

KJI NEWSLETTER ***August – September 2004***

This newsletter is published to fully inform the magistrates of Kosovo on the activities of the KJI. This publication is distributed to judges and prosecutors throughout Kosovo. The Monthly KJI Newsletter features articles from KJI Staff relating to issues of interest to judges and prosecutors working in Kosovo.

EXPROPRIATION AND COMPENSATION *

1. Introduction

One of the methods used for gaining the ownership right over the immovable item which is a subject to private ownership is expropriation.

"Expropriation or Dispossession is the conveyance of the private property into the state owned property, this is done in public (common) interest and compensation is granted".¹

Based on the UNMIK, Resolution of Security Council of UN, dated 10 June 1999, a new chapter of general development of legislation is unfolded, in which civil legal field was also included.

If we concretely observe the expropriation laws and regulations, we will not be able to find any UNMIK Regulation which regulates the issue of expropriation; however, this does not mean that this issue is not covered in the legal context.

*This article represents an elaboration of the ideas presented during the training of civil law judges held at Kosovo Judicial Institute on 07.07.04, and the author is a judicial trainer.

1. Abdulla Aliu "The right to an item" (ownership), Prishtine/Pristina 2004, pg.124

According to UNMIK Regulation 1999/24, promulgated by the Special Representative of the Secretary General (SRSG) of the United Nations (UN), the applicable laws in force in Kosovo are the following:

- a. The Regulations promulgated by the SRSG and other legal instruments issued in accordance with the relevant Regulation and the
- b. Legislation that was applicable in Kosovo before, March 1989.

In case of collision between the two the UNMIK Regulations shall be applied and will have priority over the Kosovo Applicable laws.

If the Court which has the jurisdiction over an issue, was requested by a body or a person to implement a certain legal provision, and was then determined by that court that the subject of a case or situation can not be found in any of the laws foreseen in the first part of the respective Regulation but was covered in the other law applicable in Kosovo after 22 March 1989 which law is not

discriminatory and which is compatible with part 3 of the Regulation, in such a case the court shall make exception and shall apply that respective Law.

If we concretely speak about the expropriation it was regulated by the Law on Expropriation of 1978 and 1986. Therefore, based on the applicable law, the real estate may be subject to expropriation when it is needed for construction of the new economic, housing, public utilities, health, cultural and other premises which are in public interest”.²

The real estate can be expropriated in particular for construction of the railroads, roads, bridges, airports etc..., when as it was mentioned earlier, such an expropriation is in the public interest. The question is raised on what is the public interest and who determines the public interest? The answer regarding this issue lies with the law on expropriation in which Art. 3 explicitly states:

“The public interest for construction of certain objects respectively initiation of the work on real estate for which there is a detailed urban plan is determined by the same urban plan”. This indicates that it is the urban plan that determines the issue of public interest. There is an exception to this when the urban plan is not available; the Municipal Assembly respectively the executive board through special decision may undertake

² Article 2 of the law on Expropriation, Off. Gaz. of SAPK no. 21/78

the necessary action towards the expropriation of the real estates.

At present taking into consideration the actual limited competencies of the Municipal Assemblies in Kosovo regarding the administration of their property³ and adding here the disagreement regarding the limitation lines (borders) between the Municipalities, these problems are making this issue more sensitive, results of these problems are reflected in the concrete cases of Courts when having to take a decision regarding the expropriation.⁴

These and other issues related to the expropriation will be elaborated through the following points.

2. The procedure for assessment of compensation for the expropriated property

In general aspect every citizen has the right to have his possessions, “to harvest the fruits”; this right is derived from the ownership right.

However, although this is emphasized in principal, in every day life there can be exclusions for the benefit of realizing the public interest or more concretely when expropriation is used as measure for limiting the right to ownership.

³ In this case we are referring to the competencies of KTA

⁴ Example: the unresolved issue between the Prishtine/Pristina Municipal Assembly and the Assembly of Fushë Kosovë /Kosovo Polje regarding the municipal borders.

As mentioned above expropriation is done in the public interest but not to the detriment of the other party, this in an issue that determines the right on compensation in the interest of the previous owner.

The expropriation may be partial and complete; the complete expropriation is when the real estate turns into the socially owned property. Whilst the partial expropriation establishes servitudes on the real estates or tenancy of the agricultural land for the certain period of time.⁵

As mentioned above, the owner of the expropriated real estate is entitled to just and reasonable compensation which is paid by the user of the expropriated property. With the compensation received the former owner should be able to replace his/her expropriated property with another property. The compensation for the expropriated property is usually done in monetary assets however if there is a consent between the parties the compensation may also be done by giving another real estate to the owner. When dealing with the expropriation of residential buildings, the user of the expropriated property, before the demolition starts, should find another adequate residence for the former owner or the bearer of the housing right.

The compensation regarding the agricultural land shall be assessed according to the market price of the

⁵Articles 46 and 47 of the Law on Expropriation (LE)

agricultural land⁶, whereas for the construction land the value of the compensation shall be assessed based on the value of the expropriated building.

The price of compensation of the expropriated real estate is set by taking into consideration all the existing circumstances from the moment of rendering the decision on compensation by the first instance⁷. In the case of the tenancy, the compensation shall be assessed based on the level of rent in the nearest real estate.

The proposal on expropriation shall be submitted by the user of expropriation before the administrative competent body for the legal-property issues and only after the public interest for constructing the building is confirmed.

The decision on expropriation is taken by the administrative body on the territory were the location of the real estate is settled. The procedure will be conducted according to the rules foreseen in the Law on Expropriation and the law on the General Administration Procedure⁸. After the decision on expropriation becomes final, the user gains the right on possession of the expropriated real estate⁹.

The decision of the first instance upon the proposal on expropriation can be challenged through the appeal before the second instance.¹⁰ The final decision on expropriation may be

⁶ Articles 28 and 29 of LE

⁷ Article 30 of LE

⁸ LGAP Off. Gaz. Of FRY no. 47/86

⁹ Article 25 of LE

¹⁰ Article 17 of LE

annulled upon the request of the former owner, if the user does not perform the necessary works in the foreseen building within 3 years. This deadline shall become valid from the date when the decision became final¹¹. If ten years have passed since the above mentioned date, than there is no possibility to seek for annulment of the respective decision on expropriation¹².

The compensation for the expropriated property may be done through both contested and non-contested procedures. Usually it is preferable to have an agreement between the owner of the expropriated property in one hand and the user of expropriation on the other hand in order to determine the compensation for the expropriated property. In this respect the primary role belongs to the competent administrative body for legal property affairs. This competent body is obliged to appoint the hearing *ex officio* during which the parties would be informed of their rights and obligations in the structure of offer. The eventual agreement between the parties included in the minutes, which has the power of an executive title (*titulus ekzekutivus*)¹³, is forwarded to the competent public attorney. If the public attorney finds that the parties have reached an agreement on compensation but the same agreement is in detriment to the society, he/she has the right to file a suit before the competent court requesting the annulment of the agreement.

¹¹ Article 21 par. 4 of LE

¹² Article 21 par.5 of LE

¹³ Article 50 par. 4 of LE

The lawsuit may be submitted 15 days from the reception of the minutes of the agreement reached for compensation, no later than the deadline of 6 month from the day this agreement was reached. The filed lawsuit shall prevent the payment of compensation for the part disputable for the public attorney.

3. Annulment of the final decision on expropriation and dispossession

The annulment of the final decision on expropriation and dispossession can be done by an agreement of parties and by request of the previous owner.

Art. 21 par. 3 of the Law on Expropriation provides that the user of expropriated property and the former owner may request the annulment of the final decision on expropriation. The legal effect of this action by the parties is to return to the previous status which means that such a decision annuls all the effects produced by the decision on expropriation.

Such actions of the parties have to be observed from the material aspect, so their requests shall represent the free will of the parties, and it is not necessary to have a formal joint written request in this regard.

Upon receiving the request or requests, the competent body is obliged to render a decision for annulment of the final decision on expropriation.

In these cases the competent administrative body only confirms the existence of joint request of the parties respectively that they are expressing their free will, whereas in practice there

are cases when the annulment of the decision is done as a result of death of one party.

As mentioned above the annulment of the final decision on expropriation may be done upon a request by the former owner Art. 21, par. 4 of the Law on expropriation provides that the final decision on expropriation may be annulled as well by the request of the former owner if the user of the expropriated property does not complete the works foreseen in that building within three years term from the time the decision on expropriation became final.

The request for the annulment of the final decision may be filed by the previous owner of the expropriated property. This right may be conveyed to the successor which means it is inheritable.

Concerning the term on filing the request, it starts from the moment when the decision becomes final and it lasts three years during which period the user of expropriation has to perform the necessary work in order to realize the purpose of expropriation.

Art. 21, par. 5 of the Law on expropriation also foresees the term of 5 years from the date when the decision on expropriation became final, therefore the request cannot be submitted before the expiry of 5 years term.

The first instance body that decides upon the proposal on expropriation is also competent to decide regarding the

request for annulment of the decision on expropriation¹⁴.

4. Deprivation (dispossession) from the right to property according to the European convention on human rights

The Convention for the Protection of Human Rights and Fundamental Freedoms drafted under the supervision and care of the Council of Europe entered into force in 1953. Besides the catalogue on civil and political rights, the Convention also provides a system which facilitates the implementation or respective obligations of the member states. Furthermore this responsibility is entrusted to all relevant institutions: to the Commissioner of Human Rights, the European Court of Human Rights and the Committee of Ministers of the Council of Europe.

The register on guaranteed rights and freedoms in the Convention is quite long, the protection of property amongst them, which emphasizes: "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"¹⁵.

This indicates that the European Convention guarantees the right for enjoyment of property or in other expression the property right.

¹⁴ Article 21 par. 8 of LE

¹⁵ Article 1 from Protocol 1

However, considering the possible exceptions, the State may restrict the property right in order to realize the public interest respectfully according to the conditions provided for by law. One of the methods of restriction of the property right is without doubt the expropriation.

Taking into account the International Administration in Kosovo and the unresolved status of Kosovo, this puts in question the issue of application of the European Convention when dealing with the actions of UNMIK authorities and KFOR in Kosovo. The countries that ratify the Convention shall provide to every person within their jurisdiction, the rights and freedoms as determined by the European Convention. In the Kosovo situation this means that an application may be submitted only against a Country which has ratified the Convention. This means that an application may not be submitted against UN or UNMIK in Kosovo because such application would be in contradiction with Art. 35 point 3 and 4 of the European Convention. On the other hand, according to the Resolution 1244 of the Security Council of UN, Kosovo is under direct international administration of the member states of the UN through participation in UNMIK administration.

A situation in which we may foresee responsibility of one state is the power of KFOR; for example, according to the Convention, Italy would be responsible for the actions taken in the jurisdiction of the Italian KFOR.

Based on the judicial practice of the European Court, when a state has a jurisdiction to control a territory out of its national territory, this state may be held responsible for actions of its authorities in this territory¹⁶. Based on this, it is considered that injured parties are considered to be under the jurisdiction of that state and that state is obliged to provide them with the rights according to the European Convention.

Therefore, we consider that injured parties, including parties in expropriation cases, may submit an application to the European Court of Human Rights based in Strasbourg with the condition that the territory in question is under effective control of that state and that all internal legal remedies for realization of the rights guaranteed by legal acts have been exhausted.

5. The preparatory work for expropriation

Usually before initiating the expropriation procedure a number of preparatory works are needed, this issue is foreseen in Art. 7 of the Law on Expropriation. This work is related to the examination of the soil, measurements and other necessary examination work included in the proposal.

So the preparatory work in itself does not present any form of expropriation nor any phase for implementation of this

¹⁶ In this respect see: Yves Winisdoerffer and Anna Austin "European Convention on Human rights" Legal Studies in Kosovo Vol. 2. 2002, Prishtina pg. 3-6.

procedure, it only serves for definitive determination of the future user of expropriated property, which is done before determining the public interest.

Because of the nature and the aim of the preparatory work, it is possible for the investor to require the authorization for performing the preparatory work in some of the neighboring parcels, respectfully in some parts of the same area; so based on the collected information and results of the research, he/she will be able to decide regarding the manner of submitting the proposal, for example by drilling the soil it will determine the sustainability and the quality of the land, underground waters etc.

Even though the preparatory work is not expressly listed in the law, we think that such a work does not include:

- The preparatory work for opening manufactories:
- Construction of any road or bridge,
- Temporary construction of the premises for settlement of employees,
- Construction of the warehouses for storing the construction materials or similar.

In other words no construction may be undertaken during the preparatory work. Otherwise, the competent body which authorized the preparatory work will terminate the work which is carried out

of the frame foreseen in the license for performing the preparatory works.

The temporary occupation of the land does not present any form of expropriation, the temporary occupation of the land serves for the construction which is done in the neighboring expropriated property and this is the only thing they have in common with expropriation.

The preparatory works may be permitted as well for the socially owned property which is subject to the administrative conveyance, in light of Art. 74, 75, 76 of the respective Law.

The proposal which is used to ask for permission to perform the preparatory works has to include the following:

- the purpose of the proposal for expropriation,
- the real estate which is subject to the preparatory work,
- the owner of the real estate property,
- the nature,
- capacity,
- the purpose of the project
- time and duration.

The municipal administrative body for legal property issues is competent to decide upon the proposal for performing the preparatory works, following a request from the parties.

LITERATURE

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**Rrustem Qehaja –
Judicial Trainer**

Project activities September 2004

Civil Law Seminar – Execution of Civil Judgments

On 7 September, the Kosovo Judicial Institute (KJI) will organize a seminar on Execution of Civil Judgments. The programme will focus on problems related to the execution of civil judgments in the states in transition. The presentations will cover the existing procedure in Kosovo, the different types of execution and the legal remedies, the appeal against the execution decision. At the end of the training session a round table discussion will be organized with the representatives of the Department of Judicial Administration (DJA), UNMIK and Raiffeisen Bank. Thirty-five (35) judges are invited to participate. Three KJI judicial trainers and a judge from the District Court in Prishtinë/Priština will make the presentations.

Seminar for Judges of Minor Offences Courts

The KJI will organize a specific legal education programme for judges working in Minor Offences Courts in Kosovo on 16 September. This seminar will be a repetition of the training delivered earlier this year on 19 February and 13 May for other judges coming from Minor Offences Courts throughout Kosovo. The training programme deals with the legal and procedural matters for which Minor Offences Courts are competent, including traffic matters, public peace and order. Three judges coming from the High Court of Minor Offences in Kosovo will contribute to the seminar.

Seminar on Money Laundering

The KJI will also organize a seminar on UNMIK Regulation 2004/2 on the Deterrence of Money Laundering and related criminal offences on 21 and 22 September due to the entry into force of this Regulation on 1 September. The seminar will be organized in cooperation with Pillar I (Financial Information Centre), the United States Department of Justice and the Council of Europe (CoE). The training agenda will focus on the concept of money laundering, the overview of the applicable legislation in Kosovo, the pillars of effective an anti-money laundering programme, i.e. monitoring, detecting, reporting and prosecution, as well as the relevant responsibilities of the respective institutions, the Central Bank, Customs, the Ministry of Finance and Economy, and the criminal justice system. Experts from the USA, Kosovo and the CoE will present the existing procedures and good practices.

Workshop on Judicial Decisions

On 28 September the KJI will organize a workshop on model forms of judicial decisions, in accordance with the new Criminal Procedure Code of Kosovo. One district court judge and one criminal law expert will contribute to the elaboration of the training samples of the forms.