on the provisions of international treaties and international legal source, such expropriation regime should be differentiated from the basic formal expropriation regime based on the systemic legislative act on expropriation. In Switzerland, in addition to the formal expropriation in general interest, the legislation has

4 "A real estate easement for a specific period may be established through expropriation." (Judgment of the Supreme Court of Serbia, U. 3951/2005, dated 7.6.2006).

5 "In case of exploration works, only an incomplete expropriation may be allowed, including the lease of land for a specific period" (Judgment of the Supreme Court of Serbia, UŽ.1933/65, dated 11.6.1965, *Bulletin* no. 6/1966, p.49).

6 "Any organisation which, at the time of establishing compensation, uses the land on the basis of administrative conveyance, performed in compliance with the Expropriation Act, is obliged to pay the compensation for the expropriated land." (Legal opinion of the Department for Administrative Disputes of the Serbian Supreme Court, dated 14. 4. 1993, *Bulletin* no. 1/2010, p. 28).

envisaged a special legal regime of expropriation of neighbours' rights in the public interest (Vučković, 2016: 659-674).

Considering all the above, it is important to bear in mind that some forms of formal expropriation are only linked to a particular legal area, or particular legal order. As a specific form of formal expropriation, the French legislation envisages the expropriation of abandoned immovable property (*expropriation d'immeubles abandonnés*), which is subject to expropriation upon the decision of the local self-government authorities. English legislation envisages expropriation upon the autonomous application of the real estate owner, which is even more unusual from the aspect of Serbian law, where the owner's request for expropriation of the remaining estate has a secondary effect (given that the owner is entitled to file a request only after a part of the real estate has been expropriated).

Namely, in English law, the real estate owner, whose application for obtaining a construction permit is refused by the authorities, may request the public authorities to expropriate the particular real estate, i.e. to purchase it (which is more likely in the spirit of English law).

Thus, in terms of the subject matter and the purpose of expropriation, formal expropriation may be: permanent and provisional, and full and incomplete. According to the characteristics of the legal regime, it may be: basic formal expropriation, expropriation with a foreign element, and expropriation in extraordinary situations justified by urgency. As for the legal institutes which are established by means of formal expropriation, we should distinguish expropriation in a material sense and several forms of expropriation in a formal sense: administrative easements, administrative lease, provisional occupation of land in the public interest, and administrative conveyance of property.

3. Quasi-expropriation

Quasi-expropriation includes cases of legally permitted revocation and restriction of ownership and other property rights, which entails the obligation to provide relevant compensation. The legally permitted forms of expropriation are as follows: 1) expropriation as a legal principle which generates a norm for legal regulation of particular civil law matters (expropriation as a settlement of opposed private interests), 2) the so-called factual expropriation, involving *de facto* confiscation of the substance of private ownership, and 3) indirect expropriation, involving the restriction of ownership and other property rights, due to which the titleholders of such rights consequently suffer an excessive burden for the sake of legal and public order. Therefore, quasi-expropriation includes different forms of revocation or restriction which are followed by compensation; the valid criteria for quasi-expropriation is the legal nature of expropriation as

a legal instrument, i.e. its legal ground or the constituent elements of its legal regime (Prica, 2016: 102-117).

It further entails the need to differentiate between formal expropriation, factual expropriation and indirect expropriation. Thus, if there is no formal expropriation, but the effects of taken acts and actions deprive the titleholder of the substance of private ownership, there is factual expropriation at work rather than formal (direct) or indirect expropriation. Indirect expropriation is the result of legal activities (acts and actions) outside the scope of formal expropriation, and the consequence of such acts and actions is unfair restriction of the titleholder's rights.

Indirect expropriation is a response of the legal order to the effect of statutory regulation of private ownership. Thus, due to excessive burden imposed by such regulation, the principle of fairness imposes an obligation to provide adequate compensation to the titleholder of the ownership right. Indirect expropriation entails the restriction of the ownership right and other real property rights, whereas "factual expropriation" entails *de facto* interference with private ownership which occurs outside the scope of the formal expropriation regime, but its legal effect is equal to the effect of expropriation in a formal sense. Generally speaking, the distinction between indirect expropriation and "factual expropriation" corresponds to the distinction between the extensive scope of substantive ownership right (on the one hand) and the very substance of the ownership right (on the other hand). Thus, "factual expropriation" occurs in case where the effect of an act or action brings the owner into the state of the so-called "bare ownership" (*proprietas nuda*), where the owner has mere title without the right of use. On the other hand, indirect expropriation is in action in case where the restriction of private ownership imposes a particular and excessive burden on the titleholder.

Indirect expropriation is used in regulating different property-law relations, such as: the right of way, reversal of a decision in extraordinary proceedings for the protection of public interest, and private nuisance (emissions) as the most distinctive form of indirect expropriation, where the titleholder is indemnified for excessive damage caused by industrial companies in the course of performing activities in the public interest (Petrović, 2011: 163, *passim*).

Unlike indirect expropriation, "factual expropriation" implies the legal effect of legal and material acts, which deprive the owner of real estate of the possibility to use property-related authorisations, even though formal revocation of the ownership right has not officially occurred through these acts. In regular situations, the titleholder of the ownership right is entitled to hold the property, to use it, and freely dispose of the ownership right, with the *erga omnes* legal effect.

In legal reality, although not exposed to the impact of formal expropriation, the owner of a real estate may be prevented (by means of particular acts and actions) from holding the real estate, using it or freely disposing of it; consequently, the titleholder has only “bare ownership” (*proprietas nuda*), which is the legal grounds for recognizing the so-called factual expropriation and its doctrinary development in legal orders (Prica, 2018: 361-387).

“Factual expropriation” includes cases where the legal effect of statutory regulation is not aimed at revoking the ownership right but at legally regulating its legal regime, as a result of which the owner suffers the same consequences as if formal expropriation has taken place. Yet, “factual expropriation” is not only a consequence of the effect of legal regulation of the ownership regime (as a mental activity in a legal order); it may also be a result of material (physical) activity of the subjects of the legal order.

Considering the aforesaid, “factual expropriation” implies an analogue application of formal expropriation in related but legally atypical matters. In other words, the establishment of “factual expropriation” has been procured by the need to find a fair solution for legal cases where there is no revocation of the ownership right, but where the restriction of the owner’s legal position has such a powerful impact that the ownership right is deprived of its substance and reduced to the so-called “bare ownership” (*proprietas nuda*), without leaving any possibility to the titleholder of the ownership right to use any authorisations.

Besides indirect expropriation and “factual expropriation” in property cases, quasi-expropriation is also present in certain civil law matters; thus, the legal regulation of these matters entails an analogous application of formal expropriation, its legal ground or individual elements of its legal regime (Jering, 1998: 230, *passim*).“

Considering the nature of things (*rerum natura*), expropriation is a principle which generates the norm for legal regulation of specific civil law cases. Yet, there are civil law cases where the revocation of private ownership is followed by compensation for the expropriated estate, but there are also cases where private ownership right is restricted and accompanied by compensation to the owner. In both cases, there is antagonism of legal interests but the prevailing interest takes precedence, including an obligation to compensate the owner for the revocation or restriction of private ownership. Here, expropriation rests on the prescribed legal ground or analogous use of the applicable rules on compensation for expropriated real estate.

Expropriation, as a principle which gives rise to the norm for regulating civil law matters is also present in the legal institute of accession (*accessio*). Thus, in terms of the civil law institute of *specificatio*, Kovačević-Kuštrimović and Lazić

point out: "In the event of *specificatio*, the legislator authorises the owner of the building material to seek return to the previous condition if no substantial damage or costs have been caused. If it is not possible, the resolution of ownership disputes depends on the conscientiousness of the contractor, i.e. the owner of material. The conscientious (*bona fides*) party is entitled to choose, to keep the new thing as an exclusive owner and to pay the value of labour or the value of material to the other party, or to leave the asset to the unconscientious (*mala fides*) party. When the value of material is inconsequential in relation to the value of labour, the new asset belongs to the contractor, irrespective of his/her conscientiousness, whereby he/she owes compensation to the owner of material." (Kovačević-Kuštrimović, Lazić: 2006: 114-115).

Expropriation as a principle is also present in the legal institute of consolidation; thus, if the real estate of the owner whose property has been subjected to consolidation has an inconsequential value, the owner of such property is only entitled to receive compensation for the property value, while the newly created property belongs to the new owner. Further, expropriation as a principle is also reflected in the *superficies solo cedit* rule: everything that is physically attached to the land shares its legal destiny. This refers to the legal regime of constructing on another's land, which envisages several legal situations. (Kovačević-Kuštrimović, Lazić, 2006: 115-116).

4. The concept of expropriation in a material sense

Let us examine the difference between quasi-expropriation and expropriation in a formal sense. First, in terms of expropriation as a principle which gives rise to the norm for legal regulation of particular civil law matters, there is antagonism of private interests. The public interest is a regulatory determinant and static expression of these interests. It entails the need to establish a legal rule (norm) for the legal regulation of civil law matters as typical legal cases, so that the balance of opposed private interests could be established in a concrete case. It is the goal of legal regulation, while the revocation of the ownership right is an expression of the need to enact reasonable legal solutions; consequently, compensation for the expropriated real estate is a means of reconciling the opposed interests and settling the dispute.

In case of the so-called "factual expropriation", generated as a result of statutory regulation, the *ratio iuris* is the excessive burden imposed on the titleholder of the ownership right, whose right is reduced to "bare ownership" (*proprietas nuda*). Thus, for reasons of fairness and justice, he/she is provided with compensation which accompanies expropriation in a formal sense.

The difference between expropriation in a formal sense and the so-called indirect expropriation as a form of quasi-expropriation is manifested as follows: a) expropriation in a formal sense is concrete, while quasi-expropriation is abstract; b) expropriation in a formal sense affects a designated titleholder of the ownership right, whereas quasi-expropriation affects a typical real estate owner; and c) expropriation in a formal sense entails a direct and designated revocation or restriction of private ownership, which is not applicable in legal regulation of ownership where the indirect effect of such regulation may be qualified as excessive interference with the ownership right (which is the reason for compensation in formal expropriation).

Bearing in mind the aforesaid, there are three reasons for the existence of expropriation in a formal sense; they are as follows: 1) exercising a general interest related to the specific real estate, without establishing the existence of public interest which would jeopardise the principle of equality before public burdens and equality before the law in general; 2) given that the purpose of proposing expropriation (by the nature of things) entails the issue of justifiability, formal expropriation is a means of establishing whether the general interest reflects the public interest (by including publicity); 3) expropriation in a formal sense is a means of preventing the risk of state authorities' "escape" into private law. Thus, there is no reason that would justify the possibility of having the direct effect of the law regarding expropriation in a formal sense. It may be concluded that the enactment of an individual legal act is the distinctive feature of expropriation in a formal sense.

Why is compensation provided for expropriation in a formal sense and for quasi-expropriation? Given that the titleholder of the ownership right bears an excessive burden, it is in the interest of justice to establish a balance of interests, which is the condition for preserving public order and the state as a territorial (legal and political) community. In order to trigger the effect of the obligation to provide compensation to the titleholder, the imposed burden has to be excessive and specific. Prof. Petrović, a distinguished expert on German and French legal literature, concludes: "[...] in certain hypotheses, the excessive burden itself is not a sufficient condition for the occurrence of state obligation to provide compensation. An additional requirement, which is to be met cumulatively, is that the burden has to be particular and specific, i.e. imposed on an individual or a specific group [...] A modern state cannot survive without enacting regulations and imposing more or less substantial burdens on its citizens. If the compensation were to be paid every time when the imposed burden is "excessive", without taking into account the number of affected persons or the political, economic and other functions of the burden, the state would soon end up in a dead-end track. Irrespective of financial strength and stability, no state treasury would

be able to withstand it [...] Hence, the specific and particular nature of the imposed burden may be viewed only as a supplement to the criterion of excessive burden which makes it practically applicable in specific cases, i.e. when a fully constitutional or legal state measure affects an exceptionally large number of members of a society/state.” (Petrović, 2011: 162).

The imposed burden generates the request for justice, i.e. establishing a balance between legal assets (values), legal interests and legal order goals. Public order resembles the scales, balancing order and peace (on one of the plates) and chaos (on the other plate). Thus, the principle of opportunity keeps surfacing in legal order and in public order, reflecting the need to balance the plates of the scales, which is actually a precondition for the existence of legitimacy of a *Rechtsstaat* (legal state, state governed by laws/the rule of law). In this regard, Prof. Petrović says: “There are, in fact, two ideas of legal equality. One form of equality (equality in a narrow sense) is a full, arithmetic, democratic-egalitarian equality, the Greek “*isonomia*,” which may be designated as both equal legal rights and equality of law. The other form of equality is “good equality”, embodied in Solon’s concept of “*eunomia*”, which implies good and valid distribution and settlement within the polis as a whole, as “a political state of proper distribution of equal and unequal.” While *isonomia* is abstract and static, *eunomia* is concrete and dynamic, linked to the specific situation. It reveals the primordial, social and protective function of law” (Petrović, 1981: 264). Thus, compensation for expropriation in a formal sense and for quasi-expropriation is an expression of “good equality”, i.e. Solon’s *eunomia*.

In order to establish the concept of expropriation in a material sense, it is necessary to compare the legal institutes established through expropriation in a formal sense, both mutually and with other legal institutes, which are used for revoking or restricting private ownership.

In establishing the concept of expropriation in a material sense, it would be good to start by establishing the legal relation between *nationalisation* and *expropriation*, as well as between *agrarian reform* and *expropriation*. The compensation for the expropriated real estate can be applied in case of reimbursement of owners in the nationalisation or denationalisation procedure; the compensation for the expropriated real estate is even more likely to be applied in the agrarian reform procedure. In this context, a renowned legal writer, Slobodan Jovanović, distinguishes “expropriation for administrative need” and “expropriation in the interest of social justice”. Jovanović says: “Expropriation for administrative need is allowed in all the cases that may be envisaged by the law; expropriation in the interest of social justice is only allowed in cases that are expressly provided by the Constitution. [...] Such measures are not directed against the capitalistic

estate, but against its size. Capitalistic estate is tolerated, provided that it does not exceed certain boundaries. The maximum of a landed estate is to be determined by the law; any estate exceeding that maximum will be expropriated. In the feudal estate, the conveyance of property is made from the landowner to farmers; in the capitalistic estate, the conveyance of property is made from the landowner to the state. It is one case of expropriation for the sake of social justice, not for administrative needs, which is permitted by the Constitution as an exception. In the expropriation of large estates, the expropriated landlord is entitled to compensation, just like any owner in common expropriation. In common expropriation, the Constitution guarantees a "fair compensation"; in the expropriation of large estates, the Constitution leaves to the legislator to establish the principles of compensation (thus, compensation may be less than "fair"). Exceptionally, compensation is not given "for large estate that belonged to members of former foreign dynasties and for those donated to individuals by foreign authorities" (Jovanović, 1924: 452-455). Thus, expropriation under the umbrella of the agrarian reform differs from expropriation in a material sense; agrarian reform is an act of reforming the economic order, while expropriation is an act undertaken for the purpose of achieving a concrete objective goal that has the character of a general and public interest.

The goal of agrarian reform and nationalisation is the reform of property ownership regime and economic order; the reform is aimed at regulating private ownership of specifically designated real estates. The goal of expropriation in a material sense is not to reform of economic order or property ownership regime, but to exercise a concrete general interest. Denationalisation is also a reform of property ownership regime and economic order, but it does not necessarily follow nationalisation. In contrast, expropriation is commonly and necessarily correlated with de-expropriation.⁷

On the other hand, expropriation differs from land *consolidation* and *arrondation*, as legal institutes aimed at the regulating the use of agricultural land. While expropriation in a material sense aims to achieve a specific general interest, the goal of land consolidation and arrondation is to regulate how the agricultural land will be used and to ensure its more rational use.

The difference between *expropriation* and *confiscation* is reflected in the fact that confiscation represents a punitive measure which is pronounced in specific legal cases. Except for cases where confiscation is legally permitted, confiscation is the most severe form of interference with the *Rechtsstaat* doctrine. Thereby, in the expropriation process, if the real estate owner is acknowledged the com-

⁷ The denationalisation procedure commonly entails a referral to analogous application of individual elements of expropriation in a formal sense (Prica, 2016: 173-193).

compensation for expropriation as a “naked (bare) right” (which was the case in Yugoslav law in the period after the WWII), then it is confiscation clad in the garment of expropriation, i.e. “confiscatory expropriation”, which is absolutely incompatible with the *Rechtsstaat* doctrine (Petrović, Prica, 2014: 178-186).

Consequently, the attainment of a concrete general interest is a relevant feature of expropriation in a material sense and it is, concurrently, the difference between expropriation in a material sense and other legal institutes which are established through formal expropriation.

Administrative easements are a legal institute established through expropriation in a formal sense but, after being established, they are brought into conformity with the legal regime of civil law easements; as previously noted, such regulation entails the relationship of a specific legal institute versus a general legal institute. It means that easement established in an expropriation procedure does not bring about any changes in the ownership title (private ownership); in case of possible disputable issues, the established legal situation (e.g. the erection of transmission lines on the land parcel owned by the titleholder of the ownership right) will be subject to the application of the legal regime which is in force for classical civil law easements, save for the issues where it is impossible due to the specific nature of legal matter.

Hence, in administrative easements, there is a restriction of private ownership, either provisional or permanent. Similarly, private ownership restriction is also present in cases of provisional occupation of land and administrative lease (in general interest), as legal institutes which are also established through formal expropriation. Expropriation in a material sense does not entail private ownership restriction, but a transformation of private ownership into public ownership for the purpose of exercising a specified general interest. Expropriation in a material sense also is not a legal regulation of the use of public ownership between the public law subjects, which is characterised by the so-called administrative conveyance of (public) ownership as a legal institute which is established through expropriation in a formal sense.

Expropriation in a material sense exists only where the transformation of ownership (from private into public ownership) occurs through expropriation in a formal sense, for the purpose of exercising a specified objective goal having a character of general and public interests. It includes the possibility of return to the previous condition (de-expropriation), upon a request filed by the former owner, if it is established that the purpose of expropriation is not achieved or if, in the meantime, the expropriated real estate has been designated for a different purpose (use).

In the author's opinion, the possibility of *de-expropriation* is a distinctive characteristic of expropriation in a material sense. To support this stance, it is important to refer to the legal stance rooted in judicial practice (jurisprudence), which posits that the purpose of expropriation must be stated in the dispositive (operative) part the judgment and specifies that the transformation of ownership is not the ultimate goal but a means for achieving the goal which is the reason for opting for formal expropriation. Thus, a possible change of the purpose (use) of the expropriated real estate would represent a form of "simulated legal regulation". At this point, it is important to draw attention to several legal standpoints on this matter which are present in Serbian jurisprudence: (1) "The dispositive (operative) part of a first-instance decision does not contain the purpose for which the expropriation is carried out, which is significant in terms of applying the provision envisaged in Article 72 (para.1) of the Expropriation Act⁸, in order to assess under which law the procedure will be completed. In addition, the case files do not include a valid excerpt from the detailed urban-development plan regulating the area where the expropriated real estate is located [...]. The said shortcomings point to the unlawfulness of the first-instance decision; therefore, the administrative court admitted the appeal filed in administrative proceedings and annulled the first-instance decision"⁹; (2) "The dispositive (operative) part of the first-instance decision on an expropriation must also contain the purpose for which the expropriation is carried out"¹⁰; (3) "Request for nullity of the decision on expropriation is evaluated against the purpose of expropriation set forth in the decision on expropriation, and not against the subsequent change of the detailed urban-development plan"¹¹; (4) The Supreme Court of Serbia (U. no. 67/1999) specifies as follows: "if considerable work was performed on an object for the construction of which an expropriation had been conducted within a three-year period from the valid decision on compensation, or from the date of concluding a compensation agreement, the purpose of expropriation has been accomplished, and any subsequent alteration of the purpose of the expropriated object may not serve as a reason for rescission or for alteration of a valid decision on expropriation." (Pljakić, 2000: 339).

On the other hand, judicial practice (jurisprudence) contains evidence supporting the author's standpoint that de-expropriation is indeed *differentia specifica*, which separates expropriation in a material sense from all other legal institutes

8 Expropriation Act, *Official Gazette of the RS*, 53/95.

9 Judgment of the Supreme Court of Serbia, U. 7110/96, dated 1 Oct. 1997, *Bulletin*, no.1/1998, p.66.

10 Judgment of Supreme Court of Serbia, U. 7110/96, dated 1 Oct. 1997, *Bulletin*, no. 1/1998, p. 66.

11 Judgment of the Supreme Court of Serbia, U. 402/2003, dated 13. 5. 2004.

established through expropriation in a formal sense, given that the possibility of de-expropriation is not recognized in other legal institutes established through expropriation in a formal sense. Here, we may have a look at some significant judicial standpoints on this matter: (1) "The decision, on the basis of which the administrative conveyance of real estate to another titleholder has been conducted, may not be annulled under the terms of and in the manner prescribed in the provision of Art. 36 para. 3. of the Expropriation Act."¹²; (2) "The provision of the Expropriation Act on the rescission of a valid decision for failure to achieve the projected purpose of expropriation, does not refer to the land conveyed on the basis of administrative conveyance."¹³; (3) "Nationalised undeveloped construction land (without buildings), confiscated in a procedure pursuant to Article 38 of the Nationalisation Act, may not be returned to the former owner by applying the Expropriation Act provisions."¹⁴; (4) "The process of deciding on a request for rescission of a valid decision on relinquishment of nationalised land and the process of deciding on the requests pursuant to Article 84 and Article 86 (para. 7) of the Planning and Construction Act¹⁵ are two separate proceedings, where the competent authority issues separate decisions."¹⁶; (5) "Article 34 of the Expropriation Act cannot be applied to any land confiscated pursuant to Article 38 of the Act on Nationalisation of Leased Buildings and Construction Land; thus, the rescission of decision and return of the estate which has not been used for the designated purpose cannot be requested, given that the Act on Nationalisation of Leased Buildings and Construction Land does not envisage the return on the same ground."¹⁷; (6) "The decision on the basis of which administrative conveyance of real estate is made to another titleholder cannot be annulled under the terms and in the manner prescribed by Article 36 (para. 3) of the Expropriation Act."¹⁸; (7) "When submitting the proposal for exemption of undeveloped construction land, the competent authority is not obliged to present evidence that the funds have been provided for payment of compensation for the exempted land."¹⁹; (8) According to the Court's understanding, "the right to file a

12 Judgment of the Supreme Court of Serbia, U. 3257/97, dated 29. 11. 1999; Judgment of the Supreme Court of Serbia no. 3420/01, dated 08. 05. 2002.

13 Judgment of the Supreme Court of Serbia, U. 2054/2002, dated 27. 2 2003.

14 Judgment of the Supreme Court of Yugoslavia (VJS), Uis-2540/68, dated 25. 4. 1969.

15 Planning and Construction Act, *Official Gazette of the RS*, no. 47/03

16 Judgment of the Supreme Court of Serbia, U. 6195/04 dated 19 Oct.2005, *Bulletin*, no. 4/2005, 154

17 Judgment of the OVSS – Novi Sad, U. 575/65 dated 29. 6. 1965.

18 Judgment of the Supreme Court of Serbia, U. 3257/97, *Bulletin*, no. 1/1998, p. 70-71

19 Legal opinion of the Department for Administrative Disputes of the Supreme Court of Serbia, dated 24. 11. 1988, *Bulletin of judicial practice of the Administrative Court*, no. 1/2010,

request for rescission of the valid decision on expropriation of real estate, which (in terms of Article 38 of the Expropriation Act) belongs to the former owner of the expropriated real estate, does not fall into the scope of non-transferable personal rights; in effect, both according to the provision in Article 38 and by the nature of things, the exercise of that right is exclusively linked to the real estate and not to the legal personality of the former owner. Therefore, although it is not a property-related right, the right to file a request for rescission of the valid decision on expropriation passes onto successors, who are entitled to file a request for deexpropriation."²⁰

Legal importance of deexpropriation in relation to expropriation is recognised in French and German laws, on the same legal grounds. In French law, the legal importance of deexpropriation is reflected in the time limit for attaining the goal of expropriation, and the time limit for changing the purpose of expropriation by the expropriating authority; a violation of these time limits may be the reason for initiating the return to the previous state. The same legal ground also exists in German law; thus, in case of failure to attain the purpose of expropriation, the former owner is entitled to request deexpropriation (*Rückenteignung*) (Staničić, 2015: 185-212).

The significance of deexpropriation as opposed to expropriation was not recognized in the judicial practice of the State Council (the third-instance administrative court): "In the Law on Expropriation, there is no single provision on the basis of which a former owner of the expropriated land would be entitled to purchase it from the state, in case the state (after a period of time) did not use it for the intended purpose, on the basis of which it had acquired that land through expropriation; so, the state is now the landlord with unlimited power over the land, since it possesses a land deed. In such cases, even if we assume that there is a possibility of instituting restitution (return into the previous state of affairs), such a possibility cannot be allowed in the given circumstances because, even though the state did not use the estate for the intended purpose, it does not mean that the state would not - considering the current regulatory plan of Belgrade - use that same property for a purpose which is envisaged in the Law on Expropriation, irrespective of the fact that the original purpose of expropriation was the erection of Saint Sava Seminary."²¹ This standpoint was

p. 19

20 Judgment of the Supreme Court of Serbia, U. no. 3873/74 dated 29. 5. 1975, *Bulletin of judicial practice of the Supreme Court of Serbia*, no. 1/1976, p. 41-42. Judgment of the Supreme Court of Serbia, U. no. 8164/74 dated 20 February 1976, *Bulletin of judicial practice of the Supreme Court of Serbia*, no., 1/76, p. 20-21.

21 Decision of the State Council, no. 7722/27, dated 16 March 1927, *Decisions of the State Council 1924-1928*, Belgrade, 1930, p. 327-328.

criticized by Lj. Radovanović, who noted: "The reasons of the State Council are contrary to the institute of expropriation in general. By its very nature, expropriation represents an exception from a fundamental principle of today's social regime - the principle of private ownership. It is allowed only if it is prescribed by the law. However, it is allowed under the law only if it has been subject to the prescribed procedure and if the expropriated estate is used for the purpose for which the expropriation has been approved. Since expropriation can only be conducted if the purpose of expropriation is approved in advance, it is clear that the expropriated estate cannot be later used for any other purpose; in order to change the goal, it is necessary to follow the same procedure which was used when specifying the previous one. The administrative authority cannot change the goal of expropriation of its own accord; hence, any expropriation, where the administrative authority uses the power of the law to achieve a goal which is not envisaged by the law, constitutes an abuse of power. In this specific case, the State Council provided its interpretation, according to which the administrative authority does not have to stick to the goal of expropriation, which further implies that the expropriated estate even may not be used in the public interest. In that way, all the guarantees that exist for the purpose of safeguarding the private ownership right would be compromised."²²

It is important to bear in mind that, without the possibility of de-expropriation, a danger of simulated legal regulation would occur, considering that the expropriation would be approved for achieving one goal and the beneficiary of expropriation could use the expropriated real estate for the purpose of accomplishing some other goal. The *causa* of legal regulation of expropriation concerns the legal relationship between the expropriating authority and the expropriated party; consequently, when the expropriation beneficiary does not achieve the goal which has given rise to expropriation, the former owner of the real estate is authorised to request the return to the previous state of affairs. The significance of de-expropriation may also be observed in terms of the *causa* of conduct of public law subjects; as these subjects do not have free will or private autonomy (legal standing), de-expropriation is a plea for a legally binding norm against the abuse of public powers by state authorities and holders of public offices. Finally, deexpropriation is an expression of striking a balance between the necessity of interventionism of the state power and the autonomy of the civil society subjects. Public interest as a regulatory determinant of the public order has to take into consideration both the general interest and the private interest. Consequently, if expropriation is approved in the name of a general interest, it means that the achievement of the specific goal is the public interest as a static expression of general welfare. However, if it is established that such

22 *Decisions of the State Council, 1924-1928, Belgrade, 1930, p. 328.*

a goal has not been achieved, it is in the public interest (as a static expression of general welfare) to recognize the importance of the private interest and institute the return to the previous state of affairs. Hence, expropriation in a material sense is characterised by the transformation of private ownership into public ownership, including the possibility of deexpropriation. Without the possibility of instituting de-expropriation, expropriation would be a severe interference with the *Rechtsstaat* doctrine.

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ЕКСПРОПРИЈАЦИЈА У МАТЕРИЈАЛНОМ СМISЛУ

Резиме

Експропријација као правни институт је и ужа и шира од формалне експропријације (експропријације у формалном смислу), под којом подразумевамо правни пут за одузимање или ограничавање права својине у појединачном правном предмету. Путем формалне експропријације се успостављају различити правни институти, а један од тих правних института је експропријација у материјалном смислу. С друге стране, експропријација као правни институт испољава се и ван формалне експропријације, под окриљем ограничавања приватне својине до којег долази непосредним законским уређивањем појединих области правног поретка, као и поводом правног уређивања појединих правних предмета у судским и другим правним поступцима. Експропријација у материјалном смислу постоји само када путем експропријације у формалном смислу наступа преображај приватне својине у јавну својину, ради остваривања једног прецизираног општег интереса, са могућношћу враћања у пређашње стање. Враћање у пређашње стање (деекспропријација) наступа по захтеву ранијег сопственика, ако се утврди да сврха експропријације није остварена. Управо могућност деекспропријације је диференција специфика која одваја експропријацију у материјалном смислу од других правних института припадајућих експропријацији у формалном смислу, као и од квазиекспропријације и других облика одузимања и ограничавања приватне својине.

Кључне речи: формална експропријација, експропријација у материјалном смислу, квазиекспропријација, експропријација као правни институт, деекспропријација.