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Limiting the right of ownership according to theconvention for the protection of human rights and fundamental freedoms

Dr. Enes HAŠIĆ,
University of Bihać Law School

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1. The right of ownership and the European convention on basic rights and fundamental freedoms (ECHR)

Introduction

The right of ownership represents the most protected of all property rights, which, according to the classic determination, affords it holder the most complete legal and factual power over an object, or it grants such holder the right of possession, use, and exercise of the right over the thing that is the object of ownership. Even though the right of ownership is the most absolute right that anyone can have over an object, for some reasons, sometimes, it is necessary to limit this absolute effect, and even in certain cases to take the right of ownership away from the owner. In the course of history, we note the practice of selective and rough deprivation and limitation of the right of ownership of its holder. This practice had been executed under the guise of the legally established procedure of expropriation, and furthermore the just compensation of the time was either not paid out at all or was paid out in pitiful amounts, without clear legally established criteria and standards. Or, put bluntly, everything that had been stated had resulted in rough breaking of human property rights, and the so called justly determined compensation was paid out sometimes several decades removed from the coming into power of the act of expropriation[1]. Additionally in the administrative – judicial practice we find certain cases still being processed. Here we can not forget the fact that in certain individual cases of expropriation, compensation has never been paid, which certainly must be kept in mind.

1.1 The influence and grasp of the European Convention

In the past sixty years within the framework of the Council of Europe[2][3] the practice of regulating and putting into order numerous areas of the law has intensified, primarily as an answer to brutal human rights violations. In that environment the intention was to protect property rights, which ensure the economic sustainability of the individual and the society as a whole. With the adoption of the Convention for the Protection of Human Rights and Fundamental Freedoms[4], here referring to the 1950.text, there were no rules governing protection of ownership from the acts of the state. To remedy that problem the First Protocol to the European convention was adopted in Paris[5], wherein in the first article a directly implied obligation toward the state to respect and protect property rights[6] of the individual is established. The protection was

[1] Comparative law offers a number of procedures to determine compensation that lasted three decades. As in the Vajagić v Croatia case, the compensation had not ended in full 32 years, from the year 1977. to 2009.

[2]Today the membership of the Council of Europe consists of 47 European member stats. Bosnia and Herzegovina was admitted into membership on 24th of April, 2002.

[3]Also, the most significant function of the Council of Europe is the adoption of conventions, among the most important of which is the Convention for the Protection of Human Rights and Fundamental Freedoms. Vladimir Đuro Degan, INTERNATIONAL LAW, Rijeka Law School, Rijeka, 2000. Pgs 462-463.

[4]The complete text of the Convention was taken from THE BRIEF GUIDE THROUGH THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, Council of Europe Press, 1999.

[5]The conference was held on the 20th of March, 1952 and came into power on the 18th of May, 1954. Up to the present the First protocol has been ratified by 37 states. Russia and Switzerland have signed the Protocol but have not ratified it. Andorra is the only country that had not signed it. For more see THEORY AND PRACTICE OF THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, by Van Dijk and G.J.H van Hoo, Sarajevo, Muller, 2001, pg. 745. On the practice of the European Court on Human Rights, and the significant appeals decisions based on the violation of the rules of the Convention consult Domagoj Marčić and others, OVERVIEW OF THE PRACTICE OF THE EUROPEAN COURT FOR HUMAN RIGHTS, Vol. 1, number 2, Ministry of justice of Republic Croatia, Zagreb, 2006.

[6]More on the legal technical standards see article by prof. dr Enes Hašić and Hajro Pošlović, SOME QUESTIONS ON THE APPLICATION OF ARTICLE 1 OF THE FIRST PROTOCOL OF THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, Collection of papers on the current topics of civil and trade law and legal practice, number 6, Mostar, 2008. Pgs 307 and 308. In the article it is emphasized that the First protocol in a legal technical sense does not use the term ownership. In the English version it calls the right „peaceful enjoyment of his possessions" and that no one can be „deprived of his possessions" so the questioned is asked if this rule provides the guarantee of ownership, and if it is, what does it entail? The answer to this question is given by the European Court that it indeed does provide guarantee of ownership. The Court invoked the working materials used in the preparation from which the text of the Protocol was crafted. The ruling

given to the physical and legal persons in an uninterrupted enjoyment of their property. For the first time on the European level the limitation of property based on the law and general principles of international law and the public interest, is positioned, as a condition that is necessary to be established, by the state government with jurisdiction[7].

The signatory states were left with the latent possibility of a sui generis deviation from the norms of the Convention by the adoption and application of legal rules – laws. Through these legal elements as a means to an end, state governments can use them as a means of oversight over the use of property according to the public interest[8].

If we take the stated into consideration, we can notice that with the First protocol an evident effort was made to prevent unlawful acts of the state in the procedure of the taking away or limiting property. This determination was given to and through theoretical and practical critique. Firstly, at the time of the crafting of the protocol a relatively small number of states inhabited the framework of the Council of Europe[9]. On the other side, even though this obliging rule existed for the member states, the additional question is asked as to what kind of protection is given to the subjects living in those states that were not members, and especially those states that have not submitted their ratifications with the General Secretary of the Council of Europe? If we take the example of the legal norms of the Socialistic Federative Republic of Yugoslavia, we can conclude that, in these areas, the waves of change from the European level had arrived relatively late and especially if we know that Former Yugoslavia had not ratified the Convention. To tell the truth the Constitution of Bosnia and Herzegovina from 1995 and also the constitutions from other independent republics created by the dissolution of SFRY demonstrate a particular sensibility to the European convention. Bosnia and Herzegovina can in every meaning be considered aiusspecificum, considering that we have two levels of guarantees afforded to the citizens. One legal framework we have is within the domestic law, considering that the domicile organs in their actions are obliged to uphold the Convention, and the other, secondary, that even if protection is left wanting at the territory of the member states, the owners, can get protection at the level of the Council of Europe and the European Court of Human Rights[10]. In other words, Bosnia and Herzegovina has a single unusual, but obviously vital, constitutional formulation that the rules of the European convention and its protocols will be directly applied in the legal system of B&H[11]. Everything that has been stated opens numerous questions and dilemmas that are present in the positive legal norms, theory and ultimately, in judicial practice.

1.2 Bosnia and Herzegovina between obligations for the perception of the European convention and the demands coming out of the existing Laws on expropriation

In Bosnia and Herzegovina, for a long time the Law on expropriation of the Federal Republic of Bosnia and Herzegovina, adopted in 1986.[12], was in power, which contained solutions formed on the postulates of the previous socio-economic framework. By joining the Council of Europe Bosnia and Herzegovina has also accepted the jurisdiction of the European Court of Human Rights, located in Strasbourg. The specificum of the legal system and the actions of the government bodies of Bosnia and Herzegovina, which is not usual in other legal systems of the European continental circle, is represented in observance of the practice of the mentioned court in Strasbourg, primarily in those cases where the Constitutional court of Bosnia and Herzegovina decides on the submissions of the applicants whose human rights are injured. From the aspect of the practice in Bosnia and Herzegovina of forwarding individuals appeals[13] to the European Court of Human Rights in the area of expropriation are not as of yet sufficiently present, unlike Republic Croatia where beginnings of first outlines of judicial practice in this regard are visible[14].

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in the Marckx v Belgium in 1979. in which it is pointed out …. Recognition that everyone has the right to a „peaceful enjoyment of possession"from which is visible that the parties speak of the right to property.

[7]Article 1, paragraph 1. of the Protocol 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms

[8]Article 1, paragraph 2. of the First protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms

[9]The first 10 states to adopt the Statute of the Council of Europe are: Belgium, Denmark, France, Ireland, Italy, Luxembourg, Netherlands, Norway, Sweden, and the United Kingdom. On the organizational framework of the Council of Europe see work compiled by Miomir Matulović and Berislav Pavšić, THE DOCUMENTS OF THE COUNCIL OF EUROPE, University of Rijeka Law School, 2001.

[10]With the adoption of the Eleventh protocol (1998) the European Commission on Human Rights and the European Court melded into one institution titled The European Court of Human Rights. On the organizational structure and the practice of the European Court of Human Rights see article by Mario Širić, THE ORGANIZATIONAL STRUCTURE AND THE PROCEDURES WHEN APPEARING BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS, Pravna misao, Sarajevo, 2001. Pgs. 87-101

[11]Article 2 paragraph 2. of The Constitution of Bosnia and Herzegovina from 1995.

[12]The first Law on expropriation in Bosnia and Herzegovina was adopted in 1972. (Sl.list SRBiH broj 35/72), to be followed by the adoption of a new law in 1977. (Sl.list SRBiH 19/77). After nearly ten years of application the need became apparent to amend and add to the Law in 1986. (Sl. list SRBIH broj 18/86 and correction 9/87). Soon due to the needs of the practice and for the ease of navigating the numerous changes and additions in1987. the publication of the cleaned text of the Law on expropriation was undertaken (Sl. list SRBiH broj 12/87. adopted on 20th of may, 1987, that was amended in 1989. (Službeni list SR BiH broj 38/89). Afterwards in B&H up until the statehood was a unified law in power regarding this matter. During the war the Law on expropriation would be put out of legal power. In Republic Srpska a special Law on expropriation was adopted in 1996. We note the wave of changes since 2004 with the adoption of the modern Law on expropriations of real-estate in District Brčko. On similar, but also in some areas significantly different basis were on 2006. and 2007. Expropriation laws were adopted in Republic Srpska and the Federation of B&H.

[13]In the initial period individuals could not directly appeal to the European Court, instead, they had to do it through the Commission on human rights. So, the parties were the European commission and the memberstates. Today it is a recognized right for individuals to, on the basis of Article 34 of the Convention to forward an individual case to the Court. Mario Širić, ibidem, page 89.

[14]Here we can use the case of Bistrović v Croatia especially. The case before the European Court was initiated relating to the expropriation of land for the purposes of building the Zagreb – Varaždin highway. The plaintiffs in the case before the domestic administrative bodies and the county court lost the case for the expropriation of the entire land, due to the execution of the ownership rights, as was claimed, in that part of the

From the prism of positive legal rules, it is worth noting that the practice of the instruments that guarantee the application of Article 1 of the First protocol of the Convention, which are the former Human Rights Chamber of Bosnia and Herzegovina, and the Constitutional court, and at the supranational level the European Court of Human Rights.

1.3 Human Rights Chamber of Bosnia and Herzegovina and the European Court in Strasbourg as protectors of human rights – procedures of taking away of ownership.

Human Rights Chamber of Bosnia and Herzegovina[15] (Chamber) as part of the Commission for Human Rights in Bosnia and Herzegovina was established with the basic purpose of protecting the rights afforded individuals in the Convention. The material source is Article 1 of the First Protocol within the Convention as it pertains to property. At the time of the mandate of the Chamber, said institution had adopted several rulings that start paving the way to creating the practice of protecting human rights. At the beginning we should note that the Chamber, while deliberating on its rulings extensively used to use the practice of the European Court of Human Rights in Strasbourg.

However, the cases relating to the expropriation had come to see their day in the sun. The first procedure relates to the limiting of ownership, and here the Chamber considered the case that fell in the category of factual expropriations, even though the same ones were not applied in the legal meaning. By which we primarily mean the adoption of the Law on abandoned apartments[16], and the distribution of same to third persons.

Here we need to especially punctuate the moment of the adoption of this law, on the one hand, and the lack of compensation, on the other, by which this attains outlines of the classic nationalization law. Firstly the law was adopted in the moment of hostilities due to war and the other is that it does not regulate compensation, i.e. it is left out[17]. A similar view toward de facto expropriation is taken by the European Court of Human rights in the Papamichalopoulos et al. v Greece[18]. Here it is plainly visible that the rights afforded by the Convention to the states does not create a justification of arbitrariness , firstly, when property rights are at stake.

The ruling by the Chamber relating to the application of the measurements for the elimination of expropriation is important to note, it points out the following *(... it is necessary to consider that the measure in question leans toward a justified goal in the public interest, and furthermore if there is a reasonable relation between the proportionality between the means used and the goal that is to be achieved.*)[19]

The ruling in question is important because it points out three elements that condition allowing the limiting or the taking away of the right of ownership which are a reasonable basis, as the primary, a proportionality of means and the goal, as the secondary condition and a justified goal as the tertiary element. The results of the

un-expropriated real-estate has no point, even though the case led to a factual situation that the built highway was only three meters away from the family living compound. As they were denied their claim, and as they had exhausted all domestic legal means, the applicants turned with their case to the European Court for Human Rights against Croatia. The Court after holding the hearings, among others, decided that the actions of the jurisprudence bodies of Croatia was directly opposed to the First protocol of the Convention and thus had caused damages for the applicants, that they had not shown the intent and the willingness for both sides to be seen as equal and to explore the entire subject mater in question. The court ordered for Republic of Croatia to compensate the damages in the sum of 5000,00 Euro for the nonmaterial damages and the sum of 2800,00 Euro for the costs of the proceedings. This case practically demonstrates that in addition to exhaustive domestic legal remedies available to the applicants there is also the final legal recourse available to procure a favorable outcome under the guise of the Court from Strasbourg. For more on this see an article by Lea Radaković, THE PRACTICE OF THE EUROPEAN COURT FOR HUMAN RIGHTS: THE BISTROVIĆ V CROATIA CASE, pravnik 42, 1 (86) Zagreb 2008.

[15]The Chamber was founded in march of 1996. in according with Annex VI of the General framework agreement for peace in Bosnia and Herzegovina, with the goal of protecting human rights. The mandate of the Chamber elapsed on the 31st of December, 2003.. After the elapsing of the mandate of the Chamber, the cases received up until the 31st of December, 2003. Were resolved by the Commission for human rights, so that upon the completion of which the protection from violations of human rights the citizens could achieve through a direct referral to the Constitutional court of Bosnia and Herzegovina. More on the work of the Human Rights Chamber for Bosnia and Herzegovina see the article by Mehmed Deković, AT THE END OF THE MANDATE OF THE HUMAN RIGHTS CHAMBER FOR BOSNIA AND HERZEGOVINA, Pravna misao – magazine for legal theory and practice, Sarajevo 2003. Number 11-12, pages 3-7.

[16]During the war a Law on abandoned apartments was adopted. This law allowed jurisdictional government bodies to place apartments in communal ownership, whose inhabitants left the apartments, to proclaim them abandoned" and to issue a temporary permission to use those same apartments to other individuals. On the 22nd of December, 1995. The law was amended so that if the individuals did not request nor did they move into their apartment up until the 6th of January of 1996, their apartments in those cases were found to be permanently abandoned and as such could be permanently transferred to the new inhabitant. This law blocked the return of tens of thousands of refugees and dislocated persons in to their pre-war homes, with which, absent any procedure or compensation persons were prevented from enjoying the right on the basis of their inhabitation rights. More see the web portal http://209.85.229.132/search?q=cache:jk-wtXYBlGAJ:www.ohr.int/ohr-dept/hr-rol/property/fbipropleg/claimforms/default.asp%3Fcontent_id%3D5941+zakon+o+napu%C5%A1tenim+stanovima&cd=1&hl=bs&ct=clnk&gl=ba. Last checked on the 29th of July, 2009.

[17]For the „Onić" case see Christopher Harland, Ralph Roche, Ekkehard Strauss, THE COMMENTARY OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ACCORDING TO THE RPACTIE IN BOSNIA AND HERCEGOVINA AND STRASBOURHG. Grafičar promet, Sarajevo, 2003. Page 350.

[18]Delivered on 24th of June, 1993. Series A, no. 260-B paragraph 42. In the case the applicant to the European Court were Greek citizens that were owners of a notable peace of real-estate in Greece. AS they intended to build a tourist complex they asked the government for the necessary permits, which they got. However, after the introduction of the military regime in 1967. The then military hunta took away the real-estate in question and decided to make a resort for military officers and additional naval capacities. The European Court for Human Rights had found the fact of the seizure and the taking away of the real-estate as improper government entanglement in violation to paragraph 2. of Article 1 of the First paragraph and that the stated actions of the government can not be considered as being in the context of oversight over the use of property. For more see the article RIGHT TO PROPERTY by Monica Carss-Frisk, Council of Europe and Grafičar promet, Sarajevo, 2002. Page 33

[19]Christopher Harland, quoted work, page 351

efforts are noted in the achievement of a more justified ratio on the relation of the general interest on the one hand and protecting the basic rights of the individual on the other.

1.3.1. A reasonable basis and public interest

The European Court, according to Article 1. Paragraph 2 of the First protocol permits states to, in one extensive variance of interpretation, allow the invocation of public interest. One will be recognized as such up to the moment it crosses into a sphere of it being „without a reasonable basis"[20]. The reasonability is perceived also in the sphere of the upwardly limited boundary. In that vein, the actions of states must be based on a clear legal framework, with the determination that the reasonable basis is not encroached upon, in which case the encroachment borders on the injury upon the ownership rights of the subject. From the quoted verdict it is clearly visible that the Court in Strasbourg does not want to enter a discussion on that which it considers to be within the framework of the legal norms governing public interest. To the contrary, it defines the legal standard as „necessarily narrow", considering natural the wide field of estimation that belongs to the legislator in the context of the application of the measures of social and economic policy. This verdict is significant also because beside reasonability, as the upper boundary up to which the acts of the state can reach, it introduces an interpretation of the public interest from the prism of the possibility of using property by the wider social community, with a clear emphasis that the taking away of property can be in the public interest, even when the widest community will not benefit from the taken property.

A special question is raised by setting the dilemma in context of weather or not the public interest can be pointed toward a physical being. The Court in the James v UK verdict has clearly stood on the opinion that public interest is not necessarily the acting itself by the government body, but that that right perfectly legitimately also belongs to the individuals. In other words, the Court was asked to interpret the Convention in the context of the circumstances in which the taking away of property was not generally to benefit the community, and in which the issue is the transfer of property from one individual to the other, both being physical beings. The Court took the opinion that even though the issue was not related to government bodies, such acts, relating to physical beings can be in the public interest, which opened up the path for further specification and the malleability of the concept of public interest.

1.3.2 Proportionality

Proportionality of any kind is the foundational characteristic of a legally efficient procedure in front of jurisdictional governmental bodies. This is the subject of constant interpretation of the Convention in the cases before the Court. In that sense the acts of the jurisdictional governmental bodies are characterized by a necessary continuous balancing. The equilibrium has been found lacking in every case in which one side is found to be in a position in which it has to bear the bigger burden than the other side. The state government is given the right to „control" the equality of the sides in the context of the application of the measures necessary in a democratic society. By the application of the normative methods of interpretation of Article 1 of the First protocol three basic principles can be determined to follow as a result. The first one is that the right to a peaceful enjoyment of property and the exclusion of every other subject from its interruption (the first sentence of the first paragraph), the second in the fact that property can be taken away, and also be limited only in the situations in which special conditions are proscribed for (by which the law and the public interest finding of the governmental bodies that have such an ability on the basis of national legislature of the state member of the Convention is understood). The third principle is manifested in the systematic control by the government being administered, that is granted to them with the fulfillment of special circumstances there where the interest is dominant (the use of property, the payment of taxes, contributions, penalties – second paragraph)[21].

Focusing on the second principle, it is evident that the taking away of property results in the shutting down of ownership rights. The open question is how the Court in the case at hand undertakes the logical operations with the goal of detecting problems (the injury of the rules of the protocol)? First of all it is necessary to establish the act of losing ownership. Ergo, the taking away of property or the entanglement in the peaceful enjoyment of property ultimately is allowed in the imperatively set conditions and circumstances, such as the taking away of property according with the law, the existence of public interest, and the paying of just compensation. In the end for the acts to be proportional, i.e. necessary in a democratic society[22]. If even one of the elements was found to be lacking in the process as a result the breaking of the rules of the protocol would be a direct consequence.

[20] *Verdict James et al v United Kingdom from 1986. paragraph 46. and 48. In this case the applicants challenged the correctness of the application of British laws that directly allowed to long term lease holders to buy the apartment from the owner at a price that was lower than the market price. On the practical aspects of the application of the Convention for the Protection of Human Rights and Fundamental Freedoms see Donna Gomien, A BRIEF GUIDE THROUGH THE EUROPEAN CONVENTION ON HUMAN RIGHTS, Council of Europe Press, Sarajevo, 1998. Page 112.*

[21] *In the Sporrong and Lonnroth cases, verdict delivered on 23rd of September, 1982. In the case the applicants claimed that the decisions of the city of Stockholm had the result of limiting the right of ownership by the very fact that the authorities issued licenses for expropriation even though the expropriation itself was never administered. So here we have a de facto expropriation. The city officials attempted to point to the fact that the issued permits do not on their own constitute the taking away, and especially not the limitation of the right of ownership, the Court held that the subject rulings of the government authorities had greatly made more difficult the execution of the right of ownership, by which the subject acts represent a direct violation of Article 1 of the First protocol. For more on the violations of Article 1of the First paragraph, see EXCERPTS FROM THE JUDICIAL PRACTICE OF THE EUROPEAN COURT FOR HUMAN RIGHTS 2, Council of Europe, Sarajevo, 2001. Page 421.*

[22] *Prof. dr Enes Hašić, Hajro Pošković, cited article, page 313.*

Say, in the Brumarescu v Romania[23], the Court considered the application of the applicant in a way that in the concrete case had indisputably established the procedures of the jurisdictional government bodies (both in the trial and the appeal) from the standpoint of the nationalization of the apartments, which are directly pointed toward the limiting of the right of ownership of the applicant and thus constitute the breaking of the rules of Article 1 of the First protocol.

1.3.3 Justified goal

The reasonability of the basis and the proportionality of the acts of jurisdictional government bodies is in the context of a just and objective balance. The fact is that the Chamber during its mandate had ruled in several decisions that in their meritum relate to the taking away of and limiting property rights of all kinds. After the Chamber ceased existing the review of these cases was handed over to the Constitutional court of Bosnia and Herzegovina. However here a new problem is born within the real physical capacities of the Constitutional court to, among others, solve a large part of the cases that concern human rights violations and that were jurisdictionally transferred by the shutting down of the Chamber. More so if one knows that in the first moments after the shutting down of the Chamber the Commission for Human Rights, as the successor of the Chamber in the transitional period received up to 150 cases[24] monthly, in which the citizens claimed violation of human rights by the government institutions and bodies, so that the total number of 9000 cases there remained unsolved[25] at that point. Naturally in the broader sense those cases concerned the right of ownership in the context of the already widely potentiated article 1 of the First protocol of the European convention.

1.4 European court in the function of the supreme European judicial authority and the compensation for expropriated real-estate

The European Court for Human Rights in its verdicts reaches into the actions of the jurisdictional government bodies of the member-states as opposed to the submissions of the applicants. The whole string of verdicts is proof to that. However, in a good number of cases the Court did not strike down the actions of jurisdictional government bodies in its essence, but it took its position in vague terms and with utter care, so that from the cases it is clearly visible that the extensive approach in the interpretation of the idea of peaceful use of property and its link to the right of ownership[26], holds great sway.

The compensation of damages holds a vital status for the individual, as usually in this segment the state violates some of the rights guaranteed in the Convention. *In concreto* if the process of expropriation is followed through, and the compensation is not given, the conditions are met for the European court to act. To tell the through the right of compensation is not implicitly regulated in Article 1 of the First protocol of the Convention, instead it calls upon the general principles of international law. This directional disposition lowers the elements of international law on to the European level[27]. That is why, in the James v UK[28] case, those applications of Article 1 of the First protocol is said that the guarantee of ownership would be illusory if there was no system of honoring the same, and compensation appears, ultimately, as the element of balance.

In the mentioned case of Bristović v Croatia the compensation claim for the perpetrated material damages set for the purposes at 349665,05 Euro as compensation for the inability to use the remaining part of his real-estate, the Court holds that it can not tangle itself into the amount of the claim of non-material damages. It is necessary, as primer, to establish the facts appearing before the national government body. With the same verdict it directs the interested party to ensure its legal protection through the institute of renewing the procedure according to the rules of Civil procedure law. In the end the Court ruled for the state to pay out to the applicants in the name of non-material damages the sum of 5000,00 Euro.

The fact is that without the existence of the European Court the respect and application of Article 1. Of the First protocol would be superfluous, but also, the practice of acting, in the end gives much less than the applicants in a large number of cases expect, so that it seems on a broader sense of the word inadequate for the protection of the violated goods of the individual. It would be too much to conclude that the current inadequacy means lack of justice, especially if we take into consideration the fact that the negative

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[23] *Brumarescu v Romania, 28th of October, 1999, paragraph 76*

[24] *Mehmed Deković, cited work, page 5.*

[25] *On the problems of protecting human rights based on the Convention after the shutting down of the Human Rights Chamber see Mehmed Deković, THE COMISSION FOR HUMAN RIGHTS WITH THE CONSTITUTIONAL CORT OF BOSNIA AND HERZEGOVINA CEASES WORK, Pravna misao – časopis za pravnu teoriju i praksu, Sarajevo, 2007. Number 1-2 page 71.*

[26] *In the legal system of Croatia the Vajagić v Croatia case is significant when the matter of analyzing the actions of the European Court of Human Rights is concerned. The applicants in the case had based their claim before the European Court on the basis of violating Article 1 of the First protocol to the Convention (violating the right of ownership), on Article 6, paragraph 1. (duration of procedure) and on Article 13 of the Convention (effectiveness of legal remedies). The court had on the basis of Article 41 shown it legal contentment, which relates to the decision making on compensation. The Court held that the application of Article 41in the case was not ripe for verdict, and called the parties to achieve agreements on the issue, regardless of a series of attempts of domestic governmental organs to determine the size of compensation. The quoted case, also is significant in the way of the quantification of the definition of ownership. Namely, the violation of the right to peaceful enjoyment of ownership is seen in the context of entanglement in to the right of the applicant (by which ownership is meant) and through the permanent nonpayment of compensation. Therefore the entanglement can not be interpreted as taking away ownership, but falls under the investigation on the basis of the first sentence of article 1 of the First protocol which lists in general the principle of peaceful enjoyment of ownership. Paragraph 37. of the verdictVajagić v Croatia from the 20thof June, 2006. Application number 30431/03.*

[27] *In international law, in the domain of the rights of those of whom the right for compensation was taken away according to the Hull definition of compensation, under which such an individual can be deprived or property only trough an efficient and one that can not be postponed allocation of appropriate (complete) compensation. Nikola Gavella, THE GUARANTEE OF OWNERSHIP IN ARTICLE 1 OF THE FIRST PROTOCOL TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS, European private law, Collection of papers, Zagreb, 2002. Page 44.*

[28] *James v United Kingdom, verdict of the European court, 1986. Series A, number 98.*

assessment of the acts themselves by the European authorities is sufficient alarm for an emergency correction of the jurisdictional government bodies and that there is a necessity for a divergent course of action, that can not be immune in the application of the instructions from the level of Council of Europe. The legal system of Bosnia and Herzegovina in this segment, starting with the double layer toward the European convention can be viewed as aiusspecificum. Through a colorful array of uneven and somewhat overbroad framework of legal determination of what constitutes public interest by the municipal government bodies, puts the constitutional guarantee of the equality of citizens before the law in the procedure of expropriation in question in similar or identical situations, when they appear before two or more jurisdictional administrative bodies in B&H. Theoretically, of no less importance is the problem that we find in the legal inability of legally attacking rulings of municipal councils on their determinations of general interest. The situation is somewhat better in the legal systems that established a better organizational structure that not only treat public interest in a restrictive and qualitative variance, but also in a procedure that ensures a maximum of guarantees.

However, on the European level there exist cases in which the European court had entered in to the meritum of the violation of property rights by state bodies. A typical example of such a case we find in the *Ouzounoglou v Greece*[29] case. The European Court had investigated weather certain expropriation of land represents a permissible means of limiting the right of ownership as an object in public interest. By weighing the circumstances of the case the Court concluded that there was a violation of the peaceful enjoyment of ownership, and characterized the actions of jurisdictional government bodies as a violation of the European convention. The existence of the afflicted damage the Court estimated on the basis to just compensation. Here too is the question of what constitutes the „justness" of just compensation. So that it could determine the condition of the existence of the criteria the absence of which the Court is not able to, to determine the amount of afflicted material damages. The eventual suggestion on the retrial is given only as a corrective of the reparation, but again at the burden to the legal system of the state that violated the rights of the individual. We are of the opinion that the European Court as the final institutional guarantee of the prohibition and the corrective of the domestic legislation and of the acting of the jurisdictional government bodies is successful at qualitatively refuting the frequent submissions of the applicants.

It had been mentioned earlier the relatively good comparative solution found in the Republic Croatia legal system relating tot he possibility of renewing the procedure n a way that the side in the case according with the Croatian Civil procedure law can request a retrial. In Bosnia and Herzegovina the Civil procedure law itself does not foresee such a possibility. In fact, according to the rues that govern retrials[30] there is no clear standpoint on the importance of the recommendation of the European Court, but what is spoken of are the general generic rules, applicable to the cases noted in the CPL of Federation of Bosnia and Herzegovina. The lack of legal definition points to the forthcoming need to change the process law in the function of the legality of the procedure of expropriation, all with the ultimate goal of introducing a precise legal rule on the obligation of an unconditional implementation of the opinion of the European Court, not only for the created jurisprudence, but also through clear and concretized and individualized suggestions. A special sensibility needs to be pointed to the determination of the compensation regarding the diminishment of the value of the remaining part of the real-estate, that is left over after the procedure of the expropriation, and which is not encompassed by the expropriation[31]. Already in this regard have been verified the legal norms of France, which in the Law on expropriation (Code d´ expropriation), defines compensation as main and additional. It is the additional compensation precisely that is directed toward the reduction of the value of the remaining part of the real-estate.

Regarding the compensation for the remaining part of the real-estate the Law on expropriation of Bosnia and Herzegovina is silent and it points the party against whom the procedure of expropriation is undertaken to, on the basis of the law[32] seeks compensation for the remaining part of the real-estate as well, which this legal solution makes lacking. The legislator was led here by the intent to establish the balance of the position of the sides, but now in favor of the user of the expropriation, and the narrowing of the possibilities of the over frequent use of this institute, primarily for the reason that the user of the expropriation which operates in the public interest would be additionally financially burdened, for something that he/she factually does not need. So, in this way the user acquires land that ultimately will not be useful to it, but will be financially burdened. This problematic is especially acute during the construction of large objects such as highways, hydro energy potentials, when it is necessary to expropriate large parts of real-estate. Here the European Court in its practice had not given clear opinions, even though they are sensitive questions for the titleholder of the partially expropriated land, which must change in the future.

Conclusion

The right of ownership is established in Article 1 of the First protocol of the Convention for the Protection of Human

[29]Ouzounoglou v Greece, number 32730/03 from the 25th of October, 2008.

[30]Rules on retrials, articles 255-267 Civil Procedure Law of the Federation of Bosnia and Herzegovina (Službene novine FBiH, broj 53/03).

[31]An excellent legal solution is woven in the legal system of Slovenia where the part of the compensation for the expropriated real-estate encompasses the part that also relates to the diminished price of the remaining part of the real-estate that was not expropriated even though expropriation in Slovenia is governed not in one but in several laws, as in for instance in the Law on the building of objects, Law on waters, Law on the protection of the environment, Law amending the law on public roads, Law on the ordering of space and the Law on land for construction. For more see the Sanja Zagarski Monography FINANCIAL EFECTS OF THE TAKING AWAY OF PROPERTY, Croatian legal review, Zagreb, 2006.

[32]Article 11 of the Law on expropriation of Federation of Bosnia and Herzegovina from 2007.

Rights and Fundamental Freedoms. This fundamental right is not absolute, however, as there is exception for limiting or taking away it from the individuals by the states, when there is justification in the form of public or communal interest to do so. It is very important to properly define what this means, which is what the paper addressed. It looked at the interpretation of such a limitation as it was defined by the European Court of Human Rights, by the former Human Rights Chamber of B&H and others. The work pointed to the three elements that act as pre-requisites for the limiting of this right: namely the reasonable basis and public interest, proportionality and a justified goal, all of which were examined in detail. The paper also focused on the important issue of just compensation for the expropriated real-estates. The question of compensation for damages resulting in the diminishment of value of real-estate due to parts of it being expropriated and parts not was raised and addressed.

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