

UDC: 332.22:349.41(497.11)

Review paper

Received: -

Acceptee: November, 13, 2020.

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THE RIGHT OF FOREIGNERS TO ACQUIRE MOVABLE AND IMMOVABLE PROPERTY IN THE REPUBLIC OF SERBIA

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Abstract: *The authors in this paper give an overview of the legislative solution to the regulation of the legal problem of acquiring property in the presence of the element of foreignness in the subject, by the acquirer. Special attention is paid to the notion of reciprocity as a basic condition for acquiring real estate, and the mechanisms in practice that are applied in order to determine it from the point of view of origin and content. After introductory speeches on the concept of a foreigner, the content and function of property, the authors place special emphasis on the problem of acquiring real estate both inter vivos and mortis causa in our country. Pointing to the positive legal solution, they give recommendations for the future actions of the bodies, but also recommendations for future legislative solutions.*

Key words: *legal problem of acquiring property; legislative solution; the notion of a foreigner; acquisition*

INTRODUCTION

The issue of the rights of foreigners would not be hypothetically raised if only the inhabitants or citizens of that country existed on the own territory of a certain country, and thus the sphere of legal solution for the citizens of a given country would be sufficient. From the very setting of the hypothesis, it is clear that it would not be suitable for an artificially created model of observation, because today the principle of freedom of movement of persons is one of the fundamental principles that enable freedom of residence, employment and even acquisition of property in any country. It is clear that, with the exception of the legal engineering of the European Union and its members, this type of freedom is subject to certain previously fulfilled conditions that each state sets and prescribes in the internal legal order.

The general principle that we can observe today comparatively is to allow the enjoyment of rights to foreigners at the general level, by declaring that foreigners have all the same rights as domestic citizens with the exception of those specifically reserved for citizens of a particular state, and they are usually directly related to public-legal relations with the given state.

Our legislation regulates the issue of the position of foreigners by general and special laws, as well as bylaws when the urgency of the situation requires a prompt response, as is the case with the global pandemic in which we find ourselves.

THE NOTION OF A FOREIGNER

The Law on Foreigners¹ in Article 3, paragraph 1 and item 1 defines the term foreigner in a general way as a person who is not a citizen of the Republic of Serbia. Therefore, a foreigner is any person who does not have the citizenship of the Republic of Serbia.

The Law on Foreigners regulates the conditions for entry, movement, stay and return of aliens to the home country on the one hand, as well as the competence and affairs of state administration bodies of the Republic of Serbia, in connection with the aforementioned situations, stating that the procedure is in accordance with the law of the same name that is in force.² This law is not suitable for application in situations concerning asylum, refugee status, statelessness or persons enjoying privileges and immunities in accordance with the principles of public international law.³

1 Law on Foreigners, ("Official Gazette of RS", No. 24/2018 and 31/2019)

2 Law on Foreigners, Art.1

3 Law on Foreigners, Art.2

It is clear from the introductory considerations that the Law on Foreigners will not give us an answer to the initial question concerning the right and scope of enjoyment of property by foreigners on the territory of the Republic of Serbia. The question that pretends to be resolved beforehand, and we do not find the answer in the terms of the mentioned law, is how to treat a person who, in addition to the citizenship of Serbia, also has the citizenship of another country, ie the situation of bipatrids. Is it in accordance with comparative legal solutions at the discretion of the competent authority to assess which citizenship is effective, in which the center of life activities, active residence and give priority to it, whether we thereby deny the fact that the person is still a legal citizen of the Republic of Serbia. Clearly not, this type of determining the effective existence in one territory would be more appropriate to determine a fact that is closer to the territory, such as residence, domicile or similar seat of the legal entity, but in the complexity of public relations between the individual and the state it will not give the right answer. Since the issue of property is a matter of private law relations, we must look for the answer in the law that regulates the issues of private law relations with the element of foreignness.

In the Law on resolving conflicts of laws with regulations of other countries⁴, in the introductory part explaining the basic terms that will be applied in this law, special attention is paid to the legal situation of persons with two or more citizenships, one of which is citizenship of the Republic of Serbia and the situation when domestic body must assess which of the two or more citizenships to take as decisive if the person does not have the citizenship of our state, and the determination of citizenship is necessary as a preliminary action in order to reach a valid conflict of law solution.

By applying Article 11 of the mentioned law, if the issue of enjoying a certain right of a foreign citizen were raised before our body, and that person has two or more citizenships, one of which is the citizenship of the Republic of Serbia, from the point of view of our law and institutions and competent authorities, that person will not be a foreigner and will have the legal status of a domestic citizen. Consequently, if the element of foreignness existed only on the basis of its bi-patridy, the element of foreignness is no longer applied by Article 11, but the legal situation will be resolved on the basis of regulations governing the legal status of domestic citizens.

The need to establish the nationality of a person with two or more foreign nationalities, neither of whom is a domestic nationality is legally relevant, although for

⁴ Law on Resolving Conflicts of Laws with Regulations of Other Countries, ("Official Gazette of the SFRY", No. 43/82 and 72/82 - correction., "Official Gazette of the FRY", No. 46/96 and "Official Gazette of the RS" , No. 46/2006 - other law), Article 11.

property issues the dominant point of attachment is not the *lex nationalis* but the *lex rei sitae*, while issues such as inheritance without a clearly defined relevant nationality will not give the correct conflict of law solution. The law here offers aids in paragraphs 2 and 3 of the mentioned Article 11, which in a situation when a person has two or more citizenships, and none of them is Serbian, we look in which country he has registered residence, and in which country that residence is effective, then in the end we establish with which country he has the closest relationship, ie the closest connection.

It is clear here that it is a question of assessment and adequate application of terms and concepts of the law and determination of the same by the competent body before which the procedure is conducted. Further in this paper, the authors will pay special attention to property and ways of acquiring property by persons defined by law as foreigners, as well as a graphical representation of the percentage of foreigners in our territory and their structure according to the countries they come from, which will indicate a clear need to given states, if not, a clear and facilitated reciprocity regime is established.

THE RIGHT OF FOREIGNERS TO ACQUIRE PROPERTY

The issue of the rights and scope of the exercise of property rights by foreigners in the home country is an issue that does not lose its relevance in international law. (Kitić, 1991) Comparatively, legal theory and practice strive to create a unified approach to the acquisition of movable and immovable property in order to contribute to the unification of national rights and enable equal legal treatment of persons in terms of enjoyment of property rights by foreigners. Contrary to the real rights on movables, real rights on real estate are comparatively and legally treated as relatively reserved rights, and sometimes as absolutely reserved, but an increasing number of countries determine national treatment. (Varadi et al, 2016) When it comes to movables, the issue of the legal regime of enjoyment of movables in the broadest form will not be raised because there is a comparative-legal equating of the regime with the regime of domestic citizens. Our Law on the Fundamentals of Property Relations regulates the issue of the right of foreigners to acquire both movable and immovable property in our country. As a confirmation of the claim that the regime of acquiring mobility is relaxed, the provision of Article 82 of the mentioned law, which does not envisage complete equating of foreigners with domestic citizens, both in terms of natural foreign persons and economic entities or legal entities in a broader sense, is

in favor.⁵

The right of foreign persons, both natural and legal, to acquire the right of ownership on real estate on the territory of the Republic of Serbia, legal transactions *inter vivos* (contract of sale, gift contract, contract for life support, etc.) and legal transactions *mortis causa* (inheritance) it is regulated by the already mentioned Law and the bases of property relations of RS.

In the following presentation, the authors will pay attention to the analysis of the legal provisions of the said law in order to present a positive legislative solution regarding the regime of real estate acquisition for life and after death, with special reference to the treatment of land ownership as a special type of real estate.

Acquisition of property rights by legal affairs among the living (*inter vivos*)

Article 82a of the Law stipulates that foreign natural and legal persons performing activities in our country may, under conditions of reciprocity, acquire ownership of real estate necessary for them to perform those activities (paragraph 1), and foreign natural persons who do not perform activities in the Republic of Serbia may, under the conditions of reciprocity, acquire the right of ownership over an apartment and a residential building as well as other citizens of the Republic of Serbia (paragraph 2). Therefore, if it is a matter of economic entities that are not residents, our legislator envisages a special condition for acquiring property, and that is that the acquired property is necessary for performing the registered activity of those persons, ie that person.

When it comes to the acquisition of property by a natural person - a foreigner, in accordance with the previously defined definition, the acquisition of real estate is allowed in principle, but requires an additional condition for the existence of reciprocity. Namely, it is necessary for the foreign country of the foreigner to allow our citizens to acquire real estate, according to the principle of reciprocity.

Also, in accordance with Article 82a paragraph 2 of the Law on Fundamentals of Property-Legal Relations, a natural person who does not perform activities in the Republic of Serbia may not acquire ownership on other types of land, unless it is land on which there is an apartment or residential building on which he acquires the right of ownership, ie land that is used for regular use of an apartment or residential build-

⁵ Law on Fundamentals of Property-Legal Relations, ("Official Gazette of the SFRY", No. 6/80 and 36/90, "Official Gazette of the FRY", No. 29/96 and "Official Gazette of the RS", No. 115 / 2005 - other law), Article 82.

ing. (Baturan, 2013)

We wish to point out that there is an exception when it comes to agricultural land because Article 1 of the Law on Agricultural Land⁶ explicitly prescribes that a foreign natural or legal person cannot be the owner of agricultural land. Article 2 of the same law defines that agricultural land means land used for agricultural production (fields, gardens, orchards, vineyards, meadows, pastures, ponds, reeds and swamps) and land that can be claimed for agricultural production. (Vukićević et al, 2011)

The court or other body before which the issue of reciprocity is raised (eg real estate cadastre service), if it does not already know about it, should request the necessary explanation of reciprocity from the ministry in charge of justice, in this case the Ministry of Justice. Any other interested person may request an explanation of the reciprocity. The procedure is relatively simple, a request is submitted with which a fee is paid.

The issue of the type of reciprocity required for the acquisition of real estate is not regulated by the said Law, and it is assumed that this acquisition does not require the existence of contractual (diplomatic) reciprocity with the relevant foreign state, but it is sufficient that the legislation of that state allows the acquisition of real estate for foreign persons under conditions that are not significantly more severe than the conditions prescribed by the domestic Law, as well as in practice to allow citizens of the Republic of Serbia to acquire real estate on the territory of the respective state (actual reciprocity).

The Republic of Serbia has established contractual reciprocity with regard to the acquisition of property rights through real estate *inter vivos* by natural persons with only a small number of states, on the basis of trade and navigation agreements concluded in the first half of the twentieth century. In some of them, reciprocity is explicitly agreed, and with some of them, reciprocity exists through the application of the most-favored-nation clause. These are the following countries: Great Britain, the United States, the Kingdom of the Netherlands and Japan. (Ministry, 2020)

With regard to other states with which reciprocity has not been agreed, the Ministry of Justice, on the basis of the legal regulations of the respective states which regulate this matter, ie by exchanging notes, has determined the existence of reciprocity with many states.

6 Law on Agricultural Land, ("Official Gazette of RS", No. 62/2006, 65/2008 - other law and 41/2009)

Table1. Countries with which there is reciprocity

Argentina	Australia	Austria	Bahrein
Belize	Belgium	Belorussia	Bosna i Hercegovina
Brazil	British Virgin Islands	Bulgaria	Great Britain
Greece	Denmark	Dominikan Republic	Egypt
Izrael	Iran	Ireland	Italy
Japan	Armenia	South Africa	Jordan
Kazahstan	Canada	China	Cupryrs
Lebanon	Latvia	Lithuania	Liechtenstein
Lukseburg	Hungary	Malta	Morroco
Mexico	Moldavia	Germany	Newi Zeland
Norway	Panama	Peru	Poland
Portugal	Russian Federation	Romania	United States of America
Singapur	Syria	Slovakia	Slovenia
Turkey	Uzbekistan	Ukraine	Finland
France	Holland	Croatia	Montenegro
Czech Republic	Switzerland	Sweden	Spain
United Arab Emirates	Azerbaijan	El Salvador	Qatar
Cuba	Senegal	Yemen	

Source: www.mpravde.gov.rs

With regard to non-listed countries, the process of determining reciprocity is ongoing, and in that case it is necessary to apply to this ministry for clarification.

Acquisition of property on real estate by legal affairs mortis causa

Article 82b of the Law stipulates that foreign natural persons may, under con-

ditions of reciprocity, acquire the right of ownership over real estate located on the territory of the Republic of Serbia by inheritance under the same conditions as domestic citizens. Here we can see that the regime of inheritance is equally regulated as the acquisition of real estate for life, and the existence of reciprocity is envisaged as a basic condition.

Acquisition of real estate with a number of countries is regulated by bilateral agreements on legal assistance which contain a clause of national treatment, ie they provide that citizens of one contracting party can inherit property on the territory of the other contracting party under the same conditions and to the same extent as domestic citizens.

In this way, contractual (diplomatic) reciprocity is ensured. Such a solution is contained in the agreements on legal assistance, agreements on trade and navigation, ie in fact with the following countries (Ministry, 2020):

Table 2. Overview of countries with which there is a contractual reciprocity in terms of acquisition of real estate by inheritance

Austria	Belorussia	Bosna and Hercegovina	Bulgaria
Great Britain	Japan	Hungary	Mongolia
Poland	Russia	Romania	Ukraine
USA	Slovakia	Montenegro	Holland
Czech Republic	Slovenia		

Source: www.mpravde.gov.rs

However, in order to acquire property by inheritance, the existence of contractual reciprocity is not necessary, but actual reciprocity on this issue is sufficient. So, we can notice that the most relaxed acquisition regime is on this basis, considering that the existence of actual reciprocity is actually assumed, which means that acquisition will be allowed without a prior procedure of determining the existence of reciprocity on the principle of “give to receive”. Only if it is determined that our citizens are denied the right to acquire real estate by inheritance, the competent authority of our

state will react with a retaliatory measure, until the balance is re-established.

To summarize, in relation to countries with which there is no contractual reciprocity in terms of acquiring property rights on real estate by inheritance, for many years in practice the starting point is that reciprocity does not need to be determined in relation to each individual state, but assume that each the state recognizes the right to inherit real estate to our citizens until proven otherwise, which means that foreign nationals can inherit real estate in the territory of the Republic of Serbia on the basis of presumed factual reciprocity, provided that interested parties can prove otherwise.

CONCLUSION

The process of globalization has contributed to a significant interconnectedness of states, and the issue of the position of foreigners in one country is becoming an increasingly important topic, especially when it comes to economic, political, cultural, educational or other private spheres. Since it is not realistic to expect that citizens will be closed within the borders of their own country, nor that absolute unification of this matter will be possible, it remains to improve and secure the legal position of foreigners in our country according to the principles of reciprocity and fairness. A very important area of reciprocity is the care for the status of our citizens abroad and the exercise of their property rights abroad. Given that we stated that it is difficult to expect that the regulations regarding the enjoyment of property rights of foreigners in our country as well as our citizens abroad are unified on a global level, we are of the opinion that it is necessary to consider the statistics available from the Ministry of Interior in our country on the basis of work and residence, then economic exchanges with certain countries, and inevitably cultural and educational exchanges, and on the basis of such an analysis to single out priority countries with which it is urgent to absolutely relax the conditions for enjoying property rights.

If we look at the data related to visas, it is noticeable that in 2019 the number of visas issued increased compared to the previous year from 9,587 to 11,117. The largest number of visas (almost 40%) was issued to citizens of East Asian countries, mostly from China, which is a large increase compared to 2018, when 19% of visas were issued for this region. The second place was taken by the region of West Asia with 20.5% and then the region of North Africa with 15.9% and South and Southeast Asia with 12.5% of issued visas.

When it comes to the number of countries from which persons applied for a RS visa in 2019, it was from as many as requests from 133 countries in the world, while

the largest number in that period was issued to citizens of China, Egypt and India. Almost every third of the total number of issued visas was issued to citizens of China. This indicates that a large share of labor migration is from China. Serbia has a significant share of economic exchange with EU and Russian countries, which sometimes does not mean a uniform policy of relaxing measures given the complex economic and political polarization of the world, but guided by the interests of protecting the interests of domestic citizens and guided by economic and social progress. guided by clear parameters, as opposed to the general spontaneous one, which declaratively provides a lot, while essentially by applying reciprocity gives little.

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