

The statute of limitations of compensation for factual expropriation

“The claim for financial compensation for the performed factual expropriation is not subject to a statute of limitations”.

Rationale:

There are cases of construction of buildings of public interest, or of the performance of other works of public interest, which result in a complete or partial withdrawal of the property title of natural persons or legal entities, although there is no decision on withdrawal, i.e. decision establishing the public interest and the decision on expropriation. Legal theory and legal practice subsume such cases under the concept of factual dispossession, i.e. so-called factual expropriation, which is distinguished from the concept of formal expropriation by the absence of some of the essential elements of the legally established expropriation process.

In this way, of course, the competent authorities threaten and insult the subjective rights of property owners. In this regard, the court practice has raised a controversial issue through which civil substantive law institutes the alleged violation of subjective rights of natural persons or legal entities can be remedied. In other words, the question is whether the dispute on the determination of compensation for factual dispossession and complete or partial loss of title caused by the construction of the building of public interest should be resolved by applying the rules on compensation for damages, by applying the rules on the construction of another's land or, in turn, whether the relevant compensation should be determined in accordance with the provisions of the Law on Expropriation. The answer to this question determines the resolution of the issues concerning the statute of limitations in respect of the claim for the subject compensation.

The jurisprudence of the courts of the former Yugoslavia was nearly unanimous in addressing the controversial legal issue through the institute of compensation for damages (Articles 154, 155, 185, and 189 of the Law on Contracts and Torts), so that the issue of claim for the payment of such compensation being subject to statute of limitation is considered from the standpoint of the provisions of Article 376 of the Law on Contracts and Torts. This legal position, after the dissolution of the joint state, has, until recently, been followed by the courts in Bosnia and Herzegovina, expressing the opinion that the claim for the subject compensation is subject to statute of limitations within a three-year subjective or five-year objective period, under Article 376 of the Law on Contracts and Torts.

In addressing the disputed legal issues, some courts in Bosnia and Herzegovina went the other way, taking a legal opinion that the construction of a public road, without a decision on the withdrawal of the property title of a natural person, represents a factual dispossession, which is the basis for the realisation of the right to compensation, in accordance with the provisions of the Law on Expropriation, and the right to such compensation is not subject to statute of limitations.

The jurisprudence has recorded decisions that express the legal opinion that the disputed legal issue has to be resolved by applying the provisions of the Law on Property Relations governing the acquisition of title by building on someone else's land.

Bearing in mind the above-mentioned jurisprudence, the relevant legal issue was discussed at the Civil Panel, which was organised in Sarajevo on 30 January 2014, during which a unanimous legal standpoint was taken, that factual expropriation is the basis for the realisation of the right to compensation in accordance with the provisions of the Law on Expropriation, and that the right to this compensation is not subject to statute of limitations.

The reasons for adopting the above legal position can be summarised as follows:

The total or partial withdrawal of property title of natural persons or legal entities for the construction of buildings of public interest must be based on legally conducted expropriation procedure, so that the factual dispossession, without the process of expropriation, cannot justify the public interest. In cases where a public authority exercises or allows the construction of the building of public interest on the land that is not formally expropriated, subjective rights of natural persons and legal entities to real estate are threatened and violated. The property title is one of the fundamental values protected by the Constitution of Bosnia and Herzegovina. The protection of this right is specified in Article 3 of the Law on Property Relations, which stipulates that any natural person or legal entity is entitled to the peaceful enjoyment of their property, and that property title cannot be withdrawn from anyone, except for the public interest, and under conditions provided for by law and the general principles of international law. Article 6 of the same law provides that the

property title can be withdrawn only for the public interest, in accordance with the Constitution, in a manner and under conditions prescribed by law, and that the owner is entitled to full compensation for restricted or withdrawn property title. The right to peaceful enjoyment of property, and the prohibition of its withdrawal, except for the public interest and in accordance with the law and the principles of international law, is also guaranteed by Protocol No. 1 to the European Convention on Human Rights, so that the realisation of the protection of this right is not subject to the statute of limitations in respect of claims of the Law of Contracts and Torts.

The dispute in which the construction of a public road or other building of public interest has led to the factual dispossession of the owner's property cannot be resolved by applying the provisions of the Law on Property Relations, governing the acquisition of title by building on someone else's land. This is because, as a rule, it refers to the construction of a building that has become a public good for general use, which is why the conscientious owner of the land could not be given the rights provided for by the provisions regulating the acquisition of title by building on someone else's land.

The property title is, therefore, the most complete corpus possessionis, and everybody is obliged to refrain from violations of property title of others.

In the case of factual expropriation, natural persons or legal entities are deprived of their property title, so that the basis of the claim is, in fact, a claim for repossession of property. Since the return and restoration of previous state is not possible because of the realisation of the purpose of the former property, the prosecutors are entitled to seek compensation for expropriated property. Bearing in mind that the right to claim the return of property is not subject to statute of limitations (Paragraph 2 of Article 43 of the Law on Property Relations), the claim for the required compensation of former owners is not subject to statute of limitations.

The real motive, the aim, and purpose of the factual dispossession is the exercise of public interest, i.e. the construction of buildings or the performance of other works of public interest, so that the compensation to previous owners should be determined in accordance with the provisions of the Law on Expropriation. Therefore, the issue of the statute of limitations shall be governed by the provisions of this Law.

In this regard, the emphasis is on the legal position of the Supreme Court of Bosnia and Herzegovina, Sentence No. 48, published in the Bulletin of the said Court, No. 1989/2, which reads: "A claim for compensation for socialised construction land, as well as the claim for determination of just compensation for expropriated property is not subject to statute of limitations. The statute of limitations applies only to the claim for payment of compensation, determined by certain settlement or court decision".