



PROPERTY LAW – CHALLENGES OF THE 21st CENTURY

Proceedings

International Scientific Conference
held on 9 October, 2020 in Belgrade, Serbia

Editors

Jelena Simić
Aleksa Radonjić

UNION UNIVERSITY SCHOOL OF LAW, BELGRADE

PRAVNI
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Publisher

Union University School of Law, Belgrade, Serbia

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Belgrade, 2021

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EDITOR'S WORD

Union University School of Law, in cooperation with Internationale Juristenvereinigung Osnabrück, organized and held an international scientific conference titled the Property Law Conference – Challenges of the 21st Century on October 9, 2021.

This conference was organized as one of the goals of the internal scientific project Property Law - Challenges of the 21st Century, which was realized by the Union University School of Law in Belgrade in 2020. The aim of this project was to look into the tendencies of changes in the field of property law at the beginning of the 21st century. Also, one of the goals was to pay tribute to the retired professor of the Union University School of Law, Prof. Dr. Dr. h.c Vladimir Vodinelić who through his scientific work made an exceptional contribution to the regulation of Property Law, in the first place dealing with the institute of *possessio* but also leading the working group that drafted the Law on Property and Other Property Rights of the Republic of Serbia.

Apart from distinguished scientists and researchers from Serbia, prominent scientists and researchers from different parts of the world, from South Africa, Ukraine, Bosnia and Herzegovina, Croatia, Slovenia, Montenegro and Switzerland, also made a great contribution to the realization of this project.

The Conference program was divided into six panels dedicated to various topics: Property Law and Technology; Constitutional Property Law Issues; Classical Issues in the 21st Century; Post-Yugoslavian Challenges in Property Law; Expropriation; Environmental and Social Challenges. The participants' presentation, as well as the lively discussion at the Conference, showed that in the field of property law many issues remain open and that socio-political circumstances may strongly influence, for better or worse, legal changes in the domain of property law.

We owe gratitude to all the authors who responded to our invitation and contributed to the exceptional quality of both the Conference and its Proceedings with their presentations and submitted papers.

With thanks to the Union University School of Law, without which this endeavor would not be possible, we remain hopeful that these Proceedings will benefit all those who work in the realm of property law as academics and practitioners just the same.

In Belgrade, June 1, 2021

Editors

*José Carlos de Medeiros Nóbrega**

THE CHALLENGE OF A COMMON EUROPEAN PROPERTY LAW

It was a great honour to represent the International Lawyers' Association of Osnabrück (or IJVO – Internationale Juristenvereinigung Osnabrück, as we say it in German) as a partner of the Property Law Conference – Challenges of the 21st Century, organised by the School of Law, Union University (or Pravni fakultet Univerziteta Union, as you say it in Serbian). Maybe one of the greatest challenges for property lawyers in this century is still to understand each other vis-à-vis the various legal systems, with their own traditions, legislation, case-law, doctrine and of course their own *termini* (if I may say so in this *lingua franca*).

This challenge was taken over by Professor Dr. Dr. h.c. mult. Christian von Bar (Osnabrück) who counted with the long-year assistance of legal scholars representing various legal jurisdictions within the European Union. These scholars were researchers at the University of Osnabrück and members of his Standing Seminar on Common European Property Law. Professor von Bar himself and most of the researchers are members of the IJVO, as well.

The IJVO organised different meetings and invited external colleagues from different jurisdictions who made presentations and published their papers in our Journal, as for example the essays by Professor Christian Alunaru (Arad) on “Das rumänische Sachenrecht zwischen zwei Gesetzbüchern”, Professor Tatiana-Eleni Synodinou (Nicosia) on “Real property in Cyprus in search of an identity”, Professor Rodolfo Sacco (Turin) on “Besitz und Eigentum”, Professor Eveline Ramaekers (Oxford) on “Einordnung von Gegenständen durch den Europäischen Gerichtshof: mobile Immobilien und nicht körperliche Körperlichkeiten / Classification of Objects by the European Court of Justice: Movable Immovables and Tangible Intangibles”, and Professor Paolo Gallo (Turin) on “Transfer of ownership and preliminary agreements in Italian law” (see in particular the annual journals 2013–2015, available at https://www.elsi.uni-osnabrueck.de/aktuelles/ijvo/archiv_jahreshefte.html). We were also delighted to receive Professor Tatjana Josipović (Zagreb), Professor Attila Menyhárd (Budapest) and Professor Astrid Millung-Christoffersen (Aarhus) who contributed with their presenta-

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tions entitled “Die kroatische Sachenrechtsordnung”, “The new Hungarian Civil Code and the Codification of Property Law” and “Eigentumsrecht im dänischen Recht”, respectively.

All these guest presentations on behalf or in the environment of the IJVO were attended by Professor Christian von Bar and his permanent research team on property law, who met on a regular basis every week during almost 10 years (2010–2019) discussing in the form of seminars the property law of the different legal systems, resulting in a pan-European approach.

The Common European Property Law project profited from the conferences organised by the IJVO and from various networks, in which members of the IJVO took part. Some of these networks and their achievements are precedent to the project, as for example a series of national reports published as “Sachenrecht in Europa. Systematische Einführung und Gesetzestexte” (1999–2001), edited by Christian von Bar and later the comparative study “The Interaction of Contract Law and Tort and Property Law in Europe”, coordinated and co-authored by Christian von Bar and Ulrich Drobnig (2004), which afterward contributed to the elaboration of the Draft Common Frame of Reference. The flow of ideas in researching Property Law in a European perspective also profited from discussions within the Young Property Lawyers’ Forum (YPLF) and with our senior fellows, e.g. in occasion of the European Law Days 2013 (organised by the European Legal Studies Institute, University of Osnabrück and the Centrum für Europäisches Privatrecht, University of Münster). A memorable panel chaired by Professor Sebastian Lohsse (Münster) called “Perspektiven für das Sachenrecht des 21. Jahrhunderts”, counted with the presentations “Sachenrecht der nicht-körperlichen Gegenstände” by Professor Sjef van Erp (Maastricht), „Europäisches Sachenrecht” by Professor Christian von Bar (Osnabrück) and „Das Ende des Sachenrechts?” by Professor Fryderyk Zoll (Krakow and Osnabrück), which were lively discussed. Various IJVO members were part of these networks and of this academic discussion in Osnabrück and beyond.

As a contribution to this big challenge of understanding and explaining European property law in a European perspective, or putting it in other words, the achievements of the academic research project “Common European Property Law” struggled with by Professor von Bar and his team are now ready to be judged by our fellow colleagues. I am referring mainly to the publication of his book “Gemeineuropäisches Sachenrecht” in two volumes: vol. 1 “Grundlagen, Gegenstände sachenrechtlichen Rechtsschutzes, Arten und Erscheinungsformen subjektiver Sachenrechte” (“The conceptual foundations of property law, the objects protected by property law, and the types and manifestations of property rights”) and vol. 2 “Besitz; Erwerb und Schutz subjektiver Sachenrechte” (“Possession; Acquisition and protection of property rights”), published by C. H. Beck Editorial, Munich, 2015 and 2019. It is part of the *Jus Commune Europaeum* Series, which comprises “Gemeineuropäisches Deliktsrecht”, and “Gemeineuropäisches Sachenrecht” will be followed by the “Gemeineuropäisches Recht der natürlichen Person”.

Maybe because reading two volumes written in German would for some be an exhausting challenge, and because property lawyers with international back-

ground already have too many challenges within this field of law, as the Property Law Conference at the Union University in Belgrade has clearly shown us, I am glad to announce that a version in English covering part of the first volume of the “*Gemeineuropäisches Sachenrecht*” is being prepared and will be published soon.

Indeed, many other publications closely related to the achievements of the project appeared in different languages. Concerning the abovementioned first volume, see in particular the essay by von Bar “*Grundfragen europäischen Sachenrechtsverständnisses*”, in *Juristenzeitung* 70 (2015) 845–860, published also in French, Italian, Portuguese and Spanish as follows: “*Questions essentielles de droit européen des choses*”, in *RIDC* (2017) 525–565, translated by Xavier Borremans; “*Questioni fondamentali per la comprensione del diritto europeo delle cose*”, in *Rivista di diritto civile* 64 (2018) 571–612, translated by Geo Magri; “*Questões fundamentais para a compreensão do Direito europeu das coisas*”, in *Boletim da Faculdade de Direito da Universidade de Coimbra* 93 (2017) 245–293, translated by Carlos Nóbrega; and “*Cuestiones fundamentales para la comprensión del Derecho Europeo de Cosas*”, in *Anuario de Derecho Civil* 70 (2017) 354–396, translated by Carlos Nóbrega and Celia Martínez Escribano.

The approached fundamental questions concerning European property law read as follows:

- (1) Is it possible to provide evidence of a sufficiently common understanding of the law on patrimonial rights with effects against third parties in the legal orders of the EU Member States to establish it (under whatever name) as a systematically independent area of European private law?
- (2) What are the points of reference of such rights, or to put it in another way: what can a common European jurisprudence say about “things”?
- (3) According to which criteria can the property rights set up by the Member States’ legal orders be systematised in such a way as to allow a glance at the whole without missing regional specificities?

These questions refer to the results achieved within the research project on Common European Property Law and were answered in the first volume of the “*Gemeineuropäisches Sachenrecht*”.

About the second volume, which analyses the law of possession and detention, the law governing contractual transfers of property rights and acquisition of title in good faith, see in form of introductory essay von Bar, “*Europäische Grundfragen des Rechts des Besitzes und der rechtsgeschäftlichen Übertragung von Sachenrechten*”, in *Archiv für die civilistische Praxis* 219 (2019) 341–375. To date, versions in Hungarian, Portuguese and Spanish are available: “*A birtokra vonatkozó szabályozás és a dologi jogok átruházásának alapkérdésel Európai szemszögből*”, in *Iustum Aequum Salutare* XV (2019) 7–38, translated by Ferenc Szilágyi; “*Questões fundamentais europeias sobre o Direito de posse e das transmissões negociais dos direitos das coisas*”, *Boletim da Faculdade de Direito da Universidade de Coimbra* 96 (2020) 381–421, translated by Carlos Nóbrega; and “*Cuestiones fundamentales europeas del Derecho de posesión y del régimen jurídico negocial de las transmisiones en el Derecho de cosas*”, in *Anuario de*

Derecho Civil 72 (2019) 711–748, translated by Celia Martínez Escribano and Carlos Nóbrega.

For more punctual questionings see for example von Bar, “Why do we need Grundstücke (Land Units), and What are They? On the Difficulties of Divining a European Concept of ‘Things’ in Property Law”, in *Juridica International* (2014) 3–15 (<http://dx.doi.org/10.12697/JI.2014.22.01>), also published in a Russian translation by Roman Bevzenko: “ДЛЯ ЧЕГО НУЖНО ПОНЯТИЕ ЗЕМЕЛЬНОГОУЧАСТКА (GRUNDSTUCK) И ЧТО ЭТО ТАКОЕ? О СЛОЖНОСТЯХ УСТАНОВЛЕНИЯ СОДЕРЖАНИЯ ПОНЯТИЯ «ВЕЩЬ» В ЕВРОПЕЙСКОМ ВЕЩНОМ ПРАВЕ”, in *Civil Law Review* 18 (2018) 113–138. For a generic methodological approach, see von Bar, “Privatrecht europäisch denken!”, in *JuristenZeitung* (2014) 473–479, published in Serbian as “Evropski razmišljati o privatnom pravu”, in *European Lawyer Journal / Evropski pravnik XIII* (2015) 11–27.

Encouraged by the Common European Property Law project, various monographies, especially (but not only) doctoral theses were published following a European or comparative legal approach, such as: “Sachenrechtliche Erwerbsrechte – Eine rechtsvergleichende Untersuchung monopolisierter Eigentumserwerbsrechte in England und Deutschland” (doctoral thesis 2014) and “Mehrstufige Belastungen“ (Habilitationsschrift 2021) by Frederick Rieländer; “Integrale und funktionale Verbindungen aus Sachen im französischen und deutschen Recht” by Denis Schlimpert (2015) on “combinaisons des biens” in French and German law; “Die Entwicklung des portugiesischen Sachenrechts. Eine systematische Gesamtbetrachtung unter besonderer Berücksichtigung der lusophonen Rechte” by Carlos Nóbrega (2015) on the development of Portuguese property law and its interactions with Brazil and other Portuguese-speaking countries; “Der Unterschied zwischen dinglichen und persönlichen Rechten an Immobilien im südafrikanischen Recht” by Arne Schmieke (2017) on the differences between property and personal rights on immovables in South African law; “La prescrizione. Ricodificazione degli ordinamenti giuridici europei e prospettive di modernizzazione del diritto italiano” by Geo Magri (2019); and recently “Die funktionale Methode im dynamischen Sachenrecht Schwedens aus deutscher Perspektive” by Luise Pelzer (2021) on Swedish dynamic property law from a German perspective.

Last but not least, the Common European Property Law project, as conceived by its coordinator Professor Christian von Bar and carried out together with his research team – remembering that himself and most of the researchers are members of the IJVO – is primarily about mutual understanding and not about unification or even harmonisation. But that’s another story – and another challenge of the 21st century!

I PANEL:
PROPERTY LAW AND TECHNOLOGY
.....

Nasir Muftić*

TREATING PERSONAL DATA AS PROPERTY: A SOLUTION FOR THE DIGITAL WORLD?

Abstract: *In present times marked by a high level of technological developments, legal systems deal with the increasingly commercialized use of personal data by providing rights to the data subjects. In the era of big data, the value of personal data is likely to be even more emphasized in the upcoming process of digital transformation.*

This paper addresses one of the radical ideas in data privacy law – the introduction of a right that would treat personal data as property. The idea itself is not new, and theory has already been devoted to it. Despite the protection personal data is afforded by various legal instruments, transactions involving it are characterized by a lack of control by data subjects. The question is whether the application of ownership, that would ensure holistic treatment of personal data in private law, would suffice in order to improve their position and enhance the control they have over personal data. An alternative option involves the recognition that personal data are attributed with guarantees given to property rights along with other rights. The paper presents the current treatment of personal data and the problem regarding lack of control asserted by individuals. It also addresses the hitherto doctrinal treatment of personal data as an object of the right of ownership, and the question of recognition of property rights in personal data. It expounds on whether ownership would provide more control and, alternatively, what the recognition of property rights might bring for the future. In this respect, regulatory trends and current discussions in the EU and the United States are outlined in the last part of the paper.

Keywords: personal data, ownership, property rights, data protection, data privacy, privacy

1. INTRODUCTION

Many digital services in use today are of unprecedented value, and modern life is unimaginable without them. We are connected more than ever before, and the world has never been more of a global village than it is today. Technological companies which provide us services are typically multinational corporations whose revenues are greater than the GDPs of Bosnia and Herzegovina or Serbia, for example. During the COVID-19 pandemic, the use of digital services has become an even more substantive part of our lives, replacing activities such as schools or conferences, which had been traditionally conducted offline.

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The treatment of personal data is not a novel question. As it will be displayed in the article, many authors have wondered in the past about how modern digital societies should regulate personal data, and whether regulation is necessary at all. This article attempts to shed light on this issue in 2020, a year where digital transformation and the use of digital services have become inevitable even for the most stubborn Luddites who refuse to accept the change brought by the COVID-19 pandemic. In addressing this question, this paper has three parts. In the first part, the problem regarding treatment of personal data will be outlined. This part introduces problems the ownership of personal data or other legal devices are aimed at resolving. The second part discusses arguments pro and contra ownership. The most common and most persuasive arguments for both sides that I managed to find or fathom, will be presented. It also highlights the difference between treating personal data as property and recognizing property rights in personal data. Finally, the third part outlines current regulatory trends. It attempts to note how current regulators address the possibility of treating personal data as ownership. The paper will not address any national law in detail. Rather, it will address prevailing concepts that exist in Europe and the United States with examples from each of the jurisdictions only when it is apt to illustrate a point.

2. THE INCREASING IMPORTANCE OF PERSONAL DATA

We attest today a constant improvement of technological services and the flourishing of the companies who provide them. Exploitation of personal data of users is usually one of the main sources of revenue for technological companies. For this industry, personal data is a key asset, and its value is unlikely to diminish in the future.¹ Collecting and processing of personal data will be likely to become even more dominant in the future, to the extent that companies will be able to fathom our needs and desires, second-guess us, and provide for our needs even better than they do today.²

Apart from the advancement of digital services, what future brings to the treatment of personal data is hard to predict. Current trends suggest the increase of digital surveillance, owing to great amounts of personal data in hands of service providers, as well as to the improvement of algorithms that process such data. Although the benefits for users are already undisputable, a depth of knowledge about one's habits and personal life bears risk, especially in a case of misuse of personal data. The digital age generates a dichotomy of great benefits and risks that stem from intensive collection and sophisticated use of personal data.

Many digital services we use on a daily basis are free of charge. That, however, means that their services are only free from monetary costs for their users.

1 In fact, it has already become a common refrain that data is more valuable than oil. See: <https://www.forbes.com/sites/forbestechcouncil/2019/11/15/data-is-the-new-oil-and-thats-a-good-thing/?sh=4e7a218d7304>

2 Delacroix, S., and Lawrence, N. D., 2019, Bottom-up data Trusts: disturbing the 'one size fits all' approach to data governance, *International Data Privacy Law*, Vol. 9, No. 4, p. 237.

It has become common parlance that “if a service is free, you are the product”. In other words, technological companies often operate on data-driven business models where one’s personal data is a consideration for services that he enjoys. The current arrangement is evidently beneficial for the technological industry, which is only forecast to continue growing.³ On the other hand, people feel the lack of control and a common narrative stipulates that individuals are being surveilled as their digital footprint has become incrementally traceable, while their enjoyment of personal freedoms is impeded. On top of that, other risks associated with personal data such as data leaks, are another concern.

The increasing importance of personal data, manifested both as a cornerstone of business models of multibillion-dollar companies and simultaneously as a threat to personal data subjects, asks for a regulatory answer that should strike to settle both question and not harm any of the interests materially. Modern economies need viable business models that run on use of personal data, but at the same time provide enough protection to individuals whose data are concerned. Treating personal data as property has been discussed as one of the vehicles that can provide certainty to the legal relationships entered into for purposes of use of personal data, as well as a safety net that guarantees protection to individuals. I will demonstrate below the many mutually opposing arguments related to this dilemma. In addition, there are pending unsettled questions around what property rights in personal data mean and how they should be manifested. Notwithstanding the legal qualification, we are currently attesting a “de facto property regime of personal data”⁴ where the technological industry is “actively claiming property rights on this new asset”⁵.

3. OLD WINE IN A NEW BOTTLE

If there is an agreement that the current state of affairs requires regulatory attention, the next question is whether the currently existing legal concepts governing property can give a proper response. Namely, if there is already existing law that can be applied to a certain phenomenon, the question is whether its application would satisfy a need for regulation or is creation of new rules required. Frank H. Easterbrook argued in 1996 that creation of specific legal rules for cyberlaw would be a mistake due to the lack of knowledge about it as well as due to the applicability of existing legal concepts.⁶ Regulators should refrain, he argued, from imposing new rules on technological innovations they do not understand sufficiently.⁷ If it is unclear how to treat a certain phenomenon, they should

3 <https://www.nytimes.com/2020/07/30/technology/tech-company-earnings-amazon-apple-facebook-google.html>

4 Purtova, N., 2015, The Illusion of Personal Data, *Law, Innovation and Technology*, Vol. 7, No. 1, p. 87.

5 *Ibid.*

6 Easterbrook, F. H., 1996, Cyberspace and the Law of the Horse, *University of Chicago Legal Forum*: Vol. 1996 7.

7 *Ibid.*, p. 208.

permit the participants to make their own decisions and in pursuing that aim they should “make rules clear; create property rights where now there are none; and facilitate the formation of bargaining institutions”.⁸ This argument is in line with Coase’s theorem, as the allocation of entitlements is going to be rendered most efficiently on the free market.⁹ This is especially so if a new phenomenon is treated, as regulators are often not informed about it sufficiently to create a formula for allocation of entitlements. In case of personal data in a digital world, we are dealing with a new phenomenon that had been impacted by galloping advancement of technology, and there is no consensus on how the situation should be dealt with. The idea of treatment of personal data as property lies in the desire to empower individuals. Owners are the ultimate and exclusive holders of rights on their property, and their consent is vital for almost any interference. As one of the fundamental rights guaranteed by many national constitutions and international instruments, ownership is a well-known set of entitlements and an ultimate proxy for power of individuals. A debate on whether a well-known and reliable legal device might adequately regulate a new phenomenon in the digital world, or whether a new bundle of specifically designed rights and duties are required, is not new and has been lasting for decades.¹⁰ Apart from legal arguments that will be addressed in the following sections, there is also a consideration of worldview to determine whether personal data are treated more as a property or a right.

Certain parts of the world do have a position. In Europe, the Council of Europe and the European Union (hereinafter: EU) adopted a set of legal instruments that include protection of personal data, resting on the right to privacy or a separate right held by an individual. In the European Union, a step further has been taken with the adoption of the General Data Protection Regulation¹¹ (hereinafter: GDPR) and other legal instruments of general¹² or sector-specific¹³ fields

8 *Ibid*, p. 216.

9 In his famous article “The Problem of Social Cost”, *The Journal of Law and Economics*, Vol. 3, 1960, Ronald Coase argued that the initial delimitations of legal rights will be altered in bargain if there are no transactional costs involved.

10 See more: Purtova, N., 2017, Do property rights in personal data make sense after the Big Data turn? Individual control and transparency, *Journal of Law and Economic Regulation*, Vol. 10 2, Tilburg Law School Research Paper No. 2017/21, p. 6.

11 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (GDPR).

12 Regulation (EU) 2018/1807 of the European Parliament and of the Council of 14 November 2018 on a framework for the free flow of non-personal data in the European Union; Regulation (EU) 2019/881 of the European Parliament and of the Council of 17 April 2019 on ENISA (the European Union Agency for Cybersecurity) and on information and communications technology cybersecurity certification and repealing Regulation (EU) No 526/2013 (Cybersecurity Act); Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information .

13 Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information as amended by Regulation (EC) No 595/2009 of the European Parliament and

of application. In the United States, personal data regime on the federal level “is left to the private sector”¹⁴ and federal law “permit[s] companies to opaquely disclose and transfer consumer data to third parties”.¹⁵ While the EU’s GDPR requires a set of principles and rules to be met by data processors and provides individuals with rights in almost all transactions involving personal data, the same practices in the United States are allowed unless they have been explicitly prohibited or restricted.¹⁶ These exceptions exist in certain sectors where *lex specialis* rules modify the *laissez-faire* rule. In commercial contexts, a great role in providing protection is played by the Federal Trade Commission (hereinafter: FTC) that has authority to prevent “unfair or deceptive acts or practices in or affecting commerce”. FTC operates on a case-by-case basis in detecting violations and also “issues so-called ‘rulings’ if it believes specific types of violations are prevalent”.¹⁷ Despite differences in the level of protection individuals enjoy in the EU and the United States, a lack of control of personal data by individuals and a feeling of confusion are present in both jurisdictions.

4. OWNERSHIP AS A SOLUTION

Treatment of personal data via ownership means an application of an *in rem* right. Having *erga omnes* effect, ownership would provide an individual with a say on all types of use of personal data, that he or she would have to approve, like with any other property. Treatment of personal data as property aims at providing that no personal information from any personal data file could legally be sold or traded for any commercial purpose, without express permission from

of the Council of 18 June 2009 on type-approval of motor vehicles and engines with respect to emissions from heavy duty vehicles (Euro VI) and on access to vehicle repair and maintenance information; Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC; Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU; Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC; Commission Regulation (EU) 2017/1485 of 2 August 2017 establishing a guideline on electricity transmission system operation, Commission Regulation (EU) 2015/703 of 30 April 2015 establishing a network code on interoperability and data exchange rules; Directive 2010/40/EU of the European Parliament and of the Council of 7 July 2010 on the framework for the deployment of Intelligent Transport Systems in the field of road transport and for interfaces with other modes of transport.

- 14 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, A European Strategy for Data, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020DC0066&from=EN>, p. 3.
- 15 Elvy, S.-A., 2018, Commodifying Consumer Data in the IoT Era, *Boston College Law Review*, p. 522.
- 16 Hildebrandt, M., 2020, *Law for Computer Scientists and Other Folk*, Oxford University Press, p. 135.
- 17 *Ibid.*

the person concerned.¹⁸ The question is whether treatment of personal data as property would afford a sufficient level of protection to individuals and in the same time incentivize society to devote optimal efforts to protection of privacy in the future. This right could operate on an “opt-in” principle, requiring active consent of individuals. Ownership yields two types of entitlements: rights of possession: right to use and prevent others from using the object of ownership; and the rights of transfer: right to sell or give away the object of ownership entirely or partially.¹⁹ Unlike rights in personam, *in rem* rights have a universal effect, preventing third parties from interfering with the object of the right without consent of the holder.

There is no consensus on whether ownership should be applied to personal data. There is also no consensus on whether certain entitlements guaranteed by ownership should be applied separately from it. This section will present main arguments of both sides.

4.1. ARGUMENTS IN FAVOR OF THE INTRODUCTION OF OWNERSHIP

Exclusivity as a prerogative of ownership is a core benefit a holder has. Unless there is a public interest in availability of one’s personal data, an individual would get veto power over commercialization of his or her personal data ranging from credit account data to that from Netflix subscription lists and hotels’ guest lists – all of which are now subject to exploitation. Absent express consent, ownership would categorically block unauthorized collection and trade in personal data for commercial purposes. By doing nothing, one would avoid exposure to all such activities.²⁰ Individuals would therefore hold a firm position with clear and foreseeable entitlements. Ownership would provide them with leverage in negotiations with interested third parties that would yield monetary compensation for use of their personal data, or other benefits.²¹ Currently, even in the EU which offers a strong protection to personal data, it is sometimes possible to process one’s personal data without his or her consent. For example, Article 7(f) of the GDPR allows data processing “for the purposes of the legitimate interests pursued by the controller [...], except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject which require protection under Article 1(1).” Ownership, on the other hand, can be exceptionally disturbed or lost without the owner’s consent, mainly for reasons of public interest.

Conclusively, paternalism would be avoided. More privacy might mean less efficiency in obtained services. Instead of having the state as the decision-maker,

18 Rule J., Hunter, L., Towards Property Rights in Personal Data, in: J. Bennett, C. J., Grant, R., (eds.), 1999, *Visions of Privacy: Policy Choices for the Digital Age*, University of Toronto Press, p. 170.

19 Shavell, S., 2004, *Foundations of Economic Analysis of Law*, Harvard University Press, p. 11–23.

20 Rule, J. B., 2007, *Privacy in Peril*, Oxford University Press, p. 196.

21 See more: Purtova, N., Property rights in personal data: a European perspective, available at: https://pure.uvt.nl/ws/portalfiles/portal/1312691/Purtova_property16-02-2011.pdf

the individual would decide whether and to what extent a trade-off between the two is acceptable. Ownership would provide a means to individuals, and they would choose the ends that suit them. Divisible nature of property rights could assure individuals' preferences for the use of their personal data. Absence of ownership in the long run would mean that individuals would have to rely on the state or a state-like actor to protect their personal data. In the long run, lack of ownership would mean that in the future individuals will not be capable of protecting their personal data rights. This is especially so if the digital environment becomes even more complex in the future, the prospect of which seems likely.

Finally, ownership with its clear set of entitlements and duties would guarantee clarity to all parties involved. Clarity in treatment of personal data might bring a cultural change – the feeling that privacy is lost in a digital world could be replaced by a new understanding based on ownership of one's personal data.²² Industries would adapt to the new rules and individuals would feel they are in control. The requirement of active engagement of individuals that is characteristic for ownership would likely inspire a movement that puts one's care of his own privacy in the center. Private action would drive and discipline those industry actors who want to conduct business successfully.

4.2. ARGUMENTS AGAINST THE INTRODUCTION OF OWNERSHIP

Although ownership provides clarity and a defined set of entitlements, it does not guarantee control over personal data. Current practices in the digital world rely on the reluctance of the average person to be proactive when using digital services, which adversely impacts their autonomy. In general, people rarely read privacy policies, or they do not understand them, or they lack enough background knowledge to make an informed choice. They can therefore be easily manipulated.²³ Waiving the owner's autonomy via an inconspicuous online agreement is a plausible scenario. Lazaro and Le Metayer argue that "the premise of autonomy and active agency implied in this rhetoric seems to be radically undermined in the context of contemporary digital environments and practices."²⁴ In reality, ownership poses a binary, all-or-nothing choice to individuals. The complexity of legal and technical aspects of their transactions with typically highly sophisticated corporate parties would limit their choice, as there is a clear information asymmetry. There would not be negotiations between individuals and users of personal data as the former typically lack knowledge and time to engage. The choice an individual might have could be reduced to either permission or prohibition of collection of their personal data.

22 *Ibid*, p. 199.

23 Brandimarte, L., Acquisti, A., Loewenstein, G., 2012, Misplaced Confidences: Privacy and the Control Paradox, *Social Psychological and Personality Science*, Vol. 4, No. 3, pp. 340–347.

24 Lazaro, C., Le Metayer, D., 2015, Control over personal data: true remedy or fairy tale?, *SCRIPTed*, Vol. 12, No. 3, p. 29.

Furthermore, it is unclear whether personal data can constitute an object of ownership. First, as has been stated above, there is a worldview consideration of personal data that should be taken into account. Parts of the world such as Europe, that deem personal data not as a mere object but as a right, clearly object the application of ownership that would strip it of its beyond-property status. In Europe, personal data is seen as a right – a virtue in itself – unlike typical property, where its utilitarian value is in focus. Also, unlike property, personal data are intrinsically linked with the data subject, who is their only generator. This feature distinguishes personal data from objects of ownership, which are usually not related to their creator after being manufactured, and which can be transferred freely by anyone and to anyone, without any relations to previous owners. Furthermore, personal data is different from other objects of property, since a decision of an individual regarding his or her personal data creates a spillover effect on other individuals whose personal data are linked with the data subject. Such an example is the genetic data of individuals that involve personal data of other individuals *per se*.²⁵

The introduction of ownership would create a disbalance of rights over one's data, as there are other persons who legitimately need it. Veto power that owners have *vis-à-vis* their property can be invoked without the need to explain reasons. However, personal data are subject of other protected interests that typical property is usually not. For instance, freedom of expression of the press and freedom of the public to receive information would be opposed to the veto power of personal data owners. Settling the conflict between the concepts of freedom of expression and the right to privacy is already a problem of its own, and it would be even harder if considerations of ownership are involved. One might also argue that the introduction of ownership would disturb already existing business practices. Business models of technological companies and many other industries rely on the current state of affairs. Ownership would create a turmoil and potentially detriment the business landscape as well as predictability. Setting requirements to businesses that require changes in their current business practices creates risk of red tape. This is especially sensitive in the technological industry since some of the technologies such as artificial intelligence are projected to have beyond-market impact. As developers of potentially geostrategic tools, technological companies are looked upon favorably by regulators, who naturally refrain from adversely impacting technological advancement.

Shavell argues that ownership provides several incentives to the owner and provides predictability to all parties interested in entering into legal relationship with him or her.²⁶ It constitutes an incentive for undertaking productive activities, as those who are involved in them usually own more property. The basic argument is that individuals have a chance to reap outputs of their labor. However, its application to personal data is doubtful because personal data exist irrespective of one's labor. There are no incentives property rights bring that result in increase of social welfare, as opposed to results of one's labor. Ownership also

25 See more in Purtova, N., 2017.

26 Rule, J. B., 2007, p. 196.

provides incentive for improvement and maintenance of the property. Because ownership is a durable relationship *erga omnes*, a person has incentive to make sure their property is maintained properly. Treating personal data as property would mean that persons need to care about personal data they generate, and about how they manage it. Apart from the fact that it is cultural unorthodoxy to even think about how we generate personal data in today's world, this incentive is based on the presumption that one has the time, knowledge and/or funds for improvement and maintenance of personal data. This is certainly not the case today. As already mentioned, ownership fosters transfers of property that are mutually beneficial for all parties involved. It is uncertain whether exchanges would have the same features in the case of personal data because of information asymmetry. Individuals whose personal data have been shared are hardly aware of what they are giving away. They might be aware of the service they are getting in return, but there is a lack of knowledge of the importance of personal data and how the transferee can utilize the data. It is hard to calculate the value of one's personal data and what product/service is worth enough to render an individual willing to provide it in exchange.

5. PERSONAL DATA AS PROPERTY AND PROPERTY RIGHTS IN PERSONAL DATA

Treating personal data as property and finding property rights in personal data are not the same. The former means that a data subject has an *in rem* right and that he or she is able to freely reallocate all entitlements related to personal data. It stripes individuals from any specific personal-data-related protection, and it is covered by ownership. Recognizing property rights in personal data, on the other hand, means that the individuals have a right to be compensated for giving up their personal data. It does not necessarily mean that it equals personal data with other objects of property such as cars or fridges. It merely entails recognizing that a data subject is entitled to a set of rights that are different from the rights designed to cover non-property aspects of personal data, such as, for instance, consumer protection rights. Whether and how property rights in personal data are going to be exercised is a different question. The idea behind data protection law can "be formulated analogously to the concept of property, namely as the right of disposal over processing of personal data carried out by others".²⁷ Analogy to the concept of property does not require duplicating all entitlements the ownership provides. Property rights can be adjusted to reflect the peculiarities of the regulated object. An example of property rights suited for special types of goods exists in intellectual property law, especially copyright law. Authors have moral rights that cover immaterial aspects of their work, and an entire set of rights focused on protection of author's property has been designed.

27 Albers, M., Realizing the Complexity of Data Protection, in: Gutwirth, S., Leenes, R., and Hert, P., de, (eds.), 2014, *Reloading Data Protection – Multidisciplinary Insights and Contemporary Challenges*, Springer, p. 221.

A special set of rights, ranging from those that put in focus the human rights aspect of personal data to those that protect economic rights through perpetuation can be designed specifically for data subjects as well.²⁸ In line with the understanding which exists in copyright law that the author is in principle the weaker party, property rights designed for protecting the data subject can operate on the same assumption.

There are relatively strong grounds for arguing that personal data bear proprietary value on both sides of the Atlantic. In Europe, the European Court of Human Rights in the case of *Anheuser-Busch Inc. v. Portugal*²⁹ held that Art. 1 of Protocol No. 1 of the European Convention on Human Rights is not limited to tangible property and might cover personal data. In the EU, although the GDPR premise for regulation of personal data is based on treatment of personal data as a human right, “the rights to portability, erasure and access mentioned above can nevertheless be said to provide all that is needed to give rise to what may plausibly be characterized as property right”.³⁰ The rights of a data subject are not limited to contractual relationships and have *erga omnes* effect. Moreover, they are not alienable from individuals who can give them away completely. The GDPR uses the “*in rem* character of those rights” as a tool to prevent their erosion through contracts.³¹ Malgieri distinguishes between GDPR rights based on strength of relationship between individuals and personal data³² He argues that the presence of property rights is the strongest in the case of data directly provided by the individual. Property rights in personal data gradually decrease as the data become more indirectly related to the individual. Another category includes data obtained from an intermediated relationship, i.e. data directly provided by an individual and indirectly obtained from reality, such as GPS data and cookies. Finally, a third category involves personal data derived from reality by intellectual work of businesses and not obtained directly from individuals, such as psychological profiling and behavioral forecasts. Individuals have the strongest property rights in data directly obtained from them, which operate as a veto, while in the third category, companies who derived personal data have stronger property rights than data subjects. The second category of personal data is the most complex to ascertain. “All such categories reflect different degrees of rights of control under EU data protection law: for the first category, a full control rights on data are guaranteed to consumers, including the right to data portability; for the second category, all other control rights are guaranteed (right to access, right to be forgotten); for the third category, quasi-property of companies prevail over control rights of individuals, but consumers have other forms of protection to

28 In fact, this is one understanding of the rights prescribed in the GDPR. See *infra* note 32, 43.

29 ECtHR, *Anheuser-Busch Inc. v. Portugal*, no. 73049/01, Judgment of 11 January 2007 [GC].

30 Delacroix, S., and Lawrence, N. D., 2019, p. 246.

31 Hazel, S., Personal Data as Property, *Syracuse Law Review*, Forthcoming, p. 47, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3669268

32 Malgieri, G., 2016, Property and (Intellectual) Ownership of Consumers’ Information: A New Taxonomy for Personal Data, *Privacy in Germany PinG*, 4, p. 133.

rebalance their asymmetry – the right to information about the processing, security of processing and data quality.”³³

In the United States, in the recent case of *Carpenter v. the United States*³⁴, Justice Gorsuch in his dissenting opinion argued that parties might have a case if they invoke their property rights in personal data (specifically, the case concerned access to cell phone location records). This can perhaps be explained through the lack of recognition of privacy as a right guaranteed in the US Constitution, since its Fourth amendment, which was a subject of discussion in this case, observes the issues through the proprietary and spatial glass.³⁵ Finding a solution for the lack of control by individuals in the recognition of property rights seemed to be a logical step in the United States due to its constitutional and legal framework. As privacy is not recognized in the US Constitution, it receives less protection than other goods such as freedom of expression. If it is seen as to bear property rights, personal data can enjoy constitutional protection through rights that are property-oriented, such as the aforementioned Fourth amendment. Also, “another factor in favour of propertization is that the change in law would not have to go through the federal legislative system which, either due to the constitutional limitations or influence of the lobby showed itself unproductive when it comes to regulating privacy.”³⁶

Although the scene is far from being definitely set, a growing consensus on the recognition of property rights in personal data emerges on both sides of the Atlantic.

6. REGULATORY TRENDS

The pro and contra arguments regarding treatment of personal data through ownership make it a vexing problem for regulators. Even dominant positions in the United States and the EU have been challenged. In the USA, opposite standings are present.³⁷ In the EU, although the GDPR provides data subjects with rights that resemble ownership, the term itself has not been used in the text, and some authors claim that it does not aim to prevent data processing but merely to control it. In support, the advocates mention Article 7 of the GDPR that prescribes consent of a data subject as just one of several bases for personal data processing, as well as the decision of the Court of Justice of the European Union

33 *Ibid.*

34 Supreme Court No. 16–402, 585 U.S. ____ (2018)

35 Keller, P., 2019, The reconstruction of privacy through law, *International Data Privacy Law*, Vol. 0, No. 0, p. 12.

36 Purtova, N., 2009, Property rights in personal data: Learning from the American discourse, *Computer law & security review*, 25, p. 518.

37 For example: Banta, N. M., 2017, Property Interests in Digital Assets: The Rise of Digital Feudalism, *CARDOZO L. REV.*, 38, p. 1099; Evans, J. B., 2011, Much Ado About Data Ownership, 25 *Harvard Journal of Law and Technology*, 25, p. 69; Jerry Kan J., Buchner B., 2004, Privacy in Atlantis, *Harvard Journal of Law and Technology*, 18, p. 260; Murphy, R. S., 1996, ‘Property Rights in Personal Information: An Economic Defence of Privacy’, *Geo. L.J.*, 39, pp. 2383–84.

in *Google Spain and Google Inc.*³⁸ where the balancing between opposing rights and interests concerned has been emphasized.³⁹ It has also been argued that “the EU data protection regime, at best, enables individuals to exercise rights akin to licensing rights over their personal data.”⁴⁰ It is undisputed, however, that personal data are collected and traded every day. Privacy policies and similar agreements provide legal basis for these operations. While there are limitations on what can be the subject of an agreement concerning personal data, privacy policies are a creature of contract.

Personal data reflects the aspects of a person’s identity that cannot be grasped by the notion of property. Ownership is blind to such nuances. Without trying to understand the definitive meaning of property rights in personal data, it is certain that they include management of rights on the side of data subjects. It can be argued that the content of entitlements one enjoys is not the main issue with trade of personal data, but how one manages his or her entitlements. Today, one regularly gives away his or her entitlements even though they are guaranteed *ex ante*. Tackling power imbalance requires a right approach to management of personal data. Some authors argue that one-size-fits-all, top-down regulation aimed at curbing contractual freedom cannot meet this goal.⁴¹ They argue that individuals need help not only in defining their rights but also with the proper fashion in which they are being exercised. In the European strategy for data⁴², The Commission has recognized that while “individuals value the high level of protection granted by the GDPR and ePrivacy legislation”,⁴³ they “suffer from the absence of technical tools and standards that make the exercise of their rights simple and not overly burdensome”.⁴⁴ One of the measures aimed at remedying this problem is to create the single market of personal and non-personal data in the EU. The plan is to establish a trust (or trusts) that will manage personal data of EU citizens. The introduction of a trust would empower data subjects, who would not have to negotiate their relationships individually. Rather, the trust would be run by experts who could be on par with the industry giants, at least theoretically. The EU⁴⁵ and some of its member states⁴⁶ seem to be fond of this approach, and it will certainly be explored further.

38 CJEU, case C-131/12, *Google Spain and Google Inc.*, Judgement of 13 May 2014, EU:C:2014:317, para. 74–76.

39 Hijmans, H., 2016, *The European Union as Guardian of Internet Privacy – The Story of Art 16 TFEU*, Springer, p. 57.

40 Lynskey, O., 2015, *The Foundations of EU Data Protection Law*, Oxford University Press, p. 230.

41 Delacroix, S., and Lawrence, N. D., 2019, p. 252.

42 European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European strategy for data, https://ec.europa.eu/info/sites/info/files/communication-european-strategy-data-19feb2020_en.pdf

43 *Ibid*, p. 10.

44 *Ibid*.

45 Artyushina, A., The EU is launching a market for personal data. Here’s what that means for privacy, <https://www.technologyreview.com/2020/08/11/1006555/eu-data-trust-trusts-project-privacy-policy-opinion/>

46 Data trusts, <https://algorithmwatch.org/en/project/data-trusts/>

Despite the concerns over whether data trusts are in accordance with the GDPR⁴⁷ and whether individuals' position would be enhanced,⁴⁸ it is interesting to note that the Commission states that better management of personal (and non-personal) data is going to create a digital dividend. It remains unclear whether the dividend is meant to be a monetary compensation. Notwithstanding the outcome of the current initiative in the EU, one might notice that the trend is focused on achieving equality between individuals and the companies who use their personal data. I fail to notice an effort to doctrinally explain property rights in personal data in the EU, while an initiative to establish a functional equality is increasingly being placed in focus.

While certain US states, such as California⁴⁹, have adopted statutes in the image of the GDPR, the prevailing rule that the contract is king remains. The law governing personal data remains characterized by "an increasing confusion of gaps and inconsistent protections".⁵⁰ There are initiatives, such as the Own Your Own Data Act⁵¹, and the Data Dividend Project⁵², that strive for legislative recognition of property rights in personal data in order to secure monetary compensation to individuals whose information has been used. These proposals seem to be different from their counterpart in Europe in so far as they are not focused on management of personal data, but on dividend payment. Property rights should provide individuals with a piece of profits that companies yield from exploitation of their personal data, without enhancement of their negotiating positions. Unlike in the EU, current initiatives in the United States reflect different understanding of personal data. Notwithstanding these differences, the current initiatives in the United States also recognize property rights in personal data and are focused at tackling the problem of lack of control.

7. CONCLUSION

A problem of lack of control by individuals is prevalent on both sides of the Atlantic, despite the differences in treatment of personal data. There is a consensus that the current state of affairs requires intervention from regulators, but the avenue to be pursued has not been determined. A debate about the ownership and market efficiency as a panacea has not been definitively settled. The purpose of the debate over personal data is to guarantee control by individuals whose data are concerned. Control is not guaranteed by mere guaranteeing of certain

47 Funke, M., The compatibility of data trusts with the General Data Protection Regulations (GDPR), <https://algorithmwatch.org/en/publication/report-data-trusts-gdpr/>

48 Supra note 46.

49 As one commentator observed, the Californian statute, unlike the GDPR, "does not, however, establish barriers to access and collection of personal information. Instead, the Act creates, in effect, choices for consumers to exercise rights to disclosure and deletion by the business that has collected or obtained their personal information as well as onward selling of that information."; Keller, P., 2019, p. 14.

50 Supra note 36, p. 15.

51 Own Your Own Data Act, <https://www.govtrack.us/congress/bills/116/s806>

52 Data Dividend Project, <https://www.datadividendproject.com/>

entitlements that can be subject of freedom of contract. Ownership guarantees entitlements but does not impact the way they are going to be exercised. Excluding certain aspects of control over personal data from the right of giving away provides further protection of individuals, but at the same time marks a departure from the concept of ownership. However, even such an arrangement seems not to affirm the balance between the companies and individuals. Control over personal data cannot be claimed without proper management of the rights one enjoys. Thus, it is not only the question of content of the rights individuals assert over personal data that is pertinent, but also how the rights are exercised.

In the EU, a dominant position treats personal data as something more than ownership and stipulates that a specific set of rules should be applied to regulate it. Protection of personal data has been recognized as a human right under the European Convention on Human Rights and a fundamental right in the EU Charter of Fundamental Rights. In the United States, the consensus on protection of personal data is hard to find, which is a part of a broader issue of treatment of privacy. Whereas federal law is scarce and sectoral, some states like California seem to follow the EU's approach in regulating personal data.

Treating personal data as property is not the same as recognizing property rights in personal data. Rights provided to data subjects in the EU and the United States already bear characteristics of property rights. While it could be argued that the GDPR provides an *in rem* right with *erga omnes* effects, the US law predominantly guarantees freedom of contract. Notwithstanding the unclear doctrinal understanding of the nature of data subjects' rights, an endeavor of placing control in data subjects' hands is starting to be a main concern for regulators. While the EU considers collective management of rights as a solution, the stalemate in the United States is disturbed by initiatives that put monetary compensation of individuals in focus. Despite the differences in approaches, trends on both sides of the Atlantic are rooted in the recognition of property rights in personal data.

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5. Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information as amended by Regulation (EC) No 595/2009 of the European Parliament and of the Council of 18 June 2009 on type-approval of motor vehicles and engines with respect to emissions from heavy duty vehicles (Euro VI) and on access to vehicle repair and maintenance information;
6. Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC;
7. Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU;
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Darja Softić Kadenić*

PLANNING FOR A DIGITAL DEATH

Abstract: *Today's world, in addition to the real world, includes the virtual one, which takes place online and is dominated by digital content. Communication, business, trading, depositing of money, data storage, etc. are made within this environment, so it became impossible to still keep the property of a modern man reduced only to tangible property. The share of the rights and obligations of an individual in a digital environment is growing every day, which makes it necessary to rethink the classical notions of property, inheritance estate and its succession. A particular challenge for any legal order is the set of questions related to the inheritance of digital assets – are these assets inheritable at all, and can their holder freely dispose over those assets? What rules apply in the case where the holder of rights did not make any disposal mortis causa? What role do Terms of Service of different internet service providers play? The list of questions seems endless.*

Estate planning with respect to “analogue” assets is desirable but given the existence of default rules on intestate succession, it is not necessary. It however seems that with regard to digital assets an individual does need to act more actively. The minimum of these activities is reflected in gathering a list of digital assets and a list of belonging login credentials. And if a person's assets – both digital and non-digital – are viewed as a whole, it would be advisable to cover it as such with adequate planning for the event of death. The use of estate planning mechanisms is also the only way to truly honour one's last will and to maintain a sense of control over one's property and its further use. This is of particular importance in the context of digital assets and their rapid and generally unrestricted distribution, bearing in mind the issue of personal data protection as well. The aim of this paper is to analyse the above raised issues from the perspective of Bosnian-Herzegovinian law and to review the solutions of comparative law through different legal circles, especially looking into representatives of the Germanic, Romanic, as well as the common law legal circle, in order to lay the foundations for further research in the field of digital inheritance in the region.

Keywords: digital assets, inheritance estate, estate planning, digital estate planning, digital will

1. INTRODUCTION

The succession law rules of Bosnia and Herzegovina and other countries of former Yugoslavia are characterized by continuity and tradition, and, therefore, were not created for the fast changing 21st century world. One of the major challenges to the traditional succession law rules, besides the changes in family

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and household structures, life expectancy, and composition of estate due to the economic and legal transition in those countries, lies in the overall digitalization of our lives. At the time of writing of this paper, given the ongoing Covid-19 pandemic, most spheres of everyday life seem to have moved online and gone digital. We “meet” friends and family online, we work remotely, students go to school online and have online exams, we shop, exercise and even go to museums and on city tours online.

Given the differentiation between the analogue and digital world, analogue and digital content, even analogue and digital life, it seems only consistent to differentiate between death in the analogue and digital world. The digital remains of a person can remain accessible for unlimited time, so, a person that is not alive in the analogue world anymore, can keep on living in the digital world forever.¹ The so-called digital afterlife² raises a number of different issues, a lot of them also being of legal nature.

It is estimated that in the future almost every deceased's estate will include a digital component,³ thus the notion of inheritance estate should be expanded to encompass digital content, which should also be explicitly considered within estate planning instruments that also need to be adapted to this sort of assets.

Despite that, most internet users do not actively think about or plan the legal destiny of their digital possessions after death.⁴ This passive attitude of internet users favours the fast development of a whole industry based on the exploitation of digital graveyards, the commercialisation of digital remains and digital identities of deceased persons and the creation of their virtual avatars or clones made of their pictures, audio and video files, behaviour, preferences etc., gathered by means of the digital footprint they left online during their lifetime.⁵ Further progress of this industry is also advanced by the general terms of service of online platforms and internet service providers.

The concept of protection of privacy post mortem is still developing,⁶ the right to be forgotten post mortem⁷ is recognised only partially, and in most countries, rights related to data protection only refer to living persons.

1 Resta, G., Digital inheritance, in: De Franceschi Alberto, Schulze Reiner (eds.), 2019, *Digital Revolution – New Challenges for Law*, Nomos, p. 88.

2 See e.g.: Hopkins, J., 2013, Afterlife in the Cloud: Managing a Digital Estate, *Hastings Science and Technology Law Journal*, Vol. 5, no. 2, pp. 209–241.

3 Zankl, W., Spruzina, C., 2018, *Der digitale Nachlass*, Manz, Wien, p. 3.

4 According to research, 80% of internet users do not think about the fate of their data after death. See: Budzikiewicz, Ch., 2018, Digitaler Nachlass, *AcP* 218, Heft 2–4, p. 559.

5 Traschler, Th., 2020, Der Wettlauf um den digitalen Nachlass us rechtsvergleichender Perspektive, *ZEuP*, 1, p. 180.

6 Harbinja, E., 2017, Post-mortem privacy 2.0: theory, law, and technology, *International Review of Law, Computers & Technology*, 31:1, pp. 26–42.

7 On the right to be forgotten in general: Gumzej, N., 2016, EU pravo na zaborav i globalni internet, izvršavanje zahtjeva za uklanjanje poveznica na pretraživačima, *Media, Culture and Public Relations*, 7, 2, p. 171 etc.

2. DETERMINATION OF THE CONCEPT OF DIGITAL ASSETS

What are digital assets and what happens with them after death? This is not only a question of succession law. The answer presupposes the analysis of a set of different questions stemming from different (legal) fields.⁸ In addition, although it is a global challenge that affects each legal system, the answers are not uniform, because different legal systems choose different approaches.

First of all, the concept of digital assets (*digital inheritance*, Ger. *digitaler Nachlass*, Bos./Ser./Cro. *digitalna zaostavština/ostavina*) should be determined. The term is a neologism used in legal literature to define the bundle of questions regarding postmortal consequences of digitalisation and virtualisation of society.⁹ The English term digital inheritance, which more strongly refers to the inheritance estate in its strict legal sense is criticised, because it cannot be used in the strict meaning of inheritance estate. The term digital assets is more frequently used in English literature and is deemed to be more appropriate.¹⁰ It is used most widely and encompasses different intangible information goods located online or associated with the digital world.¹¹

According to another definition, the term digital assets denotes a set of inheritable digital contents,¹² although this definition in fact is a tautology.¹³ As a rule, such a general definition is complemented by an enumeration of typical digital contents in the form of an open-ended list that entails e-mail accounts, social and professional network accounts and content within those accounts, applications, collections of e-books, movies, music files, data stored on cloud services, web sites, domain names, online subscriptions with different services like Netflix or Amazon, e-tickets, online banking services, online investment accounts, money deposits e.g. on PayPal accounts, crypto currencies etc. Some of these assets have monetary value, others are „only” of personal value.

The main questions revolve around the dilemma whether digital assets form a separate category of goods and have a separate legal position, or they are just a part of the other (analogue) estate of a person. What kind of rights can a person have regarding digital assets – ownership, copyright or something else? Are these assets transferable and inheritable? Is it necessary to differentiate between data stored on devices the data subject owns, like his PC, smartphone, USB storage device etc., and data stored with third persons, like on clouds and servers operated by third persons? One may not forget that access to digital assets is secured

8 More in detail: Sorge, Ch., 2018, Digitaler Nachlass als Knäuel von Rechtsverhältnissen, *MMR*, 6, p. 372 etc.

9 Budzikiewicz, Ch., 2018, p. 560.

10 *Ibid.*

11 See e.g. Edwards, L., Harbinja, E., “What happens to my Facebook account when I die?": Legal Issues Around Transmission of Digital Assets on Death, in: C. Maciel and V. C. Pereira (eds.), 2013, *Digital Legacy and Interaction: Post-Mortem Issues*, Springer, p. 116.

12 See: Zankl, W., Spruzina, C., 2018, p. 2.

13 Sorge, Ch., 2018, p. 373.

by usernames, passwords etc. Do those circumstances affect the transferability of these assets or just the way of transfer (*modus acquirendi*)?¹⁴

In order to evaluate whether the deceased's digital assets make a part of his inheritance estate, the legal nature of individual digital assets should be determined. In legal doctrine, there is an ongoing discussion regarding the legal nature of data and the question whether data can be owned.¹⁵ In some legal systems the definition of property (*res*) conflicts the possibility of acquisition of rights in rem regarding digital assets. Often only tangible property (*res corporales*) is considered to be the object of rights in rem, while intangible property (*res incorporales*) is being excluded. This has been a problem in the German BGB,¹⁶ while the Austrian ABGB contains a very broad notion of property (*Sache*).¹⁷

In the region, property (*stvari, res*) is mostly considered as material parts of nature, in other words, tangible property,¹⁸ and the legal doctrine has traditionally been sceptical regarding the notion of intangible property/immaterial goods. However, the new laws on property rights in Bosnia and Herzegovina do open the door for the extension of the notion of property towards unities of property and rights (*universitas iuris*) and towards some kinds of rights and incorporeal assets; although this has been done in a slightly clumsy manner, because it supposes that those kinds of rights and intangible assets should be defined by the law.¹⁹ The BGB has been amended in order to extend the list of objects of rights in rem to so-called other objects „*sonstige Gegenstände*”,²⁰ which is not, however, deemed enough to encompass all kinds of digital assets.²¹

However, in the context of succession, absolute rights over digital assets are not necessary, because the notion of inheritance estate is broader than the notion of property (*res*). As a rule, the contractual positions out of which rights on digital assets arise are passed on to the person's heirs.

14 *Ibid.*, p. 372.

15 E.g.: Amstutz, M., *Dateneigentum*, 2018, *AcP*, 218. Band. Heft 2–4, pp. 438–551; Erp, S., van, Ownership of data and the numerus clausus of legal objects, *Maastricht European Private Law Institute Working Paper 2017/6*, available online at: <http://www.ssrn.com> (September 2020); Harbinja, E., 2016, Legal nature of emails: a comparative perspective, *Duke Law & Technology Review*, Vol. 14, No. 1, p. 227 etc.; Banta, N., 2017, Property Interests in Digital Assets: The Rise of Digital Feudalism, *Cardozo Law Review*, vol. 38, no. 3, pp. 1099–1158.

16 Within a reform in 2002 the term other objects – „*sonstige Gegenstände*”, was introduced in § 453 BGB.

17 § 285 ABGB defines property (*Sache*) as everything different from the person and serves for the use of men. Also, § 298 confirms that rights are considered movable property.

18 Art. 5 para. 1 Law on property rights of the Federation of Bosnia and Herzegovina (*Zakon o stvarnim pravima FBiH*, Službene novine FBiH 66/13, 100/13); Art. 5 para. 1 Law on property rights of Republika Srpska (*Zakon o stvarnim pravima RS*, Službeni glasnik Republike Srpske, br. 124/08, 58/09 i 95/11, 60/15); Art. 6 para. 1 Law on ownership and other property rights of the Brčko District of Bosnia and Herzegovina, (*Zakon o vlasništvu i drugim stvarnim pravima BD BiH*, Službeni glasnik BD BiH, 11/01, 8/03, 40/04 i 19/07).

19 Critically: Powlakić, M., Herausforderungen bei der Regelung von Kryptowährungen in BuH, in: Welser W. (Hrsg.), 2020, *Buchgeld und Bargeld Teil 2*, Manz, p. 177.

20 Peukert, A., „Sonstige Gegenstände” im Rechtsverkehr, in: Leible S., Lehmann M., Zech H., (eds.), 2011, *Unkoerperliche Gueter im Zivilrecht*, Mohr Siebeck, p. 95 etc.

21 Weiss, A., 2019, Zivilrechtliche Grundlagenprobleme von Blockchain und Kryptowährungen, *JuS*, 11, p. 1054.

The term inheritance estate is not defined by law in Bosnia and Herzegovina and is rather broad and scattered, which can be an advantage in the given context. The inheritance estate is comprised by all of the deceased's inheritable rights and obligations.²² Besides the fact that such a definition also represents a kind of tautology, a row of exceptions from this rule make it very vague. Inheritability postulates that the inheritance estate is comprised mainly of the deceased's monetary assets, because his personal assets are not inheritable and cease to exist after death.²³ However, there are again many exceptions, like copyright, that does have some monetary components, too, but also assets without any financial value like family photographs, diaries and other personal assets that do fall into the inheritance estate. On the other side, some monetary assets cease to exist, like preemption rights or personal servitudes. In addition, some entities that are not considered as rights, like possession, as well as some objects that did not belong to the deceased in the moment of death, like donations, also fall into the inheritance estate.²⁴ Like in other legal systems, as well,²⁵ a clear determination and delimitation of inheritability and non-inheritability proves to be a legal challenge in Bosnian-Herzegovinian law.

It follows that digital assets that have monetary value, such as web sites or domains, online deposits, crypto currencies, etc., should be encompassed by the notion of inheritance estate in Bosnian-Herzegovinian law, but this notion does not exclude legal positions without financial value like photographs, video and audio recordings, text and messages etc., irrelevant whether they are in digital or analogue form. Also, the notion of inheritance estate does not differentiate between goods that are in the possession of the deceased or of third persons,²⁶ thus, data stored externally should also be considered as inheritance estate. However, heirs acquire rights regarding the content of the accounts, but are not authorised to further use of the account, neither in the deceased person's name, nor in their own name.

3. INHERITABILITY OF DIGITAL ASSETS

If digital assets are part of the inheritance estate, is it passed on to the heirs according to general rules, especially according to the principle of universality of succession? Can the deceased dispose over digital assets by legal acts *mortis causa* such as wills, bequests or other mechanisms?

22 See: Antić, O., 2004, *Nasledno pravo*, Beograd, p. 48; Gavella, N., Belaj, V., 2003, *Nasljedno pravo*, Zagreb, p. 55; Bago et al., 1991, *Osnovi nasljednog prava*, Sarajevo, p. 18.

23 After death, persons close to the deceased can exercise postmortal protection of the deceased's personality rights, but they do not inherit this right from the deceased nor does this right belong to his heirs. This right belongs to his next of kin or testamentary heirs and it is considered not to be a personality right of the deceased but a personality right of the living persons close to the deceased, to preserve the memory of the deceased. See: Gavella N., 2000, *Osobna prava, I dio*, Zagreb, pp. 33–34. Also: Krneta, S., 1979, *Pravna priroda postmortalne zaštite ličnosti*, *Godišnjak Pravnog fakulteta Sarajevo*, pp. 15–33.

24 Bago et al., 1991, p. 21.

25 See: Mikk, T., Sein, K., 2019, Digital Inheritance: Heirs' Right to Claim Access to Online Accounts under Estonian Law, *Juridica International*, 27, p. 121.

26 Regarding Austrian law see: Zankl, W., Spruzina, C., 2018, p. 11.

What kind of rights do the heirs acquire? Do they have a right to access digital assets even when the deceased did not pass over the login credentials? Can they turn to the internet service providers to obtain information whether the deceased was a user of the service in question, and demand access? Do they only acquire the right to access, or can they manage the account, continue to use it as their own and dispose over its content? Are the personality rights of the subjects who communicated with the deceased, e.g. via e-mail or chat, protected, and if so, how? What if the Terms of Service of a provider foresee special rules regarding the data after the user's death? What if those rules conflict with the wishes of the deceased? The list of questions seems endless.

We become users of different internet services by concluding a contract with the provider of the service. Those contracts are mostly standardised within general Terms of Service which users accept uncritically, often unaware of their content. At the same time, those terms are very heterogeneous.²⁷ Regarding the impact of the user's death on his account and its content, some general Terms of Service provide that the account and its content will be deleted or frozen. In other cases, access to the account will be granted to persons nominated by the user during his lifetime, regardless of the user's other estate and his legal heirs. While until recently many providers did not regulate this issue at all, more and more of them do include the questions of the fate of data after the death of a user into their Terms of Service, or instruct users within their help section to actively opt for a solution regarding their data after death.

For example, the social network *Twitter* stipulates that in the event of death of a user, the account can be deactivated upon request of a person authorised to act on behalf of the estate, or a verified immediate family member of the deceased.²⁸ Also, without any request or report of death, the user's profile will be removed in case of prolonged inactivity of the account (longer than 6 months).²⁹ *Yahoo* stipulates that accounts are not transferable, even after the death of an account holder, thus Yahoo cannot provide passwords or access to the deceased users's account.³⁰ An authorised person can request for the account to be closed, billing services to be suspended and any content deleted.³¹ The content of the account can be disclosed only under strict conditions, including a court order issued by an Irish court.³² *Facebook* provides for several possibilities: the user can opt for the account to be deleted after death, so all content, like photos, messages etc., will be permanently removed after the notification of the death of the user. The other possibility for the user is to opt for the account to be memorialised, which will also happen if the user does not choose any option, after Facebook

27 *Ibid.*, p. 7.

28 <https://help.twitter.com/en/rules-and-policies/contact-twitter-about-a-deceased-family-members-account> (March 2021).

29 <https://help.twitter.com/en/rules-and-policies/inactive-twitter-accounts> (March 2021).

30 <https://uk.help.yahoo.com/kb/options-yahoo-account-owner-passes-sln26120.html> (March 2021).

31 <https://uk.help.yahoo.com/kb/options-yahoo-account-owner-passes-sln26120.html> (March 2021).

32 *Ibid.*

gets a notification of a user's death. In addition, the user can nominate one of his Facebook friends as a so-called *legacy contact* to manage the memorialised account to some extent.³³ That person will have access to some content, and can also request for the profile to be deleted.³⁴ Google offers a tool called *Inactive Account Manager*. The user can set a time limit between 3 and 18 months after which an account will be considered inactive, and nominate a trustworthy person that will gain access to the account or request for the account to be closed.³⁵ The professional network *LinkedIn* did not provide for rules regarding the legal consequences of the user's death on his account, and the data stored within it, until very recently. Now, the help section contains information regarding this issue and provides for the possibility to report the death of a user even if the reporting person is not authorised to act on behalf of the deceased user. Upon such a report the account becomes hidden and the profile is no longer searchable or visible on LinkedIn, but it is not deleted. A person authorised to act on behalf of a deceased user can request either to memorialise, or to close the account. If the account is closed, all the data is completely deleted from the system within short time.³⁶

One of the most disputed issues in legal literature is the impact of these rules, especially when they are contained within general Terms of Service, or even only within the help or Q&A section of the internet service provider, as well as the relation of these rules to general rules of succession law, such as the principle of universality of succession.

4. SOLUTIONS IN COMPARATIVE LAW

The picture of the approaches of individual legal systems to the issue of digital assets is fragmented. The differences are especially pronounced between European countries on the one hand, and the USA on the other. Only a small number of countries have enacted special legislation regarding digital assets, while others apply existing rules to this segment of property.

The issues around digital assets and their inheritance are not regulated on the EU level,³⁷ nor are the solutions of individual member states harmonised.³⁸

33 https://www.facebook.com/help/103897939701143?helpref=faq_content (March 2021).

34 For more in detail regarding the content of a Facebook profile after the death of a user, see: Harbinja, E., Post mortem social media: law and Facebook after death, in: Mangan, D., Gillies, L, (eds.), 2017, *The Legal Challenges of Social Media*, Elgar Law, p. 177 etc. It should be borne in mind that these rules are frequently amended.

35 <https://support.google.com/accounts/troubleshooter/6357590?hl=en> (March 2021).

36 <https://www.linkedin.com/help/linkedin/answer/2842/deceased-linkedin-member?lang=en> (March 2021).

37 Nemeth, K., Carvalho, J. M., 2017, Digital Inheritance in the European Union, *EuCML* 6, p. 253.

38 For the standing point of Austrian law regarding the issues around digital assets, see: Zankl, W., Spruzina, C., 2018; for Great Britain, see: Harbinja, E., 2017, Digital inheritance in the United Kingdom, *EuCML*, 6, p. 253; for the Netherlands: Berlee, A., 2017, Digital Inheritance in the Netherlands, *EuCML*, 6, p. 256.

However, EU countries do have a common ground reflected in the common principle of universality of succession³⁹ originating in Roman law, that is applied to digital assets as well. In addition, EU countries generally follow similar goals regarding legal protection of interests involved. Despite this common ground, EU member states developed different solutions regarding digital assets, depending on their choice to approach the problem from the succession law point of view or the personality rights and (postmortal) data protection point of view.⁴⁰

The US approach is based on the opposite starting point compared to European countries: it exempts digital assets, or at least digital communications,⁴¹ from the impact of the universality of succession, and regulates this area primarily from a contractual point of view, stressing the party autonomy.⁴²

Before the solutions of some countries are presented, a conclusion can be anticipated, according to which European countries are more inclined to protect internet users and their heirs and prevent the creation of data graveyards, while regulation in the USA tends to protect the internet industry, facilitating the creation of data graveyards and their commercial exploitation.⁴³

4.1. EUROPEAN COUNTRIES

4.1.1. *Germanic countries*

In Germany, a pragmatic and systematic approach based primarily on the existing rules of succession law prevailed; this approach also preserves the coherence of succession law. Relevant positions of the ruling doctrine formed during the past 10–15 years have been summarised and confirmed by the highest court, the Federal Supreme Court (BGH) in the so-called Facebook decision from 2018,⁴⁴ which also attracted international attention. The case is related to the tragic death of a 15-year-old girl who was run over by a subway train in 2012. The parents of the girl, as her legal heirs, requested access to the Facebook profile of their deceased daughter, in order to find out more information about their daughter's thoughts and mood before her death, and to find possible evidence indicating suicide. The parents even had access data for their daughter's profile, but they could not access it because in the meantime Facebook changed the account status to memorialised, after which it was no longer possible to access the profile with the user data, although the data within it was still saved. Facebook

39 See: Mikk, T., Sein, K., 2018, Digital Inheritance: Heirs' Right to Claim Access to Online Accounts under Estonian Law, *Juridica International*, 27, p. 118 etc.

40 Resta, G., 2019, p. 90 etc.

41 See: Traschler, T., 2020, p. 179, fn. 52.

42 Resta, G., 2019, p. 96.

43 Traschler, T., 2020, p. 183.

44 Decision of the BHG of 12 July 2018, III ZR 183/17, available at: <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=86602&pos=0&anz=1> (March 2021).

did not allow the parents access to their daughter's profile, after which the girl's mother initiated a lawsuit against the social network.⁴⁵

The BGH has decided in favour of the parents⁴⁶ by taking the position that digital assets do not constitute a special legal position different from analogue assets, which is why the same rules apply. Digital assets pass to the heirs with-in the rest of the property through the principle of direct universal succession. The Court characterised the Facebook account as a contractual relationship like any other, which passes to the testator's heirs, without differentiating in terms of content and type of data between personal data of a non-property nature and other data of a property nature. The Court held that the user is free to dispose of digital content using general mechanisms such as wills, bequests or powers of attorney, and may order heirs, for example, to delete all of his profiles and user accounts online.

The issues of data protection and privacy of participants in communication with the deceased were also considered, but the Court found that providing heirs with access to such data is not contrary to the German Telecommunications Act (*Telekommunikationsgesetz*), considering that the provisions of this law protect the privacy of telecommunications participants from third parties, and it does not consider the heirs as third parties because they occupy the legal position of the deceased.⁴⁷ The Court also took a position on the relationship between the testator's heirs' access to his data and the provisions of the General Data Protection Regulation ("GDPR"), noting that in German law the GDPR applies only to personal data of living individuals, as Germany did not opt to extend the protection after the death of the data subject.⁴⁸ In addition, the Court argued that, even if the provisions of the GDPR were to apply, the heirs have a legal interest justified under Article 6 of the GDPR, which prevails over the interest of the participants in the communication in protecting their data.⁴⁹ From the aspect of protecting the privacy and data of the testator, it certainly seems less of an intrusion to transfer that data to his heirs, than to leave it in the hands of the internet provider.⁵⁰

Finally, the BGH also commented on contractual clauses, in particular on the contractual exclusion of inheritability of data within the general Terms of

45 Facts and arguments used by the Court are provided in the press release of the Federal Supreme Court 115/2018, available at: <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&nr=85390&linked=pm> (October 2020).

46 Previously, the second instance court (Kammergericht Berlin) on 31 May 2017, 21 U 9/16, decided in favour of the social media network.

47 Margin numbers 54–56 of the BGH Facebook decision: <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=86602&xpos=0&anz=1>.

48 REGULATION (EU) 2016/679 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (GDPR), Recital 27.

49 Traschler, T., 2020, p. 172.

50 *Ibid.*

Use. The Court took a restrictive position on that issue. Although in principle such clauses are not inadmissible, the BGH sets high criteria for their admissibility,⁵¹ which are certainly not met by their inclusion in the general Terms of Use, and especially in the help section without explicit reference in the contract. The Court considered the exclusion clause unfair because it is contrary to the fundamental principle of universal succession, which has the purpose of determining the subject of certain rights and serves the legal security of participants in legal transactions.

Austria and Switzerland⁵² follow this line of argumentation with minimal deviations.

Other European countries whose legal systems are primarily influenced by German law show a similar approach. In the Netherlands, there are no special rules regarding the winding up of digital assets, so, generally, digital assets are inherited in the same way like all other assets.⁵³ However, unlike in Germany, this issue has not been exhaustively tackled by the doctrine so far.⁵⁴

It is interesting to look into Estonian law, for instance, since Estonia is held to be a pioneer of the digital society.⁵⁵ The best illustration for this is the fact that as much as 98% of companies in Estonia are established online.⁵⁶

In Estonia, as according to German jurisprudence, digital assets are encompassed by the principle of universal succession.⁵⁷ But, unlike Germany, Estonia provided for statutory protection of personal data post mortem.⁵⁸ However, it is held that the data protection law does not entitle internet service providers to deny the heirs access to the accounts of the deceased.⁵⁹

4.1.2. Romanic countries

Unlike Germany and other countries of the Germanic legal circle which subject digital assets to general (succession law) rules, France, Italy and Spain have adopted special regulation. These countries have approached the issue of digital asset management from the aspect of data protection, placing new rules in the regulations implementing the GDPR in these countries and thus excluding the succession of digital assets from the general law on succession. All three states have expanded the scope of the rights guaranteed by the provisions of Articles 15–22 GDPR after the death of the data subject. The new regulations aim

51 Margin numbers 25 et seq. of the BGH Facebook Decision, <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=86602&pos=0&anz=1>.

52 For Switzerland, see: Brucker-Klay, E., 2013, *Sterben und Erben in der digitalen Welt*, ZHAW School of Management and Law.

53 Berlee, A., 2017, p. 257.

54 *Ibid.*, pp. 256–257.

55 Mikk, T., Sein, K., 2019, p. 117.

56 <https://investinestonia.com/business-in-estonia/legal-system/>

57 Mikk, T., Sein, K., 2019, p. 120.

58 The English translation of the Estonian Data Protection Act that is in force since 1st January 2008 is available at: <https://www.riigiteataja.ee/en/eli/ee/507032016001/consolide/current> (March 2021).

59 Mikk, T., Sein, K., 2019, p. 127.

to strengthen the right to informational self-determination of data subjects,⁶⁰ which also requires a proactive approach by the future decedent.

In French law, in principle, data protection ceases with the death of the subject. In order to prevent this, i.e. in order to prolong its effect after death, the subject must appoint a person authorised to exercise those rights. For these purposes, the future decedent should make a digital will. In other words, he should issue an order, a directive, that can be general (*directives générales*) or specific (*directives particulières*), with the respective internet service provider.⁶¹ Those directives resemble the concept of advanced directives in case of incapacity.⁶²

In Italy and Spain, the situation is reversed, the data subject must take active action to prevent the data from passing on to its successors. According to the new Italian regulations, if the data subject does not want his heirs, close relatives, or trustees and other persons with a legitimate interest, to exercise the right of data protection after his death, he must explicitly exclude, prohibit or limit it by a written statement that has the characteristics of a power of attorney or agency contract with effects after death (*mandatum ad mortem exequendum*).⁶³ Such statement must be clear, specific, given freely, and informed.⁶⁴ It follows that the exclusion of inheritability under the general terms of the contract does not meet the above criteria. Thus, similarly to Germanic countries, the countries belonging to the Roman legal circle seek to limit the influence of standard contractual clauses on the right to informational self-determination.

4.1.3. United Kingdom

The United Kingdom, although a European state, is no longer a member of the EU, but even while it was, it differed from other member states as a member of the common law legal circle.

There is still no regulation in the UK that would clearly regulate this area, although there is an intention to regulate it following the models of France and the United States.⁶⁵ At the moment, in the absence of clear guidelines, the situation seems rather complicated. The protection of personal rights and personal data ends with death and does not extend post mortem, so in the UK the treatment of digital assets post mortem is not viewed from the aspect of data protection, although some authors actively advocate this approach to strengthen post mortem privacy protection.⁶⁶

60 Resta, G., 2019, p. 91; Also: Patti, F. P., Bartolini, F., 2019, Digital Inheritance and Post Mortem Data Protection: The Italian Reform, *European Review of Private Law*, 5, pp. 1185–1186.

61 Traschler, T., 2020, p. 177.

62 See: Softić Kadenić, D., 2021, Planiranje imovinske sukcesije: nasljednopravni i drugi instrumenti, Univerzitet u Sarajevu – Pravni fakultet, Sarajevo, p. 182.

63 Patti, F. P., Bartolini, F., 2019, p. 1186. Similar solution is available in Spain. See: Traschler, T., 2020, p. 176.

64 *Ibid.*, 1189.

65 Harbinja, E., 2017c, p. 256.

66 Edwards, L., Harbinja, E., 2013, Protecting Post-Mortem Privacy: Reconsidering the Privacy Interests of the Deceased in the Digital World, *Cardozo Arts&Entertainment Law Journal*, vol. 32, no. 1, pp. 83–129.

If certain digital content falls under the term “property”, it is considered suitable for inheritance and passes to the heirs.⁶⁷ However, when it comes to content that is not published online, on a social network or in any other way, this condition is not met, so the particular digital content would not pass on to the heirs of the deceased.⁶⁸

The use of online tools is considered a desirable and practical solution, as well as an instrument for strengthening an individual’s self-determination. However, in the absence of explicit recognition of such “testamentary dispositions” in relation to digital content, there is a problem of conflict with the applicable legal rules governing inheritance relations.⁶⁹

4.2. UNITED STATES OF AMERICA

In the USA, the effort to approach the issues of treatment of digital property after death in a uniform way resulted in the adoption of the so-called Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA) 2015, which is implemented in almost all states.⁷⁰ Although originally the task of the Uniform Law Commission that worked on this regulation was to balance the obligations of fiduciaries who are otherwise in charge of managing the deceased’s inheritance and have appropriate powers in relation to his digital legacy,⁷¹ on the one hand, against the internet service providers’ aspiration to protect privacy of their users, on the other hand, the final text is strongly influenced by the internet industry lobby.⁷²

Digital assets in the United States represent a special category, different from the analogue assets of the deceased. The basic rule stipulates that the internet service provider is not obliged to transfer data to the user’s heirs, unless the user has explicitly agreed to this transfer, which indicates the obligation of active user action.⁷³

Priority is given to user preferences expressed within online tools, i.e. mechanisms that providers themselves make available to their users and through which they can appoint a fiduciary to be given access to data after death or to instruct the provider to delete data, such as Google’s Inactive Account Manager or Facebook’s Legacy Contact. Such directions expressed within online tools even

67 Harbinja, E., 2017c, p. 254.

68 *Ibid.*, 252.

69 Harbinja, E., 2017c, p. 255.

70 By November 2020, only three states filed to enact acts implementing RUFADAA. See: <http://my.uniformlaws.org/committees/community-home?CommunityKey=f7237fc4-74c2-4728-81c6-b39a91ecdf22> (November 2020).

71 Succession in the United States is not direct, instead the inheritance estate is transferred to fiduciaries who can be nominated by the deceased (personal representative, trustee) or by the court (executor) with the duty to administer the inheritance estate.

72 Sheridan, P., 2020, Inheriting Digital Assets: Does the Revised Uniform Fiduciary Access to Digital Assets Act Fall Short?, *Ohio State Technology Law Journal* vol. 16, no. 2, p. 369. See also: Klein, S., Parthemer, M., 2016, Who will delete the digital you: Understanding fiduciary access to digital assets, *Probate and Property* vol. 30, no. 4, pp. 33–34.

73 Traschler, T., 2020, p. 179.

prevail in case of conflict with directions given in wills, trusts, or powers of attorney,⁷⁴ which indicates that contractual rules prevail over succession law rules. If the user did not give instructions in any of these forms, the general conditions of use of the provider apply, and only if they do not regulate this issue, the rules provided in RUFADAA apply.⁷⁵ Instructions issued within the online tool of the platform have priority in case of a conflicting disposition in the will or power of attorney, provided that the online tool allows the user to change or revoke such instruction at any time.⁷⁶

Contrary to European countries that seek to suppress the practice of contractual exclusion of inheritability under standard contractual clauses, in the United States these solutions are viewed favorably.

4.3. BOSNIA AND HERZEGOVINA

Digital property and its fate after the death of their holder are not topics that have been dealt with by domestic doctrine or practice to date. From the above overview of some comparative legal solutions, certain recommendations can be drawn that could be applied in Bosnia and Herzegovina (hereinafter: B&H) as well.

In the absence of special regulation, and having in mind the tardiness of the legislative apparatus, the German approach seems suitable for our environment, as well. This approach seems adequate in view of the similarities in substantive law.

The Law on Personal Data Protection⁷⁷ in force in B&H is not harmonised with the provisions of the GDPR, and the protection it provides refers to data of living persons,⁷⁸ which corresponds to the solutions that exist in German law and imposes an approach from the aspect of succession law. The notion of inheritance estate in B&H law can include digital content, regardless of the place where the data is stored, and regardless of the proprietary or personal nature of the data.⁷⁹ Only if certain parts of digital assets were strictly personal in nature would they be non-inheritable.⁸⁰ Generally, however, this is not the case. Profiles on social networks, e-mail and other accounts are based on the contractual relationship between the user and the provider, hence the rights and obligations are not personal, and pass to the heirs of the deceased. This is supported by the fact that the same contractual rules apply to millions of users and they, as a rule, are not obliged to even state their real names during registration.⁸¹ This does not speak in favour of the personal nature of the obligation. The principle of

74 Resta, G., 2019, p. 97.

75 Sheridan, P., 2020, p. 370.

76 Resta, G., 2019, p. 97.

77 The Official Gazette of Bosnia and Herzegovina nos. 49/06, 76/11 i 89/11.

78 Although it is not explicitly stated in this Act, the data subject is defined as a natural person – Article 3. A deceased person is not a subject anymore, therefore, the data subject can be only a living person.

79 The opposite view: Harbinja, E., 2017b, p. 181.

80 Budzikiewicz, Ch., 2018, p. 569.

81 Also: Zankl, W. Spruzina, C., 2018, p. 7. The legal nature of contracts with online providers with respect to the service is discussed by: Budzikiewicz, Ch., 2018, p. 568 etc.

direct universal succession is a fundamental principle of domestic succession law, which also suggests the application of the German model.⁸²

This principle is not of a dispositional character; it is *ius cogens* and cannot be deviated from by agreement, which can also be an argument against excluding the inheritability of certain digital assets by contract with the provider. In B&H law, in contrast to German law, agreements on succession on future inheritance, or bequests, are prohibited,⁸³ which is perhaps the strongest argument against the contractual exclusion of the inheritability of digital assets.

The arguments of the German BGH, which refer to potential rights of the partners in communication with the testator in terms of protecting their privacy and secrecy of correspondence, also seems applicable in the B&H context. In B&H law, the heirs inherit the testator's letters and written correspondence with third parties, and this does not violate the right to secrecy of letters and other forms of communication, so the distinction between letters and communication in analogue and digital forms does not seem justified.

In the absence of special instruments provided for the transfer of digital assets *mortis causa*, future decedents in B&H may dispose of digital property in the event of death by using the usual mechanisms, primarily by will and by bequest. Powers of attorney are also available, but not used in practice.

If the deceased used a certain online tool made available by a certain provider and within that tool determined the fate of the content on that user profile, the question of the relationship between such disposition and general rules of succession law arises, such as e.g. provisions prescribing the obligatory form of the will, rules regarding the tacit and explicit revocation of the will, etc. It seems that in this context, consideration should be given to amending the laws in force regulating succession.

5. DIGITAL WILL

Digital assets are mostly protected from unauthorised access by passwords and other mechanisms, especially when externally stored digital assets are concerned. Therefore, the identification and localisation of digital assets represents one of the main obstacles from the heirs' perspective. In addition, as it became clear from the previous chapters, digital assets, even if they are considered to be generally inheritable, are not necessarily included when intestate succession rules are applied, not even in the case the deceased left a will, but without special reference to digital assets. The heirs' access to those assets can be burdensome despite the effects of universality of succession, because the provider in question can decline access relying on his Terms of Service. Sometimes it will simply be

82 Regarding some aspects of digital property, specifically crypto currencies, there are positions in scholarship whereby they constitute inheritance estate and the heirs do have a right to request access. See: Josipović, T., *Kryptowährungen und das kroatische Privatrecht*, in: Rudolf Welsch (Hrsg.), 2020, *Buchgeld und Bargeld, Teil 2*, Wien, Manz.

83 A contract on succession is possible only between (future) spouses and not-marital partners in some parts of the country.

too late, because until the heirs have learned about digital assets and have located where they are stored and contacted the provider to gain access, the content could already be deleted or made otherwise inaccessible.⁸⁴

Even when it is undisputed that the digital assets will pass over to the heirs by means of the principle of universality of succession, it is still disputable from the deceased's perspective, whether it is reasonable and in the deceased's interest that the whole community of heirs gets knowledge and access to all of his digital assets, including those of personal nature.⁸⁵ Depending on the type of content, the deceased might want to give access only to certain family members or closest friends, while he might want to delete some content without the heirs' insight into it.⁸⁶

In any case it seems that, independently of the legal system and its approach regarding the inheritability of digital assets, it is advisable to actively plan the transfer of digital assets in the case of death in order to simplify succession. However, in some countries, like in the USA or France, this necessity is more pronounced than in others, like Germany. The minimum thing to do during one's lifetime is to compile a list of digital assets – e-mail accounts, profiles, online subscriptions and other contracts, etc., with accurate access data, and to store it in a safe place, in order to facilitate the heirs' insight into the composition of the inheritance estate. In this context, however pragmatic this solution might be, it has to be borne in mind that most internet service providers prohibit the transfer of login credentials and the use of third persons' accounts, so the deposition of login credentials for future heirs could constitute a breach of contract with the internet provider.⁸⁷

Evidently, in contrast to analogue assets, that allow for a passive attitude during one's lifetime – because in lack of a will or other estate planning instrument, the succession will be carried out by default rules of intestate succession – digital assets require positive action and a well-elaborated plan. Most persons are unfortunately still unaware of this fact.⁸⁸

Digital estate planning is the process of due preparation for the transfer of digital assets after death. It represents a package of dispositions *mortis causa*, tailored according to the peculiarities of digital assets, providing for the safekeeping and later the transfer of login credentials for accessing digital assets. Accurate digital estate planning supposes at least three main segments: the identification of digital assets, the facilitation of access to digital assets and the determination and implementation of the deceased's wishes.⁸⁹

84 Zankl, W., Spruzina, C., 2018, p. 2.

85 Fraunhofer SIT, Universität Bremen, Universität Regensburg (Hrsg.), 2019, *Der digitale Nachlass, Eine Untersuchung aus rechtlicher und technischer Sicht*, Stuttgart, p. 181, <https://www.sit.fraunhofer.de/de/digitalernachlass/> (March 2021).

86 Hopkins, J., 2013, p. 230.

87 See: Harbinja, E., 2017c, p. 255; Berlee, A., 2017, p. 258.

88 According to some research data in Germany, in 2019 only 13% of internet users planned the transfer of their digital assets after death. <https://www.handelsblatt.com/finanzen/steuern-recht/recht/digitales-testament-internet-nutzer-kuemmern-sich-kaum-um-den-digitalen-nachlass/25476022.html?ticket=ST-4740889-HVs3MMr0mO3iVqNWsTeH-ap3> (January 2021).

89 Hopkins, J., 2013, p. 229.

The term digital will wrongly implies that it is a will made in digital form. The term comprises all instruments that facilitate the disposition over digital assets *mortis causa*. Its existence does not infringe the will formalities nor the *numerus clausus* regarding the types of wills that are valid in a legal system.

Traditional estate planning instruments like the traditional will are not well equipped for the transfer of digital assets, because they are not tailored to the characteristics of this type of assets. The biggest flaw of the will in this context lies in the fact that wills are declared publicly, thus the login credentials and other information regarding the deceased's digital assets would become public, too.⁹⁰ In addition, every subsequent registration for an online service or change of login credentials, which is advisable for security reasons, would require the change in the will, or the creation of a new will.

However, it is possible to refer to digital assets within a traditional will and, for example, to state where the login credentials are stored and who should get access to them, albeit being aware of the possible breach of contract caused by such action. The document with the credentials should itself be created separately and stored with a notary, or in another safe place. Also, the testator could advise the chosen heirs how to proceed with his digital assets. He could further nominate an executor regarding digital assets and give detailed instructions how to proceed with individual digital assets. It is advisable to chose a person with the necessary IT skills.⁹¹ This solution resembles the possibility to nominate a person of trust within different online tools like Facebook's Legacy Contact or Google's Inactive Account Manager. The will can also refer to the intent expressed within an online tool of the respective internet service provider or refer to the Terms of Service of that provider, if their application corresponds with the testator's wishes.

The use of online tools can be a good solution especially for situations in which the testator wishes to erase a certain account and its content without his heirs taking insight into that content. In that case, he could configure the account settings so that the account and its content will be deleted after death or prolonged inactivity of the user.⁹² When those tools are used in order to transfer the content of the account to the heirs, this can cause problems because of the different approach of individual legal systems towards such online tools.

However, in some cases it will be too late to wait for the will to be officially proclaimed, because of running costs stemming from online contractual obligations, online payment transactions, etc., where such a delay would cause serious damage.⁹³ A possible solution could be a postmortal or transmortal mandate, that empowers the authorised agent to act immediately, independently of the course and duration of the probate proceedings. When a power of attorney is issued, the login credentials should also be included in a separate document, because the power of attorney is used in legal transactions in order for the agent

90 *Ibid.*, p. 230.

91 Fraunhofer SIT, 2019, p. 182.

92 *Ibid.*, 183.

93 Zankl, W., Spruzina, C., 2018, p. 22.

to legitimise himself.⁹⁴ In legal systems that provide for a continuing power of attorney for the case of incapacity,⁹⁵ that at the same time is a transmortal power of attorney, this can be an adequate solution for the management of the digital estate of an incapable user during lifetime and subsequently after his death. In common law jurisdictions, a trust could be used for the management of digital estate, whereby the transfer could be arranged during one's lifetime, while the settlor would still maintain access and control, with a regulated and discrete transfer after death. However, trusts created only for digital assets are still very few.⁹⁶

Recently, there are new services online that offer to manage digital assets in return for a fee.⁹⁷ It is possible to create an „inventory” of all digital assets, including the corresponding login credentials, and determine what should happen with each individual asset after death. It is a brand new industry that has to be treated with caution, although it seems like an appealing solution at first sight. Communication is simple and informal, and everything takes place online. The change of login credentials and other configurations are easy and fast. However, the use of such services bears serious risks, too.⁹⁸ The first one is connected to security. Such services can be very attractive to hacking attacks due to the amount of stored data.⁹⁹ The second risk is connected to business continuity issues of such services. What if such a start-up becomes insolvent?¹⁰⁰ In addition, those services may not necessarily be familiar with the applicable law regarding succession.¹⁰¹

For all the above mentioned reasons, it seems advisable to leave the digital estate planning, including proper legal advice and the creation of necessary documents, to trusted professionals like notaries.¹⁰²

6. CONCLUDING REMARKS

Most legal systems and judiciaries have already been confronted with issues concerning digital assets and their treatment post mortem, and they have offered either legislative solutions, or at least some kind of prevailing view regarding those issues. Although the digital world is in fact a world without borders,

94 Bittler, J., Frey, C., Nordmann, H., Schuldzinski, W., 2020, *Das Vorsorgehandbuch*, 6. Auflage, Verbraucherzentrale, p. 36.

95 See: Recommendation CM/Rec(2009)11 of 9 December 2009 of the Committee of Ministers of the Council of Europe on principles concerning continuing powers of attorney and advance directives for incapacity.

96 Hopkins, J., 2013, pp. 234–235.

97 Roy, M., 2011, Beyond the digital asset Dilemma: Will online services revolutionize estate planning?, *Quinnipiac Probate Law Journal*, Vol. 24, no. 4, p. 337 etc.

98 Hopkins, J., 2013, p. 238.

99 *Ibid.*

100 Hopkins, J., 2013, p. 239.

101 Zankl, W., Spruzina, C., 2018, p. 21.

102 Some authors e.g. in Austria advocate the extension of competences of notaries to the administration of digital assets. See: Zankl, W., Spruzina, C., 2018.

the approaches of individual countries and their outcomes have resulted in a fragmented picture. Individual countries differ not only regarding the path they choose in order to reach the goal, but also in the determination of the goal itself. Thus, while European countries are inclined to protect internet users and their heirs and prevent the creation of data graveyards, the regulation in the USA for instance, tends to protect the internet industry, facilitating the creation of data graveyards and their commercial exploitation. No legal system can close its eyes before the growing share of digital assets in a person's property, and the same is true regarding each single holder of these assets.

Regardless of the rules in place and the standpoints of individual legal systems, every future decedent has to act more actively during his lifetime and plan for the event of death and the succession of digital assets, more so than it might be the case regarding other (analogue) estate. This field represents a flourishing ground for the development and more frequent use of various digital estate planning instruments and services. The process, however, has to be put in trustworthy hands.

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4. <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&nr=85390&linked=pm> (October 2020).
5. <https://www.linkedin.com/help/linkedin/answer/2842/deceased-linkedin-member?lang=en> (March 2021).
6. <https://support.google.com/accounts/troubleshooter/6357590?hl=en> (March 2021)
7. https://www.facebook.com/help/103897939701143?helpref=faq_content (March 2021)
8. <https://help.twitter.com/en/rules-and-policies/contact-twitter-about-a-deceased-family-members-account> (March 2021).
9. <https://help.twitter.com/en/rules-and-policies/inactive-twitter-accounts> (March 2021).
10. <https://uk.help.yahoo.com/kb/options-yahoo-account-owner-passes-sln26120.html> (March 2021).
11. <https://uk.help.yahoo.com/kb/options-yahoo-account-owner-passes-sln26120.html> (March 2021).

II PANEL:
CONSTITUTIONAL PROPERTY LAW ISSUES
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*Pavlo V. Pushkar**

THE INFLUENCE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ON THE PROTECTION OF PROPERTY IN THE COUNTRIES OF EASTERN EUROPE: TRANSFORMATION OF NOTIONS OF PROPERTY PROTECTION IN THE RUSSIAN FEDERATION AND UKRAINE

Abstract: *The aim of this publication is to compare the historical legal background related to the protection of property rights in the Soviet legal system, inherited by both the Russian Federation and Ukraine as a result of collapse of the Soviet Union, with the current state of affairs relating to the protection of private property in both domestic systems, mostly on a doctrinal and constitutional level. This historical legal background, in its dynamic, is being checked with the use of the comparative method, against the international legal framework, and against approaches by to the protection of property rights by regional human rights systems, as well as with references to general principles of law, both international and domestic. The article also compares historical perspectives on property protection with the foundational doctrinal approaches to the protection of property under the European Convention on Human Rights and the case-law of the European Court, reflecting these core approaches. It then briefly assesses judgments and execution processes with regard to both the Russian Federation and Ukraine, based on the leading cases concerning protection of property rights. It draws conclusion, based on the above comparisons, as to the influences the European Convention and the Strasbourg Court have had on the transformation of legal systems in both Russia and Ukraine, notably with the main focus on the protection of private property rights. As a result of this brief review, the author reaches conclusions that more needs to be done still domestically to attain the level of protection required by the Convention, with the help of guidance given in the Court's case-law and execution processes.*

Keywords: private property, peaceful enjoyment of possessions, state and socialist property, principles of property law, European Court of Human Rights, European Convention on Human Rights, Article 1 of Protocol No. 1, Russian Federation, Ukraine.

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1. INTRODUCTION

The countries of Eastern Europe and the Russian Federation faced and continue to face serious difficulties in transformation of their legal systems to ensure compliance of legislative and institutional frameworks with the requirements of the European Convention on Human Rights. It goes without saying that the case-law of the European Court of Human Rights (hereinafter: Strasbourg Court) has played a paramount role in the ongoing transformations, mostly as the foundation for establishing balanced and fair relationships between the state and private property. The issues of compliance of domestic laws and regulations in these countries with the requirements of the Convention, institutional reaction of their legal systems, approach of the judiciary to the Convention and the Court's case-law, and the enforcement of judgments of the Strasbourg Court vis-à-vis notably re-establishing breached property rights, on a systemic and structural scale, have been the most problematic in this transformation process. In countries, which under the communist era were not recognizing private property as such, it was and still remains difficult to provide full-fledged protection to individual property rights.

More specifically, it is difficult to reach understanding that the state shall be allowed to restrict private property rights only in exceptional circumstances and that its activities shall be aimed at ensuring the effective exercise of property rights and the protection of property of its citizens. In this sense, protection of property is one of the key cornerstones for developing a liberal economy, as well as constructing and maintaining stable and democratic political and legal systems, which would be serving interests of that society's modern economy, where the state is playing a minimalist role of regulator and facilitator of economic growth. In such a system, the state would be acting as a guarantor of effective enjoyment of property rights and would not be interfering in free circulation of private property between private individuals. It would not impose unnecessary restrictions on the right to peacefully enjoy property – unless they are absolutely necessary and based on the principles of rule of law – including restrictions on transactions in land and immovable property, which are the most important fundamental cornerstones for ensuring effective exercise of the right to peaceful enjoyment of possessions.

Therefore, I will first try to deal with the brief description of approaches to the protection of property rights in the Soviet legal system. I will then proceed to the analysis of the concept of property under the European Convention on Human Rights and the Court's case-law. I will then conclude on whether the new approach to treatment of property rights is being developed in the Russian Federation and Ukraine under the influence of the Convention and the judgments of the European Court of Human Rights, specifically the judgments relating to these states, which by virtue of Article 46 of the Convention are binding upon them.

2. THE POSITION OF PROPERTY RIGHTS IN THE SOVIET LEGAL SYSTEM

The notion of private property was never fully recognised in the Soviet legal system, which largely focused on the protection of various forms of state-owned property. Limited individual property rights were permitted; however, the state was always the largest property owner and manager. In fact, management of state property lied with the nomenklatura and the Communist Party elites. Private land ownership and ownership of real estate property as such were not recognised and were not allowed. The idea of individual property was based only on state-controlled income of an individual. Thus, property rights were limited to the right of use one's house or flat, which was also restricted, while the rights to own and dispose of property were limited in law and in practice, circumventing the very essence of the right to peaceful enjoyment of possessions.¹

The 1961 Foundations of the USSR Civil Legislation established that the owner had the right to own, use and dispose of property. They established several types of property, one of which was socialist property, which comprised of state property (peoples' property) and property of collective farms, professional trade unions and other collective organisations.² The Foundations, that were used as a source for legislative drafting of Civil Codes of the Soviet Socialist Republics, also established the right to have individual or personal property, which was limited.³ For instance, every citizen had the right to have personal property based on his/her "labour-related incomes", which could only be used for aims that were not contrary to "the interest of society". A person had the right to own only one house (or a part of it) of a particular size determined by law. Villagers, who were all members of the collective farms, could only own a limited number of domestic animals.⁴

Personal property could be "requisitioned" or "confiscated", in the interests of the state or in the interests of society, with payment of compensation and without it, respectively. The regime for protection of personal property was also much weaker than that of state property, which was better protected by criminal and administrative legislation and the relevant law enforcement machinery. This was also underlined in the provisions of the 1977 Brezhnev era Constitution of

- 1 Marmazov, V., Miroshnychenko A., Pushkar P. (edited by P. V. Pushkar), 2009, *Current Problems in Protection of Property Rights in the Case-Law of the European Court of Human Rights and its Influence on the Legal System of Ukraine (scientific and methodological guide for judges)*, Kyiv, Council of Europe / Academy of Judges of Ukraine, pp. 16–38.
- 2 Foundations of the Civil Legislation of the USSR (Articles 19–32), adopted by the Verkhovny Sovet of the USSR on 8 December 1961, with changes and amendments as in force in 1981.
- 3 Khalabudenko, et. al., 2012, *Civil Legislation of the Republic of Moldova and Ukraine: traditions, actuality and perspectives: collective monography*. K. Ulim, Odessa: B.i. International independent university of Moldova and National University Odessa Law Academy – 295 pages.
- 4 Foundations of the Civil Legislation of the USSR (Articles 19–32), adopted by the Verkhovny Sovet of the USSR on 8 December 1961, with changes and amendments as in force in 1981.

the USSR,⁵ with Article 61 of that Constitution establishing a duty on the citizen to protect socialist property as the highest valued property in existence. Similar provisions existed in the Ukrainian Soviet Socialist Republic's Constitution, more specifically in Articles 11–13, which divided property into state-owned, owned by collective farms and cooperatives, as well as individual property.⁶ Such legal approach fully reflected the Marxist view on property as a means of production in the socialist society, which also reflected the approach to property law as pertaining to a group of legal norms regulating the conditions under which specific property objects (or land) could be allocated to society as a whole, serving as means of production.⁷ Thus, in the period of socialism, one could only possess property resulting from his or her own labour, and could use and dispose of these property items, without contradicting state property interests. Hereby came the artificial notion of “individual property”, which was aimed to replace “privately owned property”.

To add up to the vision of the normative framework of property regulations, both the provisions of the USSR Constitution and the Foundations of the Civil Legislation of the USSR ran contrary to the provisions of international law related to the protection of property rights, which had been adopted much earlier. Once again, the dominance of socialist or state-owned forms of property over personal or individual property, seriously limited in its scope, was the basis for this contradiction. This was notwithstanding the fact that Article 17 of the Universal Declaration on Human Rights, adopted and proclaimed by the General Assembly of the UN on 10 December 1948,⁸ was adopted with the participation of the Soviet Union, as well as the Ukrainian Soviet Socialist Republic that was a UN founding member. This provision established that “everyone has the right to own property alone as well as in association with others” and that “no one shall be arbitrarily deprived of his property.”⁹

Unfortunately, the right to own property, as a fundamental right, was not recognised in the International Covenant on Civil and Political Rights (the only “evident” context in which property is used in the Covenant is the context of non-discrimination).¹⁰ This possibly gave additional argumentation to the Soviet Union not to relate to Article 17 of the Universal Declaration as a source of legal inspiration. However, notwithstanding the non-recognition of this right at the UN Covenant level, the same right is presented in all of the functioning regional human rights systems and in their founding treaties. For instance,

5 Ukraine adopted its own Constitution in 1978, which was in force with changes and amendments until adoption of the new Constitution of Ukraine on 28 June 1996, <https://zakon.rada.gov.ua/laws/show/888-09#Text>

6 Constitution of the Ukrainian Soviet Socialist Republic, adopted on 20 April 1978 (in force until 28 June 1996), <https://zakon.rada.gov.ua/laws/show/888-09#Text>

7 Sowell, T., 1985, *Marxism: Philosophy and Economics*, New York, Quill, William Morrow, p. 76.

8 The Declaration was proclaimed by the United Nations General Assembly in Paris on 10 December 1948, <https://www.un.org/en/universal-declaration-human-rights/>

9 *Ibid.*

10 International Covenant on Civil and Political Rights, UN doc. 2200A (XXI) (16 December 1966), <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

it was also presented in quite a different manner in Article 14 of the African Charter on Human and Peoples' Rights as a right guaranteed, but confined to some limitations and "human and peoples'" duties arising from the Charter, as well as subject to constraints by "interest of public need", "general interest", and subject to "provisions of appropriate laws".¹¹ A similar right to property with analogous limitations is also established by Article 21 of the American Convention on Human Rights.¹² The American Convention establishes, similarly to the European Convention on Human Rights, a general rule that "everyone has the right to the use and enjoyment of his property". However, in a slightly different way it further states that the "law may subordinate such use and enjoyment to the interest of society" and that "no one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law". In addition, it is interesting that these more general terms are appended with the prohibition, under Article 21(3), of any "usury", i.e., an exorbitant or unlawfully established rate of interest for money lent, or of other forms of "exploitation of man by man", requiring that such prohibition be imposed in the domestic law. In contrast to the above, the Convention of the Community of Independent States on Human Rights and Fundamental Freedoms (former Soviet Union states),¹³ in Article 26, largely repeated the first sentence of Article 1 of Protocol No. 1, even though its wording is quite different, and the second paragraph of Article 26 is a simpler version of the Article 1 of Protocol No. 1.¹⁴ The non-working version of the CIS Convention, even though its text is approximated to Article 1 of Protocol No. 1, is definitely not as advanced compared to Article 17 of the European Charter of Fundamental Rights, which is in turn much more advanced than the text of Protocol No. 1 to the Convention. Listing four general presumptions of the right to property – the right to own, use, dispose of and bequeath (leave or give by will after one's death) property – it also speaks of "lawfully acquired possessions", and prescribes that deprivation of possessions can occur only "in the public interest", "in the cases and under conditions provided for by law", but that it also must be "subject to fair compensation being paid in good time for

11 African Charter on Human and Peoples' Rights (Article 14), adopted on 1 June 1981 and entered into force on 21 October 1986, <https://au.int/en/treaties/african-charter-human-and-peoples-rights>

12 American Convention on Human Rights, adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969, Basic documents of the Organization of the American States, <https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm>

13 The European Court of Human Rights adopted an interesting position in 2004 as to its competence to give advisory opinion on 2 June 2004, specifically focusing on the compatibility of the CIS Convention with the requirements of the European Convention on Human Rights and the possibility to recognise the CIS Convention as a regional instrument of human rights protection, which could be recognised also from the point of view of the admissibility requirements. ECtHR, Request Number: A47-2004-001, Decision of 2 June 2004, <http://hudoc.echr.coe.int/eng?i=003-1339293-1397515>).

14 Convention of the Community of Independent States on Human Rights and Fundamental Freedoms (26 May 1995), website of the Executive Committee of the CIS (in Russian only), <https://cis.minsk.by/page/11326>

their [possessors'] loss". The last element reflects the codification of one of the principles of international law ("no taking of property without fair and timely compensation"). The Charter also adds three distinct elements to the protection of property and private commercial or economic activities, based on the ideas of private ownership. It adds that "the use of property may be regulated by law in so far as is necessary for the general interest". In addition to that it establishes that not only "intellectual property shall be protected" (Article 17 paragraph 2), but also the "freedom to conduct business", in accordance with the supranational regulations of European Union law and national laws and practices (Article 16 of the Charter).¹⁵ Therefore, it clearly established that European Union law might provide "more extensive protection" of rights and fundamental freedoms, in contrast with the Convention for the Protection of Human Rights and Fundamental Freedoms, which contains similar and corresponding rights, the meaning and scope of which shall be the same as laid down in the Convention and as interpreted by the European Court of Human Rights, in its case-law. These principles are clearly established in Articles 52 and 53 of the Charter.¹⁶

Turning back to the approaches in the USSR Constitution and the Foundations of the Civil Legislation of the USSR, their approach was also quite different from the spirit, formulations and notions used in the text of Article 1 of Protocol No. 1 to the Convention, adopted in 1952, which established that "every natural or legal person is entitled to the peaceful enjoyment of his possessions". Even though the adoption of this provision attracted a high degree of discussion and showed differences in approaches to the protection and regulation of property rights, the text of the Convention eventually showed convergence of European approaches to property protection and consensus over the notion of property and the scope of restrictions that could be imposed on the exercise of this right.¹⁷ The following provision reads: "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." The Protocol also provides that the establishment of the right to property "shall not in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."¹⁸ These convergent approaches were reconfirmed in the provisions of the European Union Charter of Fundamental Rights, as was discussed above, which clearly advanced the protection of private property and reinforced its primary role in the construction of European economic market, based on the ideas of not only economic, but also personal freedoms.

15 Charter of Fundamental Rights of the European Union 2000/C 364/01, of 26 October 2012. It was drafted by the European Commission and solemnly proclaimed on 7 December 2000 by the European Parliament, the Council and the European Commission. Its legal status was then confirmed with the entry into force of the Treaty of Lisbon on 1 December 2009. http://data.europa.eu/eli/treaty/char_2012/oj

16 *Ibid.*

17 Popović, D., 2009, *Protecting Property in the European Human Rights Law*, Eleven International Publishers, Netherlands, p. 8.

18 See Article 1 of Protocol No. 1 ECHR, adopted on 20 March 1952 in Paris.

The changes brought to the Constitutions of the former Soviet States and to their domestic legislation, after the dissolution of the Soviet Union and the relevant declarations of independence by these states, reflected on the approaches taken to the protection of property: the right to peaceful enjoyment of possessions was declared a fundamental right, protected by law and its enforcement machinery – which was contrary to the Soviet times when this right was neglected. These constitutional novelties also prohibited any arbitrary interference in the right to peaceful enjoyment of possessions or any interference not based in law. An example of such an approach is embedded in Article 41 of the Constitution of Ukraine, which treats property issues in an extensive manner.¹⁹ In particular, it provides as follows:

“... Everyone has the right to own, use and dispose of his or her property, and the results of his or her intellectual and creative activity.

The right of private property is acquired by the procedure determined by law.

In order to satisfy their needs, citizens may use the objects of the right of state and communal property in accordance with the law.

No one shall be unlawfully deprived of the right of property. The right of private property is inviolable.

The expropriation of objects of the right of private property may be applied only as an exception for reasons of social necessity, on the grounds of and by the procedure established by law, and on the condition of advance and complete compensation of their value. The expropriation of such objects with subsequent complete compensation of their value is permitted only under conditions of martial law or a state of emergency.

Confiscation of property may be applied only pursuant to a court decision, in the cases, in the extent and by the procedure established by law.

The use of property shall not cause harm to the rights, freedoms and dignity of citizens, the interests of society, aggravate the ecological situation and the natural qualities of land. ...”

This constitutional provision is surely an advancement. However, its text contains inherent limitations on property. For instance, property rights can be acquired only on the basis of “the procedure determined by law”. This goes against the non-interventionist approach to regulating property rights and possibly against the ideas relating to the creation of property, including intellectual property objects, which are also protected by the Constitution. Similar provisions are established in the Constitution of the Russian Federation: its Articles 35 and 36 provide for parallel approaches, but also envisage the right to private ownership of land, prescribing more extensive guarantees for property protection in this respect.²⁰

19 Article 41 of the Constitution of Ukraine, adopted on 28 June 1996, with further changes and amendments, <https://zakon.rada.gov.ua/laws/main/en/254%D0%BA/96-%D0%B2%D1%80#-Text>

20 The Constitution of the Russian Federation, adopted by national vote on 12 December 1993 and came into force on the day of its official publication. The text of the Constitution was published in Rossiiskaya Gazeta newspaper as of 25 December 1993 (English translation).

Notwithstanding these clear-cut Constitutional approaches, many practical issues still create obstacles in the domestic legal systems, including in the Russian Federation and Ukraine, preventing these states from giving full effect to private property protection and thus giving real effect to this right.²¹ The economic transition could not happen immediately, requiring a thoughtful restoration of a full-fledged legal regime for private property. Moreover, the legal standing of private property within the legal systems as well as in the system of the societal values had to be restored to the highest possible extent.²² The underlying reasons are found in attitudes towards property rights, both in legal theory and in the practice of law, also those dating from Soviet times, that differ from approaches to property protection as seen in the European legal systems of liberal economies. The cornerstone for private property protection requiring change was the role of the state in regulating private property, which even today remains restrictive and in many senses backwards looking – not directed at the development of a liberal economy and a free market.²³

3. LEGAL APPROACH TO PROTECTION OF PROPERTY DEVELOPED IN THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

The term ‘property’ can be used to describe three different aspects of the relationship between people and things: the nature of rights, the continuing relations and the nature of the relationship, as well as the description of an object itself.²⁴ The right to property (right to peaceful enjoyment of possessions) as established by Article 1 of Protocol No. 1 covers a wide range of economic interests: it covers not only classical objects of property, but also such objects as movable and immovable property, tangible and intangible interests, including shares, patents, copyright, intellectual property rights, permits and licenses to run business, arbitration and judicial awards, landlord entitlements to rent, economic interests connected with the running of a business (clientele, goodwill and business reputation), the right to exercise of profession, a legitimate expectation to obtain something into ownership that is sufficiently established, property and social privileges that are sufficiently established in law, etc.²⁵

Changes and amendments were introduced to the Constitution in July 2020, as a result of the referendum. <http://www.constitution.ru/en/10003000-03.htm>

- 21 There is a somewhat useful approach for analysis of private property protection in the Russian Federation and Ukraine by the International Property Rights Index Foundation, which analyses aggregated accumulated data as regards property rights by country: <https://www.internationalpropertyrightsindex.org/countries>
- 22 Clark, S., 2007, *The Development of Capitalism in Russia*, Oxon, Routledge. p. 11–21.
- 23 Havrylyshyn, O., 2017, *Political Economy of Independent Ukraine: Slow starts, false starts, and a last chance?*, Studies in Economic Transition, Palgrave MacMillan, p. 356.
- 24 Clarke, A., Kohler, P., 2005, *Property Law: Commentary and Materials*, New York, Cambridge University Press, 2005, p. 17.
- 25 Carss-Frisk, M., 2001, *The right to property: A guide to the implementation of Article 1 of Protocol No. 1 to the European Convention on Human Rights*, Human rights handbook, No. 34, Strasbourg, Council of Europe Publishing, p. 6.

In short, the Convention and the Court's case-law protect a "bundle" of rights. Furthermore, the Court, in examining complaints under Article 1 of Protocol No. 1, created a system of assessing the complaints from the point of view of compliance with three distinct rules, which are set out by the Court to include the principle that everyone has the right to peaceful enjoyment of possessions, that deprivation of possessions shall be subjected to certain conditions (interference with property must be done in the public interest and subject to the conditions provided for by law and/or according to the general principles of international law), and that the state have the power to enforce such laws as they deem necessary for specific purposes (in the general interest and to secure payment of taxes or other contributions or penalties).²⁶

The reference to the general principles of international law is specifically interesting. It is possibly the first direct recognition of these principles in the text of the provisions of the Convention, even though the reference to the general principles and norms recognised by civilised nations had been discussed widely at the *travaux préparatoires* in drafting the Convention itself.²⁷ While there is no specific enlistment of such principles as applicable to property only, it appears that such principles as equity, equality, fairness, justice, acting in good faith, *pacta sunt servanda*, proportionality, *res judicata*, non-discrimination, etc. are all relevant to the discussions on property rights protection. Some of these principles, which might be said to relate to substantive or procedural law only, are common both to the international and the national system of laws, even though they might have a particular context in each of the domains. The reference to the general principles of international law, like, for instance, the principle of no confiscation without compensation, or the obligation to pay damages in the event of breach of property rights, clearly strengthened this provision substantively and moved it closer in the direction of private international law, even international investment law. This in turn allowed Article 1 of Protocol No. 1 to the Convention to become a common denominator in the relations between private individuals and legal entities, giving the Convention a stronger horizontal *Drittwirkung* effect, even outside the purely national scope, moving it transnationally.

It almost goes without saying that the principles of rule of law and legal certainty enshrined in the Convention provide that laws that are used as a condition for interference are sufficiently accessible and foreseeable.²⁸ It should also be mentioned that interference with the right to property should serve a legitimate aim and should be proportionate to that aim, meaning that there should be a reasonable relationship of proportionality between the means used to enforce the prohi-

26 Grgic, A., Mataga, Z., Longar, M., Filfan, A., 2009, *The right to property under the European Convention on Human Rights. A guide to the implementation of the European Convention on Human Rights and its protocols*, Human rights handbooks, No. 10, Strasbourg, Council of Europe Publishing, pp. 5–6.

27 Reference to the notion of the "general principles of law recognised by civilised nations" contained in the *travaux préparatoires* to the Convention. Information document prepared by the Registry of the European Court of Human Rights, Council of Europe, Strasbourg, 7 November 1974, https://www.echr.coe.int/Documents/Library_TravPrep_Table_ENG.pdf

28 ECtHR, *Beyeler v. Italy*, no. 33202/96, Judgment of 5 January 2000 [GC], para. 109.

bition and the aim sought to be realised (the so-called “fair balance test”).²⁹ Quite naturally, the case-law of the Court speaks about the interference and the fair balance test with the aim of ensuring protection of public or general interest.

In any case, any interference with property rights, either the control of use of property, its expropriation, or deprivation, must not be arbitrary, and must be sufficiently substantiated, having sufficient legal and factual basis. Nevertheless, the practice of the European Court never expressly speaks of such a factor as the existence of a “pressing social need” in interfering with property. In addition, the Court’s case-law speaks not only about interference with property that must be effectuated on the basis of procedure established by law, but also of the need to comply with the requirements of substantive law that constituted the grounds for such an interference, i.e., that the interference is not arbitrary and is within the margins of the “rule of law”.³⁰ The practice of the Court also underlines that this provision does not expressly require the payment of compensation for interference with property, but compensation is required for deprivation of property effectuated by the State.³¹ In many cases of lawful expropriation, such as the distinct expropriation of land with a view to building a road or for other purposes “in the public interest”, only full compensation can be regarded as reasonably related to the value of the property; however, that rule is not without its exceptions.³² The practice of the Court also allows a wide margin of appreciation in matters of taxation and securing the payment of taxes or other contributions or penalties, which nevertheless should be based on the principle of non-discrimination.³³

4. CONCLUDING REMARKS: IS THERE A NEW APPROACH TO PROPERTY PROTECTION IN THE DOMESTIC LEGAL SYSTEMS OF THE RUSSIAN FEDERATION AND UKRAINE?

One of the relevant examples is the most recent judgment of the Court with regard to Ukraine, relating to the moratorium on the sale of agricultural land. The blanket ban, de facto imposed on such sale since the independence of Ukraine, was lifted only recently, in April 2020, as a measure in response to the demands of the IMF. Although it was lifted, it still remains in force, until July 2021, and the lifting also requires legislative and institutional framework to enforce land ownership rights. One of the driving factors for such an annulment of the moratorium was the judgment of the European Court of Human Rights in the case of

29 ECtHR, *Bélané Nagy v. Hungary*, no. 53080/13, Judgment of 13 December 2016 [GC], para. 115.

30 ECtHR, *Kushoglu v. Bulgaria*, no. 48191/99, Judgment of 10 May 2007, paras. 49–62.

31 ECtHR, *James and Others v. the United Kingdom*, no. 8793/79, Judgment of 21 February 1986, para. 54, ECtHR, *Broniowski v. Poland*, no. 31443/96, Judgment of 28 September 2005 [GC], para. 182.

32 ECtHR, *The former King of Greece and Others v. Greece* (just satisfaction), no. 25701/94, Judgment of 28 November 2020 [GC], para. 78.

33 ECtHR, *Guberina v. Croatia*, no. 23682/13, Judgment of 22 March 2016, para. 78. See also ECtHR, *Weller v. Hungary*, no. 44399/05, Judgment of 31 March 2009, para. 37.

Zelenchuk and Tsytsyura v. Ukraine.³⁴ The case remains under supervision with the Committee of Ministers of the Council of Europe over the execution of the judgment.³⁵

The Russian Federation faced specific difficulties in the area of property rights as result of large re-privatisation of state-owned property. One example of cases still pending execution before the Committee of Ministers is the judgment in the case of *Yukos v. the Russian Federation*.³⁶ The case raised issues of constitutionality for the Constitutional Court of the Russian Federation, as well as vivid discussions as to the international obligations of the state under Article 41 of the Convention, both at the level of the Parliamentary Assembly of the Council of Europe and the Council of Europe's expert body – the Venice Commission.³⁷

A number of other cases concerning the countries of Eastern Europe, relate to so-called “social benefits”, an area that is only distantly covered by the obligations stemming from Article 1 of Protocol No. 1. The Strasbourg Court has taken a cautious approach in dealing with these essentially social rights, nevertheless recognizing that where legislation provides for such a benefit or where this benefit is confirmed by an enforceable legislative scheme or a domestic judgment – the state has an obligation to provide and ensure the enforcement of such a right. The Court's case-law recognises that in a modern, democratic state, many individuals are, for all or part of their lives, completely dependent for survival on social security and welfare benefits. Many national legal systems recognise that such individuals require a degree of certainty and security, and provide for benefits to be paid – subject to the fulfilment of the conditions of eligibility specified in the domestic law – as of right.³⁸ The Court has previously addressed the issue of legitimate expectation in the context of social benefits on a number of occasions.³⁹ Therefore, the Court regards such “social benefits” as falling within the category of property rights under the Convention and the case-law under Article 1 of Protocol No. 1.

Another difficulty in cases concerning property rights also exists in relation to the delineation between the state and private property, whereas the state still

34 ECtHR, *Zelenchuk and Tsytsyura v. Ukraine*, nos. 846/16 and 1075/16, Judgment of 22 May 2018.

35 For more information as to the measures in the case of *Zelenchuk and Tsytsyura* pending execution under supervision of the Committee of Ministers of the Council of Europe, see: <http://hudoc.exec.coe.int/ENG?i=004-50173>

36 ECtHR, *OAO Neftyanaya Kompaniya Yukos v. Russia*, no. 14902/04, Judgment of 20 September 2011.

37 Russian Federation – Opinion on draft amendments to the Constitution (as signed by the President of the Russian Federation on 14 March 2020) related to the execution in the Russian Federation of decisions by the European Court of Human Rights, adopted by the Venice Commission on 18 June 2020 (CDL-AD(2020)009-e), [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2020\)009-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2020)009-e)

38 ECtHR, *Stec and Others v. the United Kingdom* (dec.), nos. 65731/01 and 65900/01, Decision of 12 April 2004, para. 51; ECtHR, *Richardson v. the United Kingdom* (dec.), no. 26252/08, Decision of 10 April 2012, para. 12.

39 ECtHR, *Kjartan Ásmundsson v. Iceland*, no. 60669/00, Judgment of 12 October 2004, para. 44; ECtHR, *Klein v. Austria*, no. 57028/00, Judgment of 3 March 2011, para. 43.

is a major stakeholder in the economy and has major control over economic assets and capital. This is seen from the judgments of the Court in the so-called *Ivanov/Burmych* group of cases⁴⁰ concerning Ukraine, where one of the major issues involved the practically permanent moratoriums imposed on the execution of judgments concerning domestic debts of the state, state-owned or state-controlled companies, in cases usually launched by private applicants (a similar issue persisted with respect to Serbia as regards the “socially owned companies”⁴¹, as well as in several other Eastern European states carrying “negative heritage” of socialist legal systems). The mentioned issue reinforces the discriminatory situation regarding state and private property within the domestic system of Ukraine. A somewhat similar situation had been alleviated through the implementation of the judgments in the *Burdov No. 2* group of cases,⁴² where measures had been adopted by Russia to limit state liability for essentially private commercial debts.

To summarise, both the Strasbourg Court and the Committee of Ministers of the Council of Europe, have strongly influenced and supported the transformation of the legal systems of Eastern European countries in their action with a view to secure property rights. Nevertheless, due to the Convention’s active role and decisive influence on domestic change in both Russia and Ukraine, the notion of property itself, having been seen from the point of view of the classical “triad of property rights” – right to possess, right to use, and the right to dispose of – has been expanded to incorporate the requirements set in the case-law of the Court. It now largely accommodates the requirements of the Convention and Article 1 of Protocol No. 1, which regard the notion of possessions as an “autonomous concept”, guided by three distinct rules, subject to possible interferences and limitations that are foreseen by this provision. However, the idea that the interferences and limitations should be applied narrowly is still not fully realised and we can see this both from the judgments adopted by the Strasbourg Court as well as by the cases pending execution. Indeed, years of influence have undeniably transformed the legal and institutional framework with a view to provide stronger protection to private property. Nevertheless, much more needs to be done to ensure that the right to peaceful enjoyment of possessions is protected not only in theory, but also in practice. One such indicator could be less cases pending both before the Court and before the Committee of Ministers of the

40 These cases (the *Ivanov/Burmych* group of cases) relate to the major structural problem of non-enforcement or delayed enforcement of domestic judicial decisions, mostly delivered against entities owned or controlled by the state, and to the lack of an effective remedy in this respect (violations of Articles 6 § 1 and 13 of the Convention and Article 1 of Protocol No. 1), <http://hudoc.exec.coe.int/ENG?i=004-47973>

41 The *Kačapor* group and *Kin-Stib and Majkič* group comprise cases concerning a significant number of failing socially owned companies in Serbia lacking funds to service their debts for which the State was not responsible. Information as regards to the execution of judgments of the Strasbourg Court pending within these groups of cases: <http://hudoc.exec.coe.int/ENG?i=004-7246>

42 See, for more details, information on the execution of the judgments in the *Gerasimov* group of cases. The Russian authorities adopted a remedy in response to the ECtHR, *Burdov (No. 2) v. Russian Federation*, no. 29920/05, pilot judgment 1 July 2014, which has been recognised by the Court as effective: <http://hudoc.exec.coe.int/ENG?i=004-14126>

Council of Europe. To these ends, the actions of the domestic judiciary also need to be aligned with the case-law of the European Court of Human Rights, and they need to be inspired by the core principles and approaches to the protection of property developed since 1950s. The process of execution of judgments can play an important role to correct the anachronistic legal regulations and lift unlawful or arbitrary restrictions on the exercise of property rights, as for instance the moratoriums on sale of land or as regards the enforcement of domestic judgments. To meet these ends, full and timely enforcement of judgments of the Strasbourg Court, with guidance provided by the Committee of Ministers' supervision, is an important step to be taken, one that has to be further strengthened and supported domestically at both the institutional and political levels.

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ECHR RESTITUTION CASE-LAW FOR CENTRAL AND EASTERN EUROPE

Abstract: *This article explores the case-law and the role of the European Court of Human Rights (“the Court”) in respect of restitution of property in Central and Eastern Europe, predominantly under Article 1 of Protocol No. 1 (protection of property) to the European Convention on Human Rights (ECHR). It further focuses on takings of property by the communist regime in the aftermath of the Second World War, as well as during the recent conflicts in the Balkans, and the restitution processes in the states which once formed part of the former Socialist Federal Republic of Yugoslavia (“the SFRY”): Bosnia and Herzegovina, Croatia, Montenegro, North Macedonia, Serbia and Slovenia. Given that there has been relatively little published on the restitution processes in the region, the aim of this contribution is to shed light on the scope of restitution, the legal problems stemming from restitution that arose at the international level and the Court’s contribution to these processes. Through the examination of the Court’s case-law and its role regarding restitution in these states, the contribution ultimately reveals the evolving legal understanding of restitution itself.*

The Court’s judgments conform to the general principles of international law on reparations, and hence the Court has been unable to expand the scope of domestic law to cover additional beneficiaries (including, for instance, to expand access to non-citizens under Article 14 of the Convention (prohibition of discrimination) combined with Article 1 of Protocol No. 1, where such a requirement was in place). Bearing in mind further constraints imposed on the Court by international public law, including its limited temporal jurisdiction and its subsidiary role, fair trial guarantees under Article 6 of the Convention, in addition to Article 1 of Protocol No. 1 guarantees, have played a key role in many of these cases. In particular, the enforcement of domestic decisions and judgments, length of proceedings, respect of the res judicata effect of a final judgment, rights of a third party acting in good faith, and resolution of disputes concerning the coexistence of two title deeds to the same property, were at stake. The shortcomings in the implementation stage have also led to the adoption of pilot judgments. This line of cases has strengthened the Court’s role as a guiding companion to Central and Eastern European countries in their journey towards democracy, rule of law, and the market economy. The Court has played this role both in cases concerning individual applicants and in pilot judgments involving large numbers of applicants.

While Bosnia and Herzegovina, Croatia, Montenegro, North Macedonia, Serbia and Slovenia have, for the most part, put significant effort into righting the wrongs of uncompensated confiscation of property that occurred during the communist rule (or, as far as Bosnia and Herzegovina is concerned, during the 1990s war), the Court’s case law clearly shows that engaging

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in restitution in practice is an extraordinarily complex and cumbersome endeavor. These challenges are reflected in the protracted nature of many restitution proceedings, the extended length of which the Court has, on occasion, considered to constitute a violation of the ECHR. The importance of enforcement and implementation has also been confirmed in the case-law concerning the member states from the region. The Court clearly enforced state processes once they were put in place, both as far as the rule of law and the actual implementation were concerned. For instance, in one case the Court ordered the transfer into the applicants' possession of substitute land; in another case, the Court ordered the removal of a church from the applicants' real estate property. However, given that the member states have a broad margin of appreciation in the field of economic and social policy, especially in the transition towards a market-led economy, the Court has allowed some degree of leeway at the implementation stage.

Overall, no major deficiencies have so far been detected at the international level in respect of the restitution legislation passed by states in the region, which is perhaps surprising given the heated public debates, the considerable number of amendments and the extensive litigation both before the domestic courts and in international fora concerning this legislation. Instead, the shortcomings found were related to the arbitrariness of the domestic courts' reasoning or the lack of the execution of judgments. In some cases, the Court gave guidance on the legality of modification of compensatory entitlements granted by legislation during pending proceedings. The Court has so far not found any structural problems in the restitution processes in the region which would trigger the pilot procedure. Some of the inadmissibility decisions on restitution were also quite important for the member states concerned since they showed the limits of Strasbourg's supervision.

As to the evolving nature of the restitution, although the obligation to return expropriated property to individuals has not, strictly speaking, become a recognized part of international law, this body of case-law has raised awareness of the importance of restitution of property for undoing past wrongs in international fora. In international law, it has already become close to an obligation in certain contexts, such as in respect of internally displaced persons. Furthermore, the victims of previous regimes or mass human rights violations are increasingly being granted the right to individualization, even in the inter-state context. The symbolic dimension of restitution should also not be forgotten, not only for individual heirs, but for wider communities and entire nations.

The law of restitution will therefore likely play an increasingly important role in the 21st century. The restitution legislation enacted by Central and Eastern European countries, as well as the case-law established by the ECHR in this area, are therefore of critical importance as the concept of restitution becomes ever more a recognized moral, as well as legal, principle.

Keywords: European Court of Human Rights, case-law, role, international law on reparations, restitution of property, Central and Eastern Europe, former SFRY, evolving nature of restitution

1. INTRODUCTION

A significant portion of the litigation before the European Court of Human Rights ("the ECHR") from the countries of Central and Eastern Europe concerns property issues. Much of this litigation centers on various property law reforms, including notably the restitution of property to previous owners. These cases often entail very complex factual circumstances, broader economic and social considerations, as well as intricate legal reasoning.

There were initially fears among some long-standing Council of Europe (“CoE”) member states that allowing former socialist countries to join the Convention system would significantly affect ECHR property case-law. However, these fears have not come to fruition, as the pre-existing Convention standards have been by and large upheld.

It is clear in international law that the taking of property (expropriation/deprivation), without compensation in an amount reasonably related to its value, will normally constitute a breach. A total lack of compensation can be justified only in exceptional circumstances, such as during the process of German unification. However, this approach only concerns modern-day takings; a different approach has been adopted in respect of restitution of property taken decades ago which could not be returned *in natura*, as will be shown by the contribution.

Until comparatively recently, the land, homes and other possessions of the “losers” of an armed conflict were widely regarded as part of the “spoils of war” by the victors. Thus, property claims after the end of wars or armed conflicts were generally part of peace negotiations or other types of negotiations between governments. The resolution of such disputes over foreign property usually involved lump-sum settlements,¹ with a valuation below the actual value of the assets.

The most important principle of international law relating to the violation, by a state, of a treaty obligation is “that the breach of an engagement involves an obligation to make reparation in an adequate form”². However, in general, no right to restitution could be directly invoked under international law by individuals. A similar stance was prevalent regarding property expropriated from “undesirable” groups or populations internally. To address the lack of satisfactory solutions at the inter-state level, provisions were also made unilaterally at the national level for populations that fled their country of origin.

A significant change occurred at the domestic level after the change of political regimes in 1990 in Central and Eastern Europe. Democratic parliaments and governments put in place vast restitution programs to return property taken in the aftermath of the Second World War to previous owners and/or their heirs.

Beyond the immediate pecuniary value of returned property, the symbolic dimension of restitutions is perhaps equally important for individuals and their heirs, larger communities, and even entire nations. For instance, allow me to mention the recent, and quite extraordinary, return of the National Hall (*Narodni dom* in Slovenian) in Trieste, Italy, to the Slovenian minority. From 1904 until the early 1920s, *Narodni dom*³, a state-of-the-art cultural and economic building, was the heart of the booming Slovenian community in Trieste, which was at that

1 Shaw, M., 1997, *International Law*, Cambridge, pp. 582 and 282; Škrk, M., Italian claims to property in Slovenia, in: Natalino Ronzitti (ed.), 2005, *Neighborhood Relationship of Italy with Croatia, Serbia-Montenegro and Slovenia* (in Italian: *I rapporti di vicinato dell'Italia con Croazia, Serbia-Montenegro e Slovenia*), Luiss University Press – Giuffrè, p. 101.

2 The judgment of the Permanent Court of International Justice in the case of *the Factory at Chorzów* (jurisdiction), Judgment No. 8, 1927, the Permanent Court of International Justice (“PCIJ”), Series A, no. 9, p. 21.

3 Maček, A., Pflaum, V., Vilfan Vospernik, A., 2019, Reflections on the Composition of Trieste Citizenry in the Nineteenth and Early Twentieth Centuries (in Slovenian: *O strukturi*

time the major seaport of the Austro-Hungarian Empire. The building included a theatre, a hotel, private flats, a bank, and a printing press, and it housed numerous cultural associations. It was burned, under circumstances that remain opaque, by fascist squads on 13 July 1920.⁴

Exactly one hundred years later, on 13 July 2020, the Italian and Slovenian Presidents signed an agreement returning the building to the Slovenian community. This agreement went further than required by Italian domestic law – specifically, the 2001 Act on the Legal Framework and Protection of the Slovenian Linguistic Minority in the region of Friuli-Venezia Giulia – which provided for the use of the building by the community for cultural purposes. This act was deeply cathartic for the Slovenian community. Such restitutions are rare, particularly those made so long after the property in question was initially expropriated, but this example demonstrates that even the passage of one hundred years is not too long to consider the possibility of restitution.

Little has been published on the return of property after 1990 in the region, i.e. for the member states which formed part of the former Socialist Federal Republic of Yugoslavia (“the SFRY”): Bosnia and Herzegovina, Croatia, Montenegro, North Macedonia, Serbia and Slovenia. This contribution explores how the restitution processes have contributed to the rule of law and the region’s economic well-being, as well as the current challenges faced by these countries. In the region, the processes of return (= the restitution) of property taken in the aftermath of the Second World War, as well as during the recent conflicts in the Balkans, is either currently ongoing or is reaching its end. The contribution will also try to show the fields of international law in which restitution has become an important legal principle.

2. KEY NOTIONS OF THE ECHR RIGHT TO PROPERTY

When the European Convention on Human Rights (“the Convention”) was being drafted, the CoE member states were at first unable to reach an agreement about whether the right to property should be among those rights protected by the Convention. The formulation eventually adopted by the First Protocol to the Convention was a compromise solution, providing a rather qualified right to property and allowing member States significant power to interfere with that right.

Article 1 of Protocol No. 1 is the only provision of the Convention and its Protocols which guarantees economic rights. It provides:

“Article 1 of Protocol No. 1 – Right to property

1. 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.

tržaškega meščanstva v 19. in v začetku 20. stoletja), Kronika: časopis za slovensko in krajevno zgodovino, 2019, Vol. 67, Issue 3, pp. 561–562.

4 For the detailed description of events, damage incurred and compensation claims, see the letter of Josip Vilfan, Trieste barrister and President of *Edinost*, representing the Slovenian community, to the then Italian Prime Minister Giovanni Giolitti.

2. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

In its landmark judgment *Marckx v. Belgium*⁵, the Court stated for the first time that:

“... By recognizing that everyone has the right to the peaceful enjoyment of his possessions, Article 1 is in substance guaranteeing the right of property. This is the clear impression left by the words “possessions” and “use of property” (in French: “biens”, “propriété”, “usage des biens”); the travaux préparatoires, for their part, confirm this unequivocally: the drafters continually spoke of “right of property” or “right to property” to describe the subject-matter of the successive drafts which were the forerunners of the present Article 1. Indeed, the right to dispose of one’s property constitutes a traditional and fundamental aspect of the right of property ...

The second paragraph of Article 1 nevertheless authorizes a Contracting State to “enforce such laws as it deems necessary to control the use of property in accordance with the general interest”. This paragraph thus sets the Contracting States up as sole judges of the “necessity” for such a law ... As regards “the general interest”, it may in certain cases induce a legislature to “control the use of property (...)”

When the Court examines the applicant’s allegations under Article 1 of Protocol No. 1, the first step in its analysis is to establish whether the applicant has a “possession” within the meaning of the first part of that Article. If not, the application will be declared incompatible *ratione materiae* with the provisions of the Convention.

The concept of “possessions” in the Court’s jurisprudence is an autonomous one which is independent from the formal classification in domestic law. “Possessions” include rights “*in rem*” and “*in personam*”, covering both “existing possessions” and assets, including claims, in respect of which the applicant can argue that he or she has at least a “legitimate expectation”. A claim may be regarded as an asset only when it is sufficiently established to be enforceable, for instance when it is based on settled domestic case-law. By contrast, a conditional claim cannot be considered an asset.

The concept of “possessions” encompasses immovable and movable property and other proprietary interests, such as rights arising from shares, intellectual property rights, final arbitration awards, established pension entitlements, entitlements to rent arising from a contract, and even rights arising from the running of a business. This broad interpretation is prompted by the word “*biens*” in the French version of the text of Article 1 of Protocol No. 1. In French legal terminology, the term “*biens*” relates to all patrimonial (i.e. pecuniary) rights. However, the protection of that Article does not come into play unless it is possible to demonstrate the proprietary interest in question. Nor does Article 1 of Protocol No. 1 guarantee the right to acquire property (*Marckx*, cited above).⁶

5 ECtHR, *Marckx v. Belgium*, no. 6833/74, Judgement of 13 June 1979, paras. 63–64.

6 *Ibid.*, para. 50.

Once the Court is satisfied that Article 1 of Protocol No. 1 is applicable to the case at hand, it embarks on the substantive analysis of the circumstances of which the applicant complains. Therefore, the Court's second step is to consider whether there has been an interference with the applicant's "possessions" and, ultimately, the nature of that interference (i.e., which of the Article 1 of Protocol No. 1's three rules applies).

In the case of *Sporrong and Lönnroth v. Sweden*⁷, the Court developed the following famous definition of the three rules: "The first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property. The second rule, contained in the second sentence of the first paragraph, covers only deprivation of "possessions" and subjects it to certain conditions. The third rule, stated in the second paragraph, recognizes that the Contracting States are entitled, inter alia, to control the use of property in accordance with the general interest."

Regardless of the applicable rule, any interference with the rights protected by Article 1 of Protocol No. 1 must meet the requirement of lawfulness (*Vistiņš and Perepjolkins v. Latvia* [GC]⁸). The notion of law under the Convention also has an autonomous meaning. The provisions of the domestic law should be sufficiently accessible, precise, and foreseeable in their application. The principle of legal certainty is one of the fundamental principles of a democratic society and is inherent in the Convention as a whole.

Furthermore, any interference by a public authority with the peaceful enjoyment of "possessions" can only be justified if it serves a legitimate public (or general) interest (*Bélané Nagy v. Hungary* [GC]⁹, and *Lekić v. Slovenia* [GC]¹⁰). The notion of "public interest" is necessarily an extensive one. Since the domestic authorities have a better knowledge of their society and its needs than does the Court, they are usually better placed to establish what is in the public interest. The Court found it natural that the "margin of appreciation" available to the legislature in implementing social and economic policies should be a wide one (*James and Others v. the United Kingdom*¹¹). The Court will therefore respect the domestic authorities' judgment as to what is in the "public interest" unless that judgment is manifestly without reasonable foundation. The "margin of appreciation" also derives from the Court's subsidiary role.

Finally, a measure interfering with the peaceful enjoyment of "possessions" must comply with the principle of proportionality: it must be necessary in a democratic society directed at achieving a legitimate aim and it must strike a fair

7 ECtHR, *Sporrong and Lönnroth v. Sweden*, nos. 7151/75 and 7152/75, Judgement of 23 September 1982, para. 61.

8 ECtHR, *Vistiņš and Perepjolkins v. Latvia* [GC], no. 71243/01, Judgement of 25 October 2012, para. 95.

9 ECtHR, *Bélané Nagy v. Hungary* [GC], no. 53080/13, Judgement of 13 December 2016, para. 113.

10 ECtHR, *Lekić v. Slovenia* [GC], no. 36480/07, Judgement of 11 December 2018, para. 105.

11 ECtHR, *James and Others v. the United Kingdom*, no. 8793/79, Judgement of 21 February 1986, para. 46.

balance between the demands of the general interest of the community and the requirements of the individual's fundamental rights. State authorities are better placed than the Court to assess the existence of both the need and the necessity of the restriction in question, given their direct contact with the social processes of their country. Such a fair balance will not have been struck where the individual property owner is made to bear "an individual and excessive burden". In assessing compliance with this requirement, the Court must conduct an overall examination of the various interests at issue.

Compensation terms are material to the assessment of fair balance and, notably, whether the contested measure imposes a disproportionate burden on the applicant (*The Holy Monasteries v. Greece*¹², and *Platakou v. Greece*¹³).

Furthermore, the obligation to respect the right to property under Article 1 of Protocol No. 1 incorporates both negative and positive obligations. The essential object of this provision is to protect individuals against unjustified interference by the state. However, the effective exercise of the right protected by Article 1 of Protocol No. 1 does not depend merely on the state's duty not to interfere; it may also require positive measures of protection, particularly where there is a direct link between the measures an applicant may legitimately expect from the authorities and his effective enjoyment of his "possessions" (*Öneryıldız v. Turkey* [GC]¹⁴). This is so even in cases involving litigation between private individuals or companies (*Sovtransavto Holding v. Ukraine*¹⁵).

In the context of Article 1 of Protocol No. 1, the state's positive obligations may require it to take the measures necessary to protect the right of property. However, the boundaries between the state's positive and negative obligations under Article 1 of Protocol No. 1 do not lend themselves to precise definition (*Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia* [GC]¹⁶).

Issues arising in connection with the enjoyment of one's "possessions" often relate to other Articles of the Convention, for instance Articles 2, 3, 6, 7, 8, 10, 11, 13, and 14. Of particular importance in the field of restitution are Article 6 (fair trial guarantees), Article 13 (right to an effective remedy), Article 14 (prohibition of discrimination), and Article 8 (right to home) which may for instance be invoked by persons currently in possession of property subject to a restitution claim.

Finally, after the changes in Central and Eastern European governments at the turn of the nineties, the Court was faced with certain unprecedented large-scale issues that could potentially affect a significant number of individuals. This called for a new approach that required finding a way to deal with systemic or

12 ECtHR, *The Holy Monasteries v. Greece*, nos. 13092/87 and 13984/88, Judgement of 9 December 1994, para. 71.

13 ECtHR, *Platakou v. Greece*, no. 38460/97, Judgement of 11 January 2001, para. 55.

14 ECtHR, *Öneryıldız v. Turkey* [GC], no. 48939/99, Judgement of 30 November 2004, para. 134.

15 ECtHR, *Sovtransavto Holding v. Ukraine*, no. 48553/99, Judgement of 25 July 2002, para. 96.

16 ECtHR, *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia* [GC], no. 60642/08, Judgement of 16 July 2014, para. 101.

structural issues. This approach – the so-called pilot-judgment procedure – was first developed in the field of property, in the Bug River cases (*Broniowski v. Poland* [GC]¹⁷) which concerned problems that originated in changes to Poland's eastern border after the Second World War and outstanding compensation claims for the property left on the former Polish territories beyond the Bug River. Another Polish pilot case, *Hutten-Czapska v. Poland* [GC]¹⁸ concerned the rent-control system in force in Poland, which imposed a number of restrictions on the rights of landlords.

3. ECHR RESTITUTION CASE-LAW

One of the characteristics of communist rule in Central and Eastern Europe was the widespread taking of private property into public ownership or control, either through nationalization, confiscation, agrarian reform, or as a sanction in the context of criminal proceedings.¹⁹ A series of applications involving rather complicated factual and legal issues resulting from the political will of the states to reverse injustices from the previous regime and seek a new balance between different social groups have been examined by the Convention institutions. The abundance of ECHR case-law regarding restitution shows the scale of this phenomenon among member states from Central and Eastern Europe.

Other CoE bodies addressed this issue. The Parliamentary Assembly in its Resolution 1096 (1996) on Measures to dismantle the heritage of former communist totalitarian systems adopted the following recommendation:

“... the Assembly advises that property, including that of the churches, which was illegally or unjustly seized by the state, nationalised, confiscated or otherwise expropriated during the reign of communist totalitarian systems in principle be restituted to its original owners in integrum, if this is possible without violating the rights of current owners who acquired the property in good faith or the rights of tenants who rented the property in good faith, and without harming the progress of democratic reforms. In cases where this is not possible, just material compensation should be awarded. Claims and conflicts relating to individual cases of property restitution should be decided by the courts.”

ECHR case-law also indicates the importance of timing: when property was taken is often determinative of whether restitution may occur. Member states that were previously members of the Soviet Union and that confiscated property predominantly during the 1920s have not, in general,²⁰ undertaken such obligations, largely because the memory of any heirs to the property have by now

17 ECtHR, *Broniowski v. Poland* [GC], no. 31443/96, Judgement on merits of 22 June 2004 and Friendly-settlement judgment of 28 September 2005.

18 ECtHR, *Hutten-Czapska v. Poland* [GC], no. 35014/97, Judgement of 19 June 2006.

19 Vilfan Vospernik, A., Vincent Berger's role in developing case-law concerning Slovenia, in: Berg, L., Enrich Mas, M., Kempees, M. (eds.), 2013, *Cohérence et impact de la jurisprudence de la Cour européenne des droits de l'homme: Liber amicorum Vincent Berger*, Oisterwijk: Wolf Legal Publishers, p. 423.

20 For instance, Russia and Ukraine.

faded.²¹ But for the member states that confiscated property more recently and that have chosen to undertake restitution schemes, the ECHR has played an important role in the implementation of this process.

With the enactment of new restitution legislation or the increased use of mechanisms for reclaiming property within the framework of existing legislation,²² expectations rose for many persons that they would be able to recover properties that either they or their families lost in the aftermath of the Second World War, or at least that they would receive compensation for such property.²³ The restitution models chosen by different member states were shaped by their political, social and economic considerations.

And what approach did the ECHR take in the so-called restitution cases?²⁴

In harmony with the international public law and, in particular, in view of its temporal jurisdiction reflecting the general principle on the non-retroactivity of treaties, the Court has held that Article 1 of Protocol No. 1 cannot be interpreted as imposing any general obligation on contracting states to return property taken before these states ratified the Convention (*Jantner v. Slovakia*²⁵).

The ECHR has thus held that takings which were lawful under the previous regime should, for legal purposes, be categorized as instantaneous acts²⁶ rather than as continuing violations (*Preussische Treuhand GmbH & Co. Kg a. A. v. Poland*²⁷), the doctrine of the continuing violation being applicable only to rare, unlawful situations (*Vasilescu v. Romania*²⁸). When applicants complained exclusively about the taking of property in the aftermath of the Second World War, the Convention organs declared such applications to be outside the Commission's and the Court's jurisdiction *ratione temporis*. Some authors criticized this stance.²⁹

21 Popović, D., 2009, *Protecting Property in European Human Rights Law*, Utrecht, Eleven International Publishing, p. 71.

22 For instance, in Poland.

23 Grgić, A., Mataga, Z., Longar, M., Vilfan, A., 2007, *The right to property under the European Convention on Human Rights: A guide to the implementation of the European Convention on Human Rights and its Protocols*, Council of Europe, pp. 32–36.

24 Vilfan Vospernik, A., 2003, Brief survey of the ECHR case-law in respect to the restitution of expropriated property (in Slovenian: *Kratek pregled sodne prakse ESČP z zvezi z vprašanjem vračanja zaplenjenega premoženja*, *REVUS (Journal for the European Constitutionality)*, pp. 67–76.

25 ECtHR, *Jantner v. Slovakia*, no. 39050/97, Judgement of 4 March 2003, para. 34.

26 For the doctrine of the instantaneous act, see Popović, D., *The Nature of the Violation of Human Rights in Restitution Cases*, in: López Guerra, L., Morte Gómez, C., Mengual I Mallol, A. M., Guillem Cano Palomares (coords.), 2015, *El Tribunal Europeo de Derechos Humanos, Una visión desde dentro, En homenaje al Juez Josep Casadevall*, Tirant Lo Blanch, p. 253; see also Garlicki, L., 2006, *L'application de l'article 1 du Protocole no 1 de la Convention européenne de droits de l'homme dans l'Europe centrale et orientale, Problèmes de transition*, in: Vandenberghe, H. (ed.), *Property and Human Rights*, Brugge, pp. 131–138.

27 ECtHR, *Preussische Treuhand GmbH & Co. Kg a. A. v. Poland*, no. 47550/06, Decision of 7 October 2008, para. 57.

28 *Vasilescu v. Romania*, 22 May 1998, para. 49, *Reports of Judgments and Decisions 1998-III*, European Court of Human Rights.

29 Allen, T., Douglas, B., *Closing the door on restitution*, in: Buyse, A., Hamilton, M. (eds.), 2011, *Transitional Jurisprudence and the ECHR, Justice, Politics and Rights*, Cambridge Uni-

Another aspect of the ECHR's case-law in this area is the potentially discriminatory scope (implicating Article 14 of the Convention) of restitution laws. Article 1 of Protocol No. 1 does not impose any restrictions on the member states' freedom to determine the scope of property restitution and to choose the conditions under which they agree to restore the property rights of former owners (*Maria Atanasiu and Others v. Romania*³⁰). Given that member states enjoy a large margin of appreciation, the exclusion of certain categories of former owners from entitlement has been accepted by the Court³¹ (*Gratzinger and Gratzingerova v. the Czech Republic*³²; *Kopecký v. Slovakia*³³; and *Smiljanić v. Slovenia*³⁴).

The Court has held in this respect that the hope of recognition of a property right which it has been impossible to exercise effectively cannot be considered a "possession" within the meaning of Article 1 of Protocol No. 1, nor can a conditional claim which lapses as a result of the non-fulfilment of the condition (*Malhous v. the Czech Republic*³⁵, and *Kopecký*, cited above). Therefore, many applicants who thought that the Court would rectify their exclusion from various restitution programs were disappointed as their applications were declared incompatible *ratione materiae* on these grounds.

Conversely, once a contracting state ratifies the Convention, including Protocol No. 1, any new legislation enacted providing for the full or partial restoration of property confiscated under a previous regime may be regarded as generating a new property right protected by Article 1 of Protocol No. 1 for persons satisfying the requirements for entitlement (*Maria Atanasiu and Others*, cited above).

This applies also to compensatory entitlements granted by legislation. As to the level of compensation, for instance for appropriated land, the Court accepted reductions in compensation enacted by amending the subordinate legislation during pending domestic proceedings, as long as such reduction served the general interest of protecting the public purse and the awarded compensation did not appear to be unreasonably low (*Serbian Orthodox Church v. Croatia*³⁶). A parallel may be drawn between the amount of compensation awarded under

versity Press, pp. 208–238; Sweeney, J., 2013, *The European Court of Human Rights in the Post-Cold War Era, Universality in Transition*, Routledge, p. 100.

30 ECtHR, *Maria Atanasiu and Others v. Romania*, nos. 30767/05 and 33800/06, Judgement of 12 October 2010, para. 136.

31 In certain cases, the Human Rights Committee of the ICCPR took a different approach from that of the European Court: *Brok v. Czech Republic*. CCPR/C/73/D/774/1997, Decision of 31 October 2001.

32 ECtHR, *Gratzinger and Gratzingerova v. the Czech Republic* (dec.) [GC], no. 39794/98, Decision of 10 July 2002, paras. 70–74.

33 ECtHR, *Kopecký v. Slovakia* [GC], no. 44912/98, Judgement of 28 September 2004, para. 35.

34 ECtHR, *Smiljanić v. Slovenia* (dec.), no. 481/04, Decision of 9 June 2010, para. 29.

35 ECtHR, *Malhous v. the Czech Republic* (dec.) [GC], no. 33071/96, Decision of 13 December 2002.

36 ECtHR, *Serbian Orthodox Church v. Croatia* (dec.), no. 10149/13, Decision of 30 June 2000, paras. 62, 65–68.

national compensation schemes to individuals, where restitution in kind is not possible, and inter-state settlements.

Given these constraints, the major importance of the Convention system in respect of restitution proceedings concerns the respect of the principle of lawfulness requiring member states not only to respect and apply, in a foreseeable and consistent manner, the laws they have enacted, but also, as a corollary of this duty, to ensure the legal and practical conditions for their implementation (*Broniowski*, cited above³⁷).

In this respect, fair-trial guarantees under Article 6 of the Convention are of key importance.³⁸ The Court has discussed in particular the following guarantees: the enforcement of final domestic decisions and judgments ordering the return of property or the payment of compensation; length of proceedings or delays incurred in delivering compensation; respect of the *res judicata* effect of a final judgment; rights of a third party acting in good faith; resolution of disputes concerning the coexistence of two title deeds to the same property; and lack of legal certainty. The shortcomings in the implementation stage have led to the adoption of pilot judgments (*Manushaqe Puto and Others v. Albania*³⁹, and *Maria Atanasiu and Others*, cited above, §§ 215–218).

As to the justification a government may advance for its interference with the applicant's right to property, the Court has reiterated that a lack of funds cannot justify a failure to enforce a final and binding judgment debt owed by the State (*Driza v. Albania*⁴⁰, and *Prodan v. Moldova*⁴¹). Only very exceptionally, for instance in the unique context of German reunification, has the Court accepted that lack of any compensation does not upset the "fair balance" that has to be struck between the protection of property and the requirements of the general interest (*Jahn and Others v. Germany* [GC]⁴²).

As to the implementation of pilot judgments, the Court underlined that its role after the delivery of the pilot judgment and after the state has taken remedial action in conformity with the Convention could not be converted into that of providing individualized financial relief in each repetitive case arising from the same systemic situation.

In *Beshiri and Others v. Albania*⁴³ the Court reviewed the new domestic scheme/remedy introduced in Albania in response to *Manushaqe Puto and Others*, cited above. Noting the state's wide margin of appreciation as regards the choice

37 ECtHR, *Broniowski v. Poland* [GC], para. 184.

38 For further details, see the *Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights, Protection of property*, 2020, Council of Europe/European Court of Human Rights, pp. 68–69.

39 ECtHR, *Manushaqe Puto and Others v. Albania*, nos. 604/07 and 3 others, Judgement of 31 July 2012, paras. 110–118.

40 ECtHR, *Driza v. Albania*, no. 33771/02, Judgment of 13 November 2007, para. 108.

41 ECtHR, *Prodan v. Moldova*, no. 49806/99, Judgment of 10 November 2004, para. 61.

42 ECtHR, *Jahn and Others v. Germany* [GC], nos. 46720/99 and 2 others, Judgement of 30 June 2005, para. 117.

43 ECtHR, *Beshiri and Others v. Albania* (dec.), no. 29026/06. Decision of 17 March 2020.

of forms of redress for breaches of property rights, the Court found the new remedy to be effective, having regard to the following considerations: appropriateness of the form of redress, adequacy of the compensation, and accessibility and efficiency of the remedy. As to the adequacy of the compensation, the Court acknowledged the exceptionally difficult and complex nature of the situation and concluded that the minimum threshold for compensation of 10% of the current value of the original property could be considered reasonable in the specific context of Albania.

4. ECHR CASE-LAW FOR BOSNIA AND HERZEGOVINA, CROATIA, MONTENEGRO, NORTH MACEDONIA, SERBIA AND SLOVENIA

And how are these principles reflected in ECHR cases coming from the region?

Except for Bosnia and Herzegovina, all other CoE member states that were former members of the SFRY adopted so-called denationalization legislation regulating the restitution of, or compensation for property nationalized by the communist regime, particularly that taken in the aftermath of the Second World War. Slovenia did so in 1991, Croatia in 1996, North Macedonia in 2000, Montenegro in 2004, and Serbia in 2011.

All these CoE member states, except for Bosnia and Herzegovina, where restitution legislation was limited to post-war arrangements in the 1990s, adopted denationalization legislation providing for either restitution *in natura* where possible or compensation for such property where restitution is impossible. As for Bosnia and Herzegovina, the restitution of property to internally displaced persons is governed by Annex 7 of the Dayton Peace Agreement.

The following section gives an overview of cases published on the HUDOC⁴⁴ from all these member States, except for Serbia, given the rather recent enactment of the law in that country and the rule of prior exhaustion of domestic remedies. It does not, however, deal with cases involving the rights of third parties, such as *Berger-Krall and Others v. Slovenia*⁴⁵ and *Statileo v. Croatia*⁴⁶, both concerning protected tenancies.

4.1. BOSNIA AND HERZEGOVINA

In the context of internally displaced persons during the 1992–95 war, the case *Orlović and Others v. Bosnia and Herzegovina*⁴⁷ concerns the non-enforcement of domestic decisions. The first applicant's husband and more than 20

44 The Hudoc is the ECHR's case-law database.

45 ECtHR, *Berger-Krall and Others v. Slovenia*, no. 14717/04, Judgement of 12 June 2014.

46 ECtHR, *Statileo v. Croatia*, no. 12027/10, Judgement of 10 July 2014.

47 ECtHR, *Orlović and Others v. Bosnia and Herzegovina*, no. 16332/18, Judgement of 1 October 2019.

other relatives were killed in the Srebrenica genocide in 1995. The applicants were forced to flee from their home and left behind their property, consisting of several agricultural buildings, fields and meadows. In 1998 a Serbian Orthodox church was built on their land.

After the Dayton Peace Agreement was signed, guaranteeing the free return of refugees to their homes of origin and the restitution of their property, the Republika Srpska entity of Bosnia and Herzegovina enacted the Restitution of Property Act in 1998. The applicants brought proceedings under this law and were granted full restitution. The land was subsequently returned to the applicants, except for a plot on which the church had been built. The applicants sought full repossession in the following years, without success. They also brought, *inter alia*, civil proceedings against the Serbian Orthodox Church seeking to recover possession of the plot of land and to have the church removed.

The Court held that it was not in dispute that the applicants were the owners of the property in question and that, as internally displaced persons, they had been entitled under Annex 7 of the Dayton Peace Agreement to have the land restored to them. Furthermore, the applicants' right to full restitution had been established in the domestic decisions and the authorities had been required to take practical steps to ensure enforcement. However, instead of implementing the decisions, the authorities had initially – in 2004 – done the opposite by effectively authorizing the church to remain on the applicants' land. Indeed, the applicants were still being prevented from recovering full possession of their property 17 years after Bosnia and Herzegovina ratified the Convention and its Protocols. The Government had not given any justification for the authorities' inaction. The Court considered that such a long delay clearly amounted to a refusal to enforce the decisions, which had left the applicants in a state of uncertainty. As a result of the authorities' failure to comply with the final and binding decisions, the applicants had suffered serious frustrations of their property rights and had been made to bear a disproportionate and excessive burden.

The Court found in particular that the authorities' failure to comply with final and binding decisions from 1999 and 2001, in which the domestic courts ordered full repossession of the land by the applicants, without any justification on the part of the Government for such inaction, had seriously frustrated the applicants' property rights. It also held, under Article 46, that the respondent state had to ensure enforcement of the two decisions in the applicants' favor, including in particular the removal of the church from the applicants' land, at the latest within three months of the Court's judgment becoming final (*ibid.*, §§ 68–71).

4.2. CROATIA

The case *Gavella v. Croatia*⁴⁸ concerned the loss of the applicant's pre-emption rights as a result of the Constitutional Court's quashing certain provisions of Croatia's 1996 Denationalization Act. The applicant's family had owned three

48 *Gavella v. Croatia* (dec.), no. 33244/02, *Reports on Judgements and Decisions 2006-XII*, European Court of Human Rights.

residential buildings in the center of Zagreb which were nationalized during the communist regime.

Pursuant to Section 22 of the Denationalization Act, nationalized flats in respect of which third persons had acquired specially protected tenancies (*stanarsko pravo*) were not to be restored to their former owners. The tenants had a right to purchase such flats from the Fund for the Restitution of and Compensation for Expropriated Property under favorable conditions set out in the Specially Protected Tenancies (Sale to Occupier) Act. At the same time, the former owners or their heirs were entitled to financial compensation in respect of the flats. The applicant brought proceedings and received compensation for 27 flats.

Furthermore, in 1999 the Constitutional Court quashed section 29(1), which provided for pre-emption rights for former owners. As a result, the applicant lost his right of pre-emption.

Given that the applicant's prospects of benefiting from his right of pre-emption were dependent on a potestative condition from the outset, the Court held that the applicant's pre-emption rights were "claims" rather than "existing possessions". Accordingly, at the moment of the alleged interference the applicant could not have had a "legitimate expectation" that his claims would be realized. The Court therefore declared the applicant's complaint incompatible *ratione materiae* with the provisions of the Convention.

The case *Gottwald-Markušić v. Croatia*⁴⁹ concerned a plot of land and buildings, sequestered in 1946 by the communist authorities. The buildings had never been recorded in the land register. The applicant claims that, in 1945, she and her mother were forcibly evicted from the building without any formal process or decision. The authorities awarded the flats to various persons under specially protected tenancies (*stanarsko pravo*).

Different proceedings were commenced against the Government in the 1990s, eventually resulting in a judgment in 2003 in which the court held that such residential buildings were nationalized *ex lege* in 1958, even though no formal decision had been handed down, since such decisions were of declaratory nature only. In the meantime, the deadline for seeking compensation granted to former owners for property appropriated had expired. In 2006 the Constitutional Court upheld the lower court's 2003 judgment.

The Court noted that such interpretation by lower courts reflected the constant case-law of the Supreme Court concerning the effects of the 1958 Nationalization Act. The Court furthermore noted that the applicant could not argue that, in the absence of an individual decision on nationalization, she had not known or could not have known that the building in question had been nationalized and transferred into social ownership.

As regards the alleged loss of opportunity to seek compensation for the nationalization of the building under the Denationalization Act, the Court noted that the applicant's right to compensation in respect of the building at issue was extinguished on 2 July 1997 as a result of her failure to lodge a request for compensation within the statutory time limit.

49 ECtHR, *Gottwald-Markušić* (dec.), no. 49049/06, Decision of 30 March 2010.

Consequently, when on 5 November 1997 the Convention entered into force in respect of Croatia, the applicant had no right under domestic law to compensation for the property appropriated during the communist regime. She therefore did not have sufficient proprietary interests to constitute a “possession” within the meaning of Article 1 of Protocol No. 1 to the Convention. The Court declared the complaint incompatible *ratione temporis et materiae* with the provisions of the Convention.

The case of *Serbian Orthodox Church v. Croatia*⁵⁰ concerned claims for compensation for 164 plots of agricultural land, nationalized in 1946 by the communist authorities from the applicant Orthodox Monastery.

In the framework of the restitution legislation, in 1998 subordinate legislation setting out the criteria for determining the value of appropriated agricultural land entered into force. Changes to this subordinate legislation were enacted in 2001, effectively increasing the amount of compensation for appropriated agricultural land. Further changes were enacted in 2004, which reduced the amount of compensation for such land. The 2004 Rules provided for their immediate application to all pending proceedings in which a first-instance decision had not yet been adopted.

In 2004 the Sinj Office recognized the applicant monastery’s right to compensation and, applying the 2004 Rules, awarded it 1,424,827.45 Croatian kunas (HRK) in state bonds. The monastery lodged an appeal before the Ministry of Justice, but its appeal was rejected. The ensuing administrative judicial proceedings ended with a decision by the Constitutional Court endorsing the lower courts’ decisions.

The monastery then filed an application before the Court. Having established that the applicant monastery’s compensation claim amounted to a “possession”, the Court considered that the enactment of the 2004 Rules and their application in the applicant’s case entailed interference with the exercise of the right to compensation, which could have been asserted under the domestic law applicable until 2004. The enactment of the new Rules thus constituted an interference with the applicant monastery’s right to the peaceful enjoyment of its “possessions” guaranteed by Article 1 of Protocol No. 1 (“the general rule”). The Court held, however, that this interference was lawful.

The Court further reiterated that, where the deprivation of property occurred before the entry into force of the Convention in respect of the state concerned, Article 1 of Protocol No. 1 did not impose any restrictions on the contracting states’ freedom to determine the scope of property restitution or compensation. States were also free to choose the conditions under which they would restore or compensate for the taking of such property. However, once a state enacts restitution legislation generating new property rights, including for instance laws requiring compensation for property appropriated under a former communist regime, the Court will strictly scrutinize the state’s compliance with Article 1 of Protocol No. 1 if the state then restricts the amount of compensation available. Such scrutiny inevitably encompasses an assessment of whether the new compensation terms

50 ECtHR, *Serbian Orthodox Church v. Croatia* (dec.), no. 10149/13, Decision of 30 June 2000.

respect the requisite fair balance between the general interest of community and the applicant's right to the peaceful enjoyment of "possessions".

While under Article 1 of Protocol No. 1 the state is entitled to expropriate property – including any compensatory entitlement granted by legislation – and to reduce, even substantially, levels of compensation under legislative schemes, this provision requires that the amount of compensation granted for property taken by the state be "reasonably related" to its value.

As to the enactment of the 2004 Rules seeking to decrease public expenditure by limiting the compensation for agricultural land appropriated during the communist regime, the Court accepted that that the respondent state's choice to cut down on that expenditure served the general interest of the protection of the public purse.

Regarding the proportionality of the interference, the Court noted that the rules governing the level of compensation for appropriated agricultural land changed three times during the administrative proceedings of which the applicant monastery complained. The applicant was awarded an amount at the middle of the compensation spectrum, a sum which the Court did not consider to be unreasonably low. The Court emphasized that the award was nearly three times higher than that the applicant could have expected under the 1998 Rules, which were still in force at the beginning of the proceedings. Having regard to the wide margin of appreciation states enjoy in the area of property rights, the Court concluded that the state's interference with property rights in the present case could not be said to fail to strike the requisite fair balance between the demands of the public interest and the required protection of individuals' fundamental rights. Similarly, the state's actions could not be considered to have imposed a disproportionate or excessive burden on the applicant. The Court therefore found that the interference with the applicant monastery's right to the peaceful enjoyment of "possessions" was justified.

Finally, the communicated case *Dabić v. Croatia*⁵¹ concerns the state's potential liability for the damage done to the applicant's house by a refugee. The State had sequestered the applicant's house and had used it to provide accommodation for a refugee from Bosnia who later damaged it and stole some items from it before the house was returned to the applicant. Under the relevant legislation, the refugee had to use the house according to the standards of the *bonus pater familias*. The applicant brought civil proceedings against the refugee, the state and the municipality (than dropped the proceedings against the refugee because he died but could have pursued them against the heirs). The applicant received compensation for the inability to use the flat. The case is currently pending before the Court.

4.3. MONTENEGRO

The case of *Eparhija budimljansko-nikšićka and Others v. Montenegro*⁵² concerned restitution claims in respect of plots of land formerly owned by the Budimljansko-nikšićka Diocese and its churches and monasteries, all part of the

51 ECtHR, *Dabić v. Croatia*, no. 49001/14, communicated case.

52 ECtHR, *Eparhija budimljansko-nikšićka and Others v. Montenegro* (dec.), no. 26501/05, Decision of 9 October 2012.

Serbian Orthodox Church in Montenegro, which had been expropriated after World War II.

In March 2004, the applicants filed a request with the government seeking restitution of the expropriated plots of land. They relied on the Just Restitution Act of 2002, which provided for restitution in kind and allowed religious communities to be beneficiaries of the right to restitution.

However, in May 2003, the Constitutional Court of Montenegro had declared a number of the core provisions of the 2002 Act unconstitutional. In particular, it had held that the provisions concerning restitution in kind violated current owners' property rights and that the competencies and composition of the restitution commissions – which were to include previous owners – were unacceptable. The Act was never applied in practice. On 8 April 2004, a new Restitution of Expropriated Property Rights and Compensation Act entered into force, providing that the restitution of property to religious communities would be regulated by a separate law.

In the absence of a response from the Government, the applicants brought administrative proceedings before the Supreme Court in June 2004. On 22 September 2005, the Administrative Court, which had taken over the Supreme Court's competencies in respect of administrative disputes, ruled against the applicants.

When the case reached the ECHR, the Court considered that, in such circumstances, it was unrealistic to expect that the applicants' request, or anybody else's for that matter, would be determined at all, let alone favorably. The applicants had no "legitimate expectation" under Article 1 of Protocol No. 1 that they would be restituted, since the key provisions of the law on which they relied had been declared unconstitutional before they filed their request.

The only chance of the applicants' request succeeding lay in having the unconstitutional provisions amended and brought in line with the Constitution in force at the time, as suggested by the applicants themselves, or in having new relevant provisions introduced. However, the Court was clear that a belief that a law currently in force would be changed could not be regarded as a form of "legitimate expectation" for the purposes of Article 1 of Protocol No. 1.

The Court concluded that the applicants did not have a claim which was sufficiently established to be enforceable, and they therefore could not argue that they had a "possession" within the meaning of Article 1 of Protocol No. 1. Nor did they have such a claim under the current legislation which simply envisaged that the applicants' situation would be regulated by a separate piece of legislation. The scope of that legislation has never been defined, and there was no indication as to the modalities for the restitution of property including the procedures and responsible authority. The complaint under Article 1 of Protocol No. 1 was incompatible *ratione materiae*.

The case of *Crkva Svetog Đorđa v. Montenegro*⁵³ concerned the length of domestic proceedings in a case brought by the applicant church. The Court noted

53 ECtHR, *Crkva Svetog Đorđa v. Montenegro*, no. 15346/15, Decision of 19 March 2020.

that the proceedings in question were terminated on 14 March 2007 when the Supreme Court of Montenegro rendered its decision, three years and eleven days after Montenegro ratified the Convention on 3 March 2004. Thus, the proceedings fell within the Court's temporal jurisdiction during that time. The case involved complex factual and legal issues, including issues concerning the nationalization of property that took place in 1959 and 1965 in the former Yugoslavia. Under these circumstances, the Court found that the length of the proceedings could not be considered excessive and that the application was manifestly ill-founded.

4.4. NORTH MACEDONIA

The case *Vikentijevik v. "The former Yugoslav Republic of Macedonia"*⁵⁴ concerned the extraordinary quashing of a final order for the restitution of property given in the applicant's favor.

In 1945, the applicant's late grandfather, together with other members of the Executive Board (and shareholders) of company T. ("the company"), was convicted of offences against the people and the state. They were all sentenced to a suspended prison term with forced labor. The court also ordered full confiscation of the company's property.

The company restructured itself in 1995 and, in 2000, the applicant brought restitution proceedings. The Restitution Commission of the Ministry of Finance accepted the applicant's claims and restored to his possession some land belonging to the company and certain company buildings as well as preference and state-owned shares in compensation for the remaining confiscated property. At that point in time, the Solicitor General was notified of the decision. He replied that he had no comment. The restitution order became final and was rectified in 2001.

In 2004, following an extraordinary appeal by the Solicitor General referring to defects in the restitution proceedings, the Restitution Commission quashed the order. The Solicitor General submitted that the applicant had been awarded full restitution for all of the company's property, despite the fact that the company had been jointly owned by several persons. In March 2007, the Supreme Court remanded the case to the Restitution Commission for re-examination. The renewed restitution proceedings were pending at the time the applicant filed an application before the Court.

The Court held that the restitution order and the transfer of property constituted a "possession" within the meaning of Article 1 of Protocol No. 1. The quashing of the restitution order therefore amounted to an interference with the applicant's property rights which was provided for by law. However, the Court noted that the interference in question pursued a legitimate aim, namely ensuring that the public purse was not called upon to subsidize undeserving claimants. Holding otherwise would be contrary to the doctrine of unjust enrichment.

⁵⁴ ECtHR, *Vikentijevik v. "The former Yugoslav Republic of Macedonia"*, no. 50179/07, Judgement of 6 February 2014.

In any event, the Court recalled that it had already found in other cases that the protection of the rights and interests of third persons was a legitimate consideration which might justify the quashing of a final and binding judgment.

Finally, the Court found that the extraordinary quashing of a final restitution order was proportionate and did not amount to the violation of the Convention, given the fact that the quashing was based on findings that there had been fundamental defects in the proceedings before the Restitution Commission. As to the argument that the Solicitor General could have intervened earlier, the Court was of the opinion that the “manifest omission” of the Solicitor General in the ordinary restitution proceedings could not be interpreted as a bar to the impugned intervention, the aim of which was to correct fundamental errors. To hold otherwise would be contrary to the principle of the proper administration of justice.

A similar stance under Article 1 of Protocol No. 1 was taken in cases *Spiridonovska and Popovski v. “The former Yugoslav Republic of Macedonia”*⁵⁵ and *Toleski v. “The former Yugoslav Republic of Macedonia”*⁵⁶.

The case *Stojanovski and Others v. “The former Yugoslav Republic of Macedonia”*⁵⁷ concerned restitution proceedings in which the applicants had unsuccessfully claimed that part of a plot of land, the whole of which had been confiscated from their predecessor, should be restored to them. Legislation in force at the time provided that land could only be returned if it was undeveloped when the restitution claim was submitted. However, the authorities found that the land that the applicants claimed had been developed and that it could therefore not be returned to them. The Restitution Commission refused to grant the applicants’ claim and instead awarded them compensation in the form of state bonds.

When the applicants lodged a complaint before the Court, the latter found that the applicants’ claim to title to the land was dismissed in proceedings in which the national authorities disregarded relevant facts and existing practice brought to their attention. The Court further found that the domestic authorities had overlooked evidence according to which the land was undeveloped at the time the applicants’ claim was submitted. The summary reasons provided by the domestic authorities, without any specific reference to the applicants’ complaints, the relevant domestic courts’ case-law, or any domestic authorities’ practice were not sufficient to enable the Court to accept the Government’s argument that the applicants were not entitled to obtain title to the land in question. The Court found the reasoning of the domestic courts to be arbitrary and in breach of the principle of lawfulness.

In a subsequent just-satisfaction judgment, the Court held that “The former Yugoslav Republic of Macedonia” was to transfer into the applicants’ possession land in the same area as the requested plot and whose characteristics and value

55 ECtHR, *Spiridonovska and Popovski v. “The former Yugoslav Republic of Macedonia”*, no. 40676/11, Judgement of 19 October 2017.

56 ECtHR, *Toleski v. “The former Yugoslav Republic of Macedonia”*, no. 17800/10, Judgement of 15 June 2017.

57 ECtHR, *Stojanovski and Others v. “The former Yugoslav Republic of Macedonia”*, no. 14174/09, Judgement of 23 October 2014.

were as close as possible to that plot. If “The former Yugoslav Republic of Macedonia” failed to comply with that obligation, it would be required to pay the applicants jointly EUR 190,000 in pecuniary damage.

4.5. SERBIA

At the time of the writing of the present contribution, there were no restitution cases published on the HUDOC (the Court’s website). However, certain applications have been dismissed by a Single Judge following the Court’s established case-law in the matter, presented in the previous chapter, like in respect of other member states.

4.6. SLOVENIA

The Court has given several decisions and judgments concerning restitution matters in cases against Slovenia. The 1991 Act on Denationalization provided for either restitution in kind or compensation in state bonds. Although the deadline for submitting requests under the 1991 Act expired in 1993, the whole process has not yet come to an end and has given rise to considerable litigation in domestic courts.⁵⁸

For the sake of conciseness, I will present here the most important decisions in this field and mention the remaining ones succinctly. A number of these cases concerned applicants who were excluded under the restitution scheme. However, as the Court has consistently held, there is no general obligation on states under Article 1 of Protocol No. 1 to return property to previous owners. Moreover, states are entirely free to lay down conditions on the return of property, such as the requirement that individuals benefiting from restitution or their legal predecessors be of Slovenian nationality (or, more precisely, that they had Yugoslav nationality at the time of the forfeiture of assets), thus excluding certain categories of former owners from being able to reclaim their former property. The Court thus could not disregard conditions laid down by domestic legislation. Certain of these cases concern different considerations relating to the nationality of claimants or foreign location.

Exemplifying this group of cases, in *Bugarski and von Vuchetich v. Slovenia*⁵⁹, the applicants contested the finding of the domestic courts that they, as individuals and heirs of shareholders of the company Borlin d.d. were not entitled to restitution since the property at issue had been expropriated to a legal person. In a conceptually related case, *Nadbiskupija zagrebačka v. Slovenia*⁶⁰, the Zagreb Archdiocese (*Nadbiskupija zagrebačka*) claimed to be a religious community operating on Slovenian territory, thereby fulfilling the conditions set by the relevant restitution legislation. The Archdiocese therefore claimed to be entitled to restitution of expropriated property. Rejecting the claims of the applicants

58 Vilfan Vospernik, A., 2013, p. 423.

59 ECtHR, *Bugarski and von Vuchetich v. Slovenia* (dec.), no. 44142/98, Decision of 3 July 2001.

60 ECtHR, *Nadbiskupija Zagrebačka v. Slovenia* (dec.), no. 60376/00, Decision of 27 May 2004.

in both cases, the Court found that the findings of the domestic courts that the applicants did not fulfil the conditions set out by the 1991 Denationalization Act were not arbitrary.⁶¹ The applicants therefore had no possession or “legitimate expectation” of realizing their claims under Article 1 of Protocol No.1.

The case *Krisper v. Slovenia*⁶² concerned the restitution request by an heir of dispossessed persons who left Slovenia in May 1945. The original property owners were considered by the Yugoslav authorities at the time as persons of German origin who had not acquired Yugoslav nationality. Under the amended Section 35 of the Citizenship of the Democratic Federal Yugoslavia Act 1945, all citizens of the previous Kingdom of Yugoslavia were granted citizenship of the new State, with the exception of persons of German origin who left the territory before 28 August 1945 and who displayed disloyal behavior to the interests of the Yugoslav nations during the German occupation.

Given that the Slovenian Constitutional Court had held that one of the conditions, namely the disloyalty of persons of German origin, was a rebuttable presumption, and the applicant’s remanded proceedings were pending, his Article 1 Protocol No. 1 complaints were declared premature (decision of 25 April 2002). Subsequently, the Court found a violation of Article 6 on account of the protracted nature of the proceedings.

In this connection, it is worth mentioning the case *Weiss v. Slovenia*⁶³. Although the applicant in that case did not complain under Article 1 of Protocol No. 1, her claims concerned a similar request for restitution of or compensation for the property expropriated from the applicant’s late mother after the Second World War, on account of the fact that she was of German origin and had left the former Yugoslavia before 28 August 1945 (the cut-off date). The applicant alleged under Article 6 § 1 that the length of the proceedings on determination of citizenship and, implicitly, of the denationalization proceedings before the administrative authorities and domestic courts to which she was a party, was excessive. Her complaints were declared inadmissible because she had not used the remedies available under the Act on the Protection of the Right to a Trial without undue Delay, introduced in 2006 (“the 2006 Act”).

The case *Smiljanić v. Slovenia*⁶⁴ concerned a request for restitution of several plots of land, nationalized by virtue of an agrarian reform, lodged in 1993 by an applicant of Croatian nationality within the framework of Slovenian restitution legislation.

Article 68 of the Slovenian Constitution was particularly relevant in the case. At the time, that Article provided that foreigners could not acquire title to land except by inheritance, under the condition of reciprocity. The corresponding Croatian legislation, the 1996 Denationalization Act, granted rights to those individuals and their legal successors who had Croatian nationality. Exceptions

61 Vilfan, A., 2003, p. 33.

62 ECtHR, *Krisper v. Slovenia*, no. 47825/99, Judgement of 23 March 2006.

63 ECtHR, *Weiss v. Slovenia* (dec.), no. 37169/03, Decision of 14 February 2012.

64 ECtHR, *Smiljanić v. Slovenia* (dec.), no. 481/04, Decision of 2 June 2009.

were provided for nationals of states with which Croatia had concluded international agreements, but no such agreement had been concluded with Slovenia.

In 1997, Article 68 of the Constitution was amended in the framework of the accession of Slovenia to the European Union (“EU”). The Article now provides that foreigners may acquire ownership rights to real estate, under conditions provided by law or if so provided by a treaty ratified by the Parliament by a two-thirds majority, under the condition of reciprocity. While the Europe Agreement, ratified in 1997, met these criteria and thus enabled nationals of the EU Member States to acquire ownership rights to real estate in Slovenia, no such treaty or statute was adopted with respect to Croatian nationals. At the relevant time, Croatia was not yet a member state of the EU.

Furthermore, in 1998, during the pending domestic proceedings, amendments to the Denationalization Act were adopted. They provided that, where a claimant for restitution of property was a foreign national and the state of his origin had not concluded a reciprocal agreement with Slovenia regarding property rights, that foreign national did not have the right to restitution of property under the Denationalization Act. The applicant’s restitution claims were thus eventually dismissed by the domestic courts.

In examining the question whether the applicant could have had at any point a “legitimate expectation” of realizing his claim to restitution of property, the Court observed that the condition of reciprocity with regard to the right of foreigners to acquire title to land has been required *de lege lata* since 1991, when the Constitution was adopted. This condition was consistently examined by all the domestic authorities which dealt with the applicant’s case. While the court of first instance considered that that condition was fulfilled, all the higher courts found that this was not so. The European Court concluded that the applicant did not satisfy all the requirements for entitlement to restitution of his family’s property. Therefore, the applicant’s claim for restitution of property did not amount to an enforceable claim sufficiently established in domestic law to fall within the ambit of Article 1 of Protocol No. 1. The Court further found that the applicant’s situation could be distinguished from the issue of entitlement to welfare benefits and concluded that his case did not engage the applicability of Article 14 in conjunction with Article 1 of Protocol No. 1.

A further group of cases similarly concerned state legislative intervention while court proceedings were pending. In the case *Sirc v. Slovenia*⁶⁵, the applicant’s father had owned a textile factory in Kranj before the Second World War. However, in 1941 the German occupying forces confiscated the factory premises and all movable assets of the business. The occupying forces burned the entire factory down in 1945. Following the end of the occupation, a law was enacted in Yugoslavia whereby, inter alia, owners whose property had been confiscated by the occupying forces were entitled to immediate restitution of their property and were offered the possibility of claiming compensation. The applicant’s father submitted several requests for restitution and the factory land was returned to him, together with some movable assets.

⁶⁵ ECtHR, *Sirc v. Slovenia*, no. 44580/98, Judgement of 8 April 2008.

However, in 1947 the Supreme Court convicted the applicant, his father and several others, including Boris Furlan, the Dean of the Law Faculty at the University of Ljubljana, of collaborating with Western powers in the so-called “Nagode” political trial. The applicant was sentenced to death, though his sentence was later commuted to 20 years’ imprisonment, and his father was sentenced to 10 years’ imprisonment. Their property was also transferred to the state. The applicant’s father died soon after being released from prison in 1950. The applicant, released in 1954, inherited his father’s estate.

In 1991 the Supreme Court ordered the retrial of persons convicted in 1947 for collaboration with Western powers. Following the withdrawal of the charges by the Public Defender, the first-instance court quashed the applicant’s conviction. Accordingly, he became entitled to the restitution of, and compensation for, assets confiscated following the 1947 sentence. The applicant lodged a request with the Minister of Justice to obtain enforcement of his right to restitution and compensation. He later started several court proceedings to enforce his rights.

While the proceedings were pending, the Act on Implementation of Penal Sanctions was amended in a way which, according to the applicant, made this right substantially less favorable. In September 2001 his claims were dismissed. The applicant lodged an appeal against this decision and started several other proceedings in respect of related matters. These proceedings were pending when the Court examined the case. The applicant raised several complaints before the Court. He argued that the State’s retroactive legislative removal of his vested right to compensation, on the basis of the Act on Implementation of Penal Sanctions, and its replacement with a substantially less valuable right violated his rights to a fair trial under Article 6 § 1 and to property under Article 1 of the Protocol No. 1. The legislative change was effected in pending proceedings to which the state was a party. He also complained about the length of proceedings under Article 6 § 1.

In a decision of 22 June 2006, the Court noted that it was true that when the first-instance court examined the applicant’s claims for the first time, his request was partially granted. However, that judgment was subsequently overturned in the context of the same proceedings without having acquired final and binding effect. The domestic courts ultimately dismissed his request. Both the Supreme Court and the Constitutional Court pointed out that the foundation of the applicant’s claims under the Act on Implementation of Penal Sanctions depended on the viability of the original claims. The domestic courts eventually found that that was not the case. The Court concluded that it could therefore not be said that, when filing the claims, the request had been sufficiently established to qualify as an “asset” benefitting from the protection of Article 1 of Protocol No. 1. Neither could the first judgment be said to have invested the applicant with an enforceable right to compensation because that judgment was not sufficient to generate a proprietary interest amounting to an “asset”.

In a later judgment, the Court concluded that a part of the application was inadmissible for non-exhaustion of domestic remedies, finding that the applicant had not used the available domestic remedies concerning the protracted length

of proceedings by bringing suit under the 2006 Act. It also found a violation of Articles 6 and 13 of the Convention in respect of terminated court proceedings. A similar judgment was given in *Gerden v. Slovenia*⁶⁶.

The case *Attems and Others*⁶⁷ concerned restitution proceedings instituted by heirs of the Attems family, who had lived on land that constitutes present-day Slovenia since 1605. By 1945 the family had acquired extensive real estate and numerous companies as well as movable assets (including fine art, among other objects).

Their property had allegedly been nationalized in 1944, during the Second World War, by virtue of the decree of the then-legislative body, the Antifascist Council for the National Liberation of Yugoslavia (“the AVNOJ”). That decree prescribed, inter alia, the nationalization of all property within the territory of Yugoslavia belonging to the German Reich and its citizens, to people of German origin (with the exception of those fighting for the national liberation movement), and finally, to all persons who were criminally convicted by a military or an ordinary court and sentenced to forfeiture of their property.

After the Second World War, the Maribor Military Court convicted the applicants’ predecessors in August 1945 of the offence of high treason and sentenced them to deprivation of liberty with forced labor. They were also stripped of their political and civil rights and ordered to forfeit all their property to the state. Probably towards the end of 1945, they lost their lives in a work camp under circumstances that remain unclear.

In 1993, the domestic courts quashed the convictions and discontinued the criminal proceedings against the applicants’ predecessors. The applicants then lodged a request for declaratory decisions concerning their citizenship. In 1993, the administrative authorities adopted decisions certifying that their predecessors had been Yugoslav and Slovenian citizens until their death. The applicants then initiated restitution proceedings with several municipalities and with the Ministry of Culture. In one set of proceedings, an out-of-court settlement was reached.

In 1995, while proceedings were still pending, the Parliament passed legislation suspending the restitution of certain types of property that affected the proceedings to which the applicants were parties. The applicants then withdrew all their claims made under the Denationalization Act and started proceedings under the Act on Implementation of Penal Sanctions. In 1997, the Parliament again passed legislation resulting in a stay of all the proceedings to which the applicants were parties. The applicants initiated several other proceedings in reaction to these legislative changes.

In 2003 the domestic court, by an interim decision, upheld the applicants’ claim and decided that they were entitled to restitution of all the property taken in 1945. The court found that the property in question had not been forfeited by the nationalization provisions of the AVNOJ decree in 1944, but only by the

66 ECtHR, *Gerden v. Slovenia*, no. 44581/98, Judgement of 18 March 2008.

67 ECtHR, *Attems and Others* (dec.), no. 48374/99, Judgement of 4 January 2008.

later criminal judgment of 1945. Therefore, the domestic courts found that the property should be returned to the applicants in accordance with the Act on Implementation of Penal Sanctions, and not under the provisions of the Denationalization Act.

After appeals, the Supreme Court in 2006 set aside the decisions of the second- and first-instance courts and remitted the case in part to the first-instance court for re-examination. The Supreme Court found that the Act on Implementation of Penal Sanctions was not necessarily the right basis for restitution of the property in the case. It instructed the first-instance court to establish clearly whether the property at issue had been confiscated by the nationalization provisions of the AVNOJ decree or by the criminal judgement of 1945. If the property had been nationalized by the AVNOJ decree, the property should be returned under the denationalization provisions of the Denationalization Act and subject to the limitations for restitution set forth in that Act. If, on the other hand, the forfeiture of the property had been ordered as a penal sanction following the conviction of 1945, the property should be returned under the Act on Implementation of Penal Sanctions. The other sets of proceedings took a similar course of action.

Bringing the case before the European Court, invoking Article 6 § 1, the applicants claimed that the temporary suspension of the Denationalization Act and the Act on Implementation of Penal Sanctions, as well as the amendments to these Acts, constituted an unfair interference by the state in the proceedings and thus amounted to a breach of their right to fair trial. The applicants also invoked Article 6 § 1 in conjunction with Article 14 of the Convention, claiming that they were discriminated against in the proceedings based on their parents' origin. Furthermore, they invoked Article 1 of Protocol No. 1, alone and in conjunction with Article 14, claiming that they were deprived of possession of the forfeited property, and that the amendments to the Act on Implementation of Penal Sanctions introduced a discriminatory treatment for the restitution of property in those cases where the property was forfeited by the AVNOJ decree. In this regard they argued that they had a "legitimate expectation" that their restitution claims would be determined in their favor, and that this expectation constituted a "possession" within the meaning of the Convention.

Regarding the substance of the complaints, the Court noted that all sets of the applicants' proceedings were still pending before the first- or second-instance courts and therefore declared the complaints premature. As to the complaints about the length of proceedings, the Court noted that the applicants had not availed themselves of any of the remedies provided by the 2006 Act. This decision was similar to the one the Court made in *Gliha and Joras*⁶⁸.

The recent case of *Rau and Others v. Slovenia*⁶⁹ also concerned the question of whether the property had been taken by virtue of the AVNOJ Decree or by a criminal judgment after the Second World War. The applicants complained

68 ECtHR, *Gliha and Joras* (dec.), no.72200/01, Decision of 6 September 2007.

69 ECtHR, *Rau and Others v. Slovenia* (dec.), no. 47001/14, Decision of 26 February 2019.

about the conflicting domestic case law, as courts examined requests variously under the Denationalization Act and Section 145 of the Enforcement of Criminal Sanctions Act. The applicants were particularly concerned about this conflict because the two Acts provided for different entitlements.

The Court held, with regard to the applicant's complaints under Article 6 of the Convention, that it had not been demonstrated that there existed "profound and long-standing differences" in the relevant domestic case law. While the Supreme Court's judgment of 23 August 2012 departed from the view taken in the Supreme Court's judgment of 17 February 2011, this departure was in reaction to the Constitutional Court's remittal of the case that aimed precisely at overcoming the inconsistencies caused by the Supreme Court's initial decision. The Constitutional Court's decision and the subsequent Supreme Court judgment thus contributed to case-law development. This was not contrary to the proper administration of justice. As to the complaint under Article 1 of Protocol No. 1, the Court did not find that the applicants' proprietary interests amounted to "possessions" within the meaning of that Article.

The case of *Knez and Others*⁷⁰ also concerned the restitution of land forfeited in criminal proceedings. Like in other cases of this group, the applicants complained that the temporary suspension of and amendments to the Denationalization Act and the Act on Implementation of Penal Sanctions violated their rights under Article 6 § 1 alone, and in conjunction with Article 14 of the Convention, Article 1 of Protocol No. 1, and Article 3 of Protocol No. 7. The Court found that domestic proceedings were either still pending or else that the applicants had failed to lodge an appeal, and it therefore declared that part of the application inadmissible. However, the Court did find a violation of Article 6 in respect of one set of proceedings terminated before the 2006 Act entered into force.

Other similar applications, including those in *Misson v. Slovenia*, *Oberwalder v. Slovenia*, *Kodermac v. Slovenia*, *Blekić v. Slovenia*, and *Jasna de Matei v. Slovenia*,⁷¹ which all concerned various aspects related to denationalization proceedings, were declared inadmissible on various grounds.

Moreover, in *Dolhar v. Slovenia*⁷², in response to the quashing of a criminal judgment, the domestic courts had concluded that the property at stake could not be returned *in natura* and instead awarded compensation to the applicant. The applicant maintained before the Court that he had a right to restitution *in natura* of the immovable property and complained about the protracted nature of the proceedings. The Court found a violation of Articles 6 and 13 of the Convention. As to his complaints under Article 1 of Protocol No. 1, the Court held that the national judicial authorities gave reasoned decisions that addressed all

70 ECtHR, *Knez and Others*, no. 48782/99, Judgement of 21 February 2008.

71 ECtHR, *Misson v. Slovenia* (dec.), no. 27337/95, Decision of 21 January 1997; ECtHR, *Oberwalder v. Slovenia* (dec.), no. 75567/01, Decision of 24 March 2005; ECtHR, *Kodermac v. Slovenia* (dec.), 25630/01, Decision of 23 November 2006; ECtHR, *Blekić v. Slovenia* (dec.), no. 14610/02, Decision of 7 July 2009; and ECtHR, *Jasna de Matei v. Slovenia* (dec.), no. 56928/08, Decision of 7 February 2017.

72 ECtHR, *Dolhar v. Slovenia*, no. 66822/01, Judgement of 18 March 2008.

relevant submissions by the applicant. The Court concluded that there was nothing to show that the conclusion of the national judicial authorities was arbitrary or contrary to the provisions of domestic law.

In several cases concerning the protracted nature and other issues related to denationalization proceedings, such as *Turk and Others v. Slovenia*, *Breskvar and Jelovšek v. Slovenia*, and *Gašparič v. Slovenia*,⁷³ the parties reached a friendly settlement and the Court struck their applications out of its list of cases. In *Malec v. Slovenia*⁷⁴, a partial friendly settlement was reached.

Based on precedents from cases establishing general principles in the field of restitution of property, as applied in cases against Slovenia, first the Committee of three judges and, after the reform of the Convention system, the Single Judge dismissed a number of additional applications as inadmissible.

A recent case, *Gros v. Slovenia*⁷⁵, also briefly touches upon the denationalization process. It concerned the applicant's complaint of being denied access to a court to challenge municipal decisions to classify paths crossing his land as "public roads". In 2016, the applicant, acting as a trustee for the unidentified heirs of denationalized property, sought to challenge ordinances adopted by the Municipality of Kranj which had classified roads running over two plots of land as "public roads". The ordinances, one of which had been in force since 2004, had led to the annulment in 2016 of decisions to denationalize the plots, which the applicant was managing and over which he alleged ownership.

In February 2018, the Constitutional Court rejected his application for a review of the ordinances as having been lodged outside the time limit of one year since the ordinances had entered into force (objective time limit) or since he had become aware of the adverse impact of the ordinances (subjective time limit). The court reasoned that he should have known about the classification of the roads, which had dated from the early 2000s, and he had not explained why he could not have learned of the classification before being served with the annulment decision of 2016. The statute of limitations had therefore run on his application. Furthermore, an appeal against the annulment decision of 2016 was granted, and the relevant proceedings were still ongoing at the time the applicant lodged a complaint before the European Court.

The applicant complained under Article 6 § 1 of the Convention that he was denied the right of access to a court by the Constitutional Court. He also raised a complaint under Article 1 of Protocol No. 1 that the plots of land were renationalized. Under Article 6 § 1, the Court considered that the Constitutional Court had imposed an excessive burden on the applicant that was, furthermore, unforeseeable, given the circumstances of the present case, thus upsetting the requisite fair balance between the legitimate aim of ensuring compliance with the formal conditions for applying, on the one hand, and the right of access to

73 ECtHR, *Turk and Others v. Slovenia* (dec.), no. 45941/99, Decision of 12 December 2006; ECtHR, *Breskvar and Jelovšek v. Slovenia* (dec.), no. 7566/01, Decision of 4 January 2007; and ECtHR *Gašparič v. Slovenia* (dec.), no. 28068/08, Decision of 22 November 2011.

74 ECtHR, *Malec v. Slovenia* (dec.), no. 46983/09, Judgement of 2 April 2013.

75 ECtHR, *Gros v. Slovenia*, no. 45315/18, Decision of 7 July 2020.

that court, on the other. The Court further found that the applicant's complaint under Article 1 of Protocol No. 1 was premature given that the relevant domestic proceedings were still pending.

5. CONCLUSION

The Court's jurisprudence in the field of property restitution, and particularly its case-law related to restitution cases against Central and Eastern European countries, provides a helpful window into understanding both the Court's role and the evolving legal understanding of restitution itself.

Regarding the Court's role, older European Convention member states were concerned that allowing Central and Eastern European countries to join the Convention would have a drastic impact on the Court's jurisprudence in the area of property law, perhaps even changing the Court's role in this area entirely. As the case-law examples given above demonstrate however, this has not been the case.

Instead, in hearing and deciding these cases, the Court confirmed its role as an essential guardian of human rights, all while conforming to the requirements of international law as it stood and acting in accordance with the Vienna Convention. The very fact that these cases have not substantially changed the jurisprudential landscape is itself an important finding, and it speaks to the Court's potential for longevity and its adaptability in the face of new challenges.

Rather, this line of cases has strengthened the Court's role as a guiding companion to Central and Eastern European countries in their journey towards democracy, rule of law, and the market economy, both in cases concerning individual applicants and in pilot judgments involving large numbers of applicants.

The case-law in this area also serves to highlight the vast scope of the application of property law across time and space. In the aftermath of the Second World War, thousands of people across much of Central and Eastern Europe had property taken from them by state authorities, through nationalization, expropriation or by criminal judgments. The stories of the individuals and families affected, which are described in the Court's case-law and which I have tried to capture above, serve as a testament to the human rights abuses suffered by so many, and they underscore the importance of property law in the realm of human rights. This case law is highly illustrative of the profound changes these countries underwent both after the Second World War and after their state governments shifted towards democratic changes.

Although societies face important moral obligations with regard to restitution – an obligation many CoE member States have legally recognized – actually putting restitution into practice is extraordinarily complex and cumbersome, as the cases discussed in this contribution amply show. CoE member states which once formed the SFRY, including Bosnia and Herzegovina, Croatia, Montenegro, North Macedonia, Serbia and Slovenia, have for the most part put significant effort into righting the wrongs of uncompensated confiscation of property that

occurred during the communist rule (or, as far as Bosnia and Herzegovina is concerned, during the 1990s war). Yet the processes individuals must go through to recoup their losses can take a decade or more to navigate.

Similarly, this body of case-law demonstrates that, as for other Central and Eastern European member States, the Court could not interfere with the choice of domestic authorities regarding eligible beneficiaries, including the nationality requirement (*Smiljanić v. Slovenia*, cited above). However, it clearly enforced State processes once they were put in place, both as far as the rule of law and the actual implementation were concerned, ordering for instance the transfer into the applicants' possession of substitute land in *Stojanovski and Others*, cited above, and the removal of the church from the applicants' land in *Orlović and Others*, cited above. Given that the member states have a broad margin of appreciation in the field of economic and social policy, especially in the transition towards a market-led economy, the Court allowed some degree of leeway at the implementation stage.

Although the Court found only a few violations of Article 1 of Protocol No. 1 based on arbitrariness of the domestic courts' reasoning or the lack of the execution of judgments, some of the inadmissibility decisions on restitution were also quite important for the member states concerned since they showed the limits of Strasbourg's supervision (*Gavella v. Croatia, Eparhija budimljansko-nikšićka and Others*, and *Sirc v. Slovenia*, all cited above) and the subsidiary role of the Court in these matters. In some case, the Court found that the domestic courts had properly balanced the interests at stake, including the rights and interests of third persons (*Vikentijevik v. "The former Yugoslav Republic of Macedonia"*, cited above). Furthermore, in several cases, the protracted length of the proceedings was problematic (*Sirc v. Slovenia, Dolhar v. Slovenia, and Knez v. Slovenia*, all cited above) before the domestic remedies for the protracted length of proceedings were implemented. The Court also gave guidance on the modification of compensatory entitlements granted by legislation during pending proceedings (*Serbian Orthodox Church v. Croatia*, cited above). Unlike in the pilot cases of *Broniowski, Hutten-Czapska* and *Manushaqe Puto and Others*, all mentioned above, the Court has so far not found any structural problems in the restitution processes in the region.

Along with the endeavors for the return of Jewish property taken during the Nazi regime, both in Germany⁷⁶ and worldwide, and despite the difficulties discussed above, the countries of Central and Eastern Europe are at the forefront of an emerging global movement for restitution and reparations. Communities around the world have increasingly demanded restitution or reparations to right past wrongs. For instance, African American activists in the United States have gained support for their long-standing demands of reparations to help compensate for the centuries of unpaid, forced labor performed by their ancestors. Other groups across the globe, including in particular indigenous communities whose lands were taken from them, have also long advocated for restitution or other compensation.

76 Popović, D., 2015, p. 254.

Thus, although the obligation to return expropriated property to individuals has not, strictly speaking, become a recognized part of international law, this body of case-law has raised awareness of the importance of restitution of property for undoing past wrongs in international fora. It has already become close to an obligation in certain contexts, such as in respect of internally displaced persons.⁷⁷ Furthermore, the victims of previous regimes or mass human rights violations⁷⁸ are increasingly being granted the right to individualization, even in the inter-state context (see, for example, the just satisfaction judgment in *Cyprus v. Turkey*⁷⁹ for surviving relatives of missing persons and enclaved residents). It is interesting to note in this context that Liechtenstein lodged in August 2020 an inter-state application against the Czech Republic before the European Court. The case concerns the Government of Liechtenstein's complaint under several Articles of the Convention about the respondent state's classification of Liechtenstein citizens as persons with German nationality for the purposes of applying the Beneš decrees of 1945, which, among other things, confiscated property belonging to all ethnic Germans and Hungarians after the Second World War.

The law of restitution will therefore likely play an increasingly important role in the 21st century. The restitution legislation enacted by Central and Eastern European Countries, as well as the case-law established by the ECHR in this area, are therefore of critical importance as the concept of restitution becomes ever more a recognized moral, as well as legal, principle.

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Lerato Rudolph Ngwenyama*

USUFRUCT AND HABITABILITY: PERSPECTIVES FROM SOUTH AFRICA

Abstract: *This article explores habitability in the context of a usufruct from a South African perspective. It aims to examine whether there is a specific standard of habitability that a usufructuary can expect when the owner grants them a usufruct, and crucially to determine whether a minimum standard of habitability for usufructuaries in South African law can be derived from the Constitution of the Republic of South Africa, 1996 (“Constitution”). The article also investigates whether the obligation to ensure such a standard of habitability for usufructs rests on the owner, the state, or the usufructuary.*

In order to determine whether property subject to a usufruct is habitable, the first section of this article will consider the meaning of habitability as crystallised from case law in the context of a usufruct.

The second section of this article explores whether the Constitution and/or constitutional provisions inform a standard of habitability in the context of a usufruct. The final section of the article identifies the person who the obligation rests on to ensure habitability of property inhabited by a usufructuary in line with the common law.

Keywords: usufruct, habitability, specific standard, constitutional implication, minimum standard, obligation.

1. INTRODUCTION

A usufruct is a personal servitude mostly created by testamentary will.¹ However, it is also possible to establish a usufruct between living parties in terms

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1 Walt, AJ., Van der, 2016, *The Law of Servitudes*, Cape Town, Juta, p. 465; Merwe, CG., Van der, Case 1: Various Instances of Time-Limited Interests, in: Merwe, CG., Van der, Verbeke,

of a contractual agreement.² It cannot exist beyond the death of the usufructuary as it is a personal servitude attached to the usufructuary in his or her personal capacity.³ A usufruct is a personal servitude that may be granted over immovable property, which grants the usufructuary a limited real right to use and enjoy the property. The use and enjoyment of the property must be exercised in a manner that the property's nature remains preserved until the property is given back to the owner.⁴ As such, a usufructuary is an inhabitant of property belonging to the owner. The condition and maintenance of the property is generally seen as the responsibility of the owner who grants the usufruct for occupation.⁵ However, this responsibility is not clear, and this issue forms the crux of this article. The questions that may arise in this context are as follows: (a) whether a specific standard of habitability for property inhabited by a usufructuary exists; (b) whether, at the very least, a minimum standard of habitability for usufructuaries can be derived from the Constitution of the Republic of South Africa, 1996 ("Constitution"); and (c) on whom the obligation rests to ensure such a standard of habitability for property occupied by usufructuaries. If the property is not in a habitable state, a usufructuary may arguably be faced with two challenges in the 21st century, namely: (i) homelessness, if they choose to leave the uninhabitable property; or (ii) continue to live on property that is unsafe, undignified and inadequate. In order to determine whether a usufruct property is habitable, the meaning of "habitability" needs to be examined. The meaning of habitability in the context of a usufruct is not defined in legislation. However, there are common-law principles that signal habitability to mean a usufruct that is fit for human habitation.⁶ It is trite that in granting the limited real right of a usufruct, the owner gives the usufructuary the use and enjoyment of the usufruct. This is subject to the condition that the substance of the usufruct is well-looked-after by the usufructuary and returned to the owner upon the termination of the usufruct.⁷ Therefore, the owner who grants the limited real right of a usufruct should ensure that the property is in a habitable condition to ensure that the

A., (eds.), 2012, *The Common Core of European Private Law Time Limited Interests in Land*, New York, Cambridge University Press, p. 125.

- 2 See *Lola v. Rimon* (2012/42735) [2013] ZAGPJHC 65 (15 April 2013) *SAFLII* <<http://www.saflii.org/za/cases/ZAGPJHC/2013/65.html>> paras. 1–5; Merwe, CG., Van der, 2012, p. 125.
- 3 Section 66 of the Deed Registries Act 47 1937 ("DRA"), which provides that no personal servitude of, *inter alia*, usufruct may purport to extend beyond the lifetime of the person in whose favour it is created shall be registered, nor may a transfer or cession of such personal servitude to any person other than the owner of the land be encumbered or registered thereby. See further *Bhamjee en v. Mergold Beleggings (Edms) Bpk* 1983 4 SA 555 (T) 557 and 563; Muller, G., *et al.*, 2019, *Silberberg and Schoeman's The Law of Property*, Durban, LexisNexis, p. 383; Merwe, CG., Van der, 2012, p. 125; Walt, AJ., Van der, 2016, pp. 455–456 and 464.
- 4 Walt, AJ., Van der, 2016, p. 464; Muller, G., *et al.*, 2019, p. 383; Merwe, CG., Van der, 2012, pp. 125; Merwe, CG., Van der, 2012, pp. 265–266; Muller, G., 2018, To Fell or Not to Fell: The Impact of NEMBA on the Rights and Obligations of a Usufructuary, *Tydskrif vir Hedendaagse Romeins-Hollandse Reg*, vol. 81, no. 4, p. 529; Grobler, L., 2015, *The Salva Rei Substantia Requirement in Personal Servitudes*, doctoral dissertation, Stellenbosch University, p. 45.
- 5 See part 4 below.
- 6 See part 2 below.
- 7 See part 2 below.

usufructuary can use and enjoy the usufruct. This flows from the premise that the extraordinary repairs, which preserve the usufruct property in a habitable standard, ordinarily rests upon the owner.⁸ Hence, the habitability of properties that are subject to a usufruct will be considered against this brief background.

The first part of the article will examine the meaning of habitability of property that is subject to a usufruct. This is done to determine whether a specific standard of habitability already exists for usufructuaries in terms of the common law.

Subsequently, the second part of the article will scrutinise the impact of the Constitution on the standard of habitability for usufructuaries in light of the constitutional rights to access to adequate housing and human dignity. This is done to determine whether a minimum standard of habitability for usufructuaries can be derived from the Constitution.

The third part of the article will, in turn, investigate on whom the obligation rests to ensure habitability. More specifically, it will question whether such an obligation rests on the owner who granted the usufruct, or the state, or on the occupier in line with the common law. Alternatively, it will be questioned whether the state can be expected to have any obligation to ensure that usufruct properties are habitable.

2. THE MEANING OF HABITABILITY IN THE CONTEXT OF A USUFRUCT

There is no precise or exact meaning of habitability in the case of a property occupied by usufructuaries. Still literature and case law seem to focus on ensuring that property is habitable in the sense that it is fit for human habitation.⁹ This section discusses some of the cases that illustrate an indication of habitability, precisely in so far as the notion purports to mean property that is fit for human habitation in this context.

In the case of *Ex Parte De Douallier* (“*De Douallier*”),¹⁰ property was bequeathed to the usufructuary for life and, after her death, to the eldest child.¹¹ The bequest was on the condition that the child was not to mortgage or alienate the property. The usufructuary was too poor to pay the costs of transfer or to repair the property, which was rapidly becoming dilapidated and run-down.¹² At the stage of the property becoming run-down, the eldest child was still a minor. The court took the interests of the minor child and the usufructuary into account. It granted leave to mortgage the property in order to allow the usu-

8 See part 4 below.

9 Muller, G., *et al.*, 2019, p. 386; *Ex Parte Davy* 1902 TH 96 97–98; *Ex Parte De Douallier* 1907 24 SC 282 283; *Ex Parte Praetorius* 1915 CPD 819 820–821; *Ex Parte Atkins: In re Estate Lazarus* 1933 WLD 76 77; *Philps v Cradock Municipality* 1937 EDL 382 389; *Brunsdon’s Estate v. Brunsdon’s Estate* 1920 CPD 159 174; *Ex Parte Estate Borland* 1961 1 SA 6 (SR) 7; *Nel v. Potgieter* 1962 2 SA 608 (T) 610–611.

10 *Ex Parte De Douallier* (1907) 24 SC 282.

11 *Ex Parte De Douallier* 1907 24 SC 282 283.

12 *Ex Parte De Douallier* 1907 24 SC 282 283.

fructuary to gain enough money to enable her to obtain the transfer and place the property in a habitable state of repair.¹³ Interestingly, the case shows how creative a court can be to ensure the right of a usufructuary to a habitable property. The court's finding also indicates that a usufruct is fit for human habitation if that property is placed in a habitable state of repair.¹⁴ This implies that, at the very least, property in the context of a usufruct should be suitable to live in. Property that is in a dilapidated condition or state of disrepair is not fit or suitable for human habitation.¹⁵ Furthermore, the decision of the court in *De Douallier* signals that necessary repairs to the building classify as the standard that the usufructuary can expect.

The case of *De Douallier* was later followed in *Ex Parte Praetorius* ("Praetorius").¹⁶ In *Praetorius*, a husband and wife were married in community of property.¹⁷ They mutually bequeathed the usufruct of their estate to the surviving spouse, which in this case was the husband. However, the husband was too old and unable to look after himself out of the capital of the estate. Likewise, the husband could not pay for the rates or keep the property in good condition.¹⁸ The court, referring to *De Douallier*, authorised the husband to mortgage the estate property to cover the costs already incurred in terms of rates and repairs.¹⁹ The case of *Praetorius* endorses the idea that habitability of a usufruct means a residence that is kept in good condition. Consequently, if the property is not in good condition, the usufructuary, with the leave of the court, can be expected to effect repairs necessary to place the property in a habitable state of repair. Again, as in *De Douallier* the repairs that were necessary to put the property in a habitable state of repair point towards the standard that can be expected when the owner grants the usufructuary a usufruct. The court's decision in *Praetorius* is also laudable as it safeguards the usufructuary's right to have a habitable property.

In another case of *Ex Parte Davy* ("Davy"),²⁰ H and W entered into an ante-nuptial contract.²¹ In the contract, certain property was vested in a trustee and a usufruct of that property granted to W. On W's death, the usufruct property was to devolve among the children born in the marriage of H and W. The usufruct property was in a dilapidated state and needed to be repaired.²² The court in *Davy* allowed for money to be raised in order to pay for extraordinary repairs that were for the benefit of the property.²³ The case of *Davy* further shows that fit for human occupation includes making repairs that are necessary for the ben-

13 *Ex Parte De Douallier* 1907 24 SC 282 283.

14 *Ex Parte De Douallier* 1907 24 SC 282 283.

15 *Ex Parte Standard Bank Ltd: In re Estate Rodger* 1963 3 SA 683 (SR) 684.

16 *Ex Parte Praetorius* 1915 CPD 819.

17 *Ex Parte Praetorius* 1915 CPD 819 820.

18 *Ex Parte Praetorius* 1915 CPD 819 820.

19 *Ex Parte Praetorius* 1915 CPD 819 821.

20 *Ex Parte Davy* 1902 TH 96.

21 *Ex Parte Davy* 1902 TH 96 97.

22 *Ex Parte Davy* 1902 TH 96 97.

23 *Ex Parte Davy* 1902 TH 96 97-98.

efit of the property and not luxurious.²⁴ Such necessary repairs in effect ensure the continued existence of the property.²⁵

Despite the lack of a clear definition of habitability in the case of usufructs, the statements in cases like *De Douallier*, *Praetorius* and *Davy* point toward an outlining of the meaning of habitability as it can be derived from the requirement that the property must be fit for human habitation. The following definition of habitability is proposed as derived from the above-mentioned judgments. Habitability in the sense of fit for human habitation means property that is placed in a habitable state of repair and allowed to be kept in a good condition for the duration of the usufruct. This, in turn, may imply allowing the usufructuary, with the leave of the court, to effect necessary (although not luxurious) repairs for the benefit of improving the property. The statements such as “repairs done for the benefit of the property”,²⁶ “property kept in good condition”,²⁷ and “placing the property in a habitable state of repair”²⁸ when put together imply a very specific standard of habitability for usufructuaries based on pronouncements in the cases mentioned above dealing with a usufruct. The meaning of habitability as set out above does not indicate an explicit standard of habitability. However, in terms of the common law, it seems that the standard of habitability is met when the property is fit and habitable for human habitation.²⁹ Therefore, property that is subject to a usufruct must be fit for human habitation in order to satisfy the standard of habitability in the context of usufructuaries. It should be mentioned that an obligation in terms of habitability may be explicitly informed by a usufruct agreement or constitutional rights as shown in part three below, which is the next section that will be dealt with.

3. THE IMPACT OF THE CONSTITUTION ON THE STANDARD OF HABITABILITY IN THE CONTEXT OF A USUFRUCT

This section considers whether the Constitution (or constitutional rights more specifically) inform a standard of habitability in the context of a usufruct other than the specific standard outlined in the section above in terms of the common law. The appropriate point of departure for constitutional analysis is the principle of constitutional supremacy in terms of section 2 of the Constitution. This section provides that the Constitution is the supreme law of the land and that all law or conduct that is not in line with the Constitution is invalid.³⁰ The section further provides that obligations that are imposed by the Constitu-

24 *Ex Parte Davy* 1902 TH 96 97–98. See also *Lola v. Rimon* (2012/42735) [2013] ZAGPJHC 65 (15 April 2013) SAFLII <<http://www.saflii.org/za/cases/ZAGPJHC/2013/65.html>> para. 7.

25 Muller, G., *et al.*, 2019, p. 386.

26 *Ex Parte Davy* 1902 TH 96 97–98.

27 *Ex Parte Praetorius* 1915 CPD 819 821.

28 *Ex Parte De Douallier* 1907 24 SC 282 283.

29 See part 2 above.

30 Section 2 of the Constitution.

tion must be fulfilled.³¹ Another important principle in the constitutional analysis is the “single-system-of-law” principle that was stated in the case of *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* (“Pharmaceutical Manufacturers”).³² In *Pharmaceutical Manufacturers*, the court held that there is only one system of law in the Republic. The Constitution, as the supreme law, shapes the system. The court further mentioned that all law, including the common law, derives its force from the Constitution and is subject to constitutional control.³³ In light of section 2 and the “single-system-of-law” principle, the common-law construct of a usufruct is part of a single system of South African law.³⁴ The Constitution shapes the common law, and it *should* derive its force from the Constitution. This would mean that a usufruct is subject to constitutional control and regulation.³⁵

Considering the above framework, it is important to determine what source of law the usufructuary can use to find a remedy to protect his or her usufructuary interest. The sources of law that may generally apply are the Constitution and the common law.³⁶ The common law seems to be the apparent source of law in the context of usufructuaries. This can be argued based on the subsidiary principles.³⁷ For a usufruct, the subsidiarity principles provide that where no legislation deals with the rights of a usufructuary, the common law should be directly relied upon.³⁸ This would mean that the matter will be decided purely based on common law principles – unless these principles are not in line with the Constitution.³⁹ Once the relevant common-law position has been determined as set out above, the common law should be applied to the specific facts of the case at hand. What is essential is to determine what the common-law position entails and what outcome is prescribed by the common law for the particular case.⁴⁰ At this stage, it is not necessary to question whether the outcome of the case is fair, or acceptable, or whether the common law should be developed, but primarily to set out what the position is in terms of the common law.⁴¹

In the context of the question of whether a usufruct is habitable, the assessment of the common law becomes relevant in the following instance. The common law indicates that the usufructuary must ask the court to lift the restraint on the testator’s will, which stipulated that the property should not be mort-

31 Section 2 of the Constitution.

32 *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC). See also Walt, AJ., Van der, 2016, p. 38.

33 *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC) para 44. See further Van der Walt, AJ., 2016, *The Law of Servitudes*, Cape Town, Juta, p. 38, particularly footnote 97.

34 Walt, AJ., Van der, 2016, p. 39.

35 *Ibid.*

36 *Ibid.*

37 *Ibid.*, p. 40.

38 *Ibid.*

39 *Ibid.*, p. 41.

40 *Ibid.*

41 *Ibid.*

gaged. The court will ordinarily assess the surrounding circumstances of the case to see whether the mortgage is in the best interest of the beneficiaries (that is, the usufructuary and the heir) of the bequest. Suppose the mortgage beyond reasonable doubt benefits the beneficiaries. In that case, the court will normally lift the restrictive condition in the will so that the property can be mortgaged in order to raise money for necessary repairs. This shows how creative the courts have been to ensure that the property of usufructuaries is in fact, in a habitable state.

As the common-law position has been established, the next step is to determine whether the outcome prescribed by the common law is adequate, acceptable and justifiable in light of constitutional rights.⁴² When a usufruct is granted against immovable property, it has the purpose of providing usufructuaries with personal residence and in effect protects their housing interests, their security of tenure and provides human dignity in terms of the Constitution.⁴³ As such, the personal servitude of a usufruct is not immune to the Constitution, nor can it be excluded from constitutional scrutiny, especially where the usufruct is not habitable.⁴⁴ Suppose the property that is subject to a usufruct is not habitable. In that case, it may constitute a contravention of rights enshrined in the Bill of Rights,⁴⁵ such as the right to human dignity,⁴⁶ security of tenure⁴⁷ or access to adequate housing.⁴⁸ Thus, the question is how the South African courts will, in the future, deal with habitability in the context of usufructuaries given the constitutional right to human dignity, security of tenure and access to adequate housing, which arguably also applies to usufructuaries. In other words, it is important to consider whether a usufructuary will be able to rely on the Constitution, more specifically the right to human dignity, the security of tenure or access to adequate housing, to argue that a usufruct is not habitable. Arguably, it needs to be established whether the common-law requirements of “fit for occupation” or “use and enjoyment” – as developed in case law dealing with usufructuaries – are sufficient to provide a usufructuary with a minimum standard to ensure that the usufructuary property is habitable. The aim is to highlight these links so that clarity can be established concerning the impact of the Constitution on the

42 *Ibid.*

43 Walt, AJ., Van der, 2013, The Continued Relevance of Servitude, *Property Law Review*, vol. 3, no. 1, p. 30; Walt, AJ., Van der, 2016, p. 41; Grobler, L., 2015, p. 305.

44 Walt, AJ., Van der, 2016, p. 38; Walt, AJ., Van der, 2013, Development of the Common Law of Servitude, *South African Law Journal*, vol. 130, no. 4, p. 738; Davis, DM., Klare, K., 2010, Transformative Constitutionalism and the Common and Customary Law, *South African Journal on Human Rights*, vol. 26, no. 3, p. 430; Walt, AJ., Van der, 2013a, pp. 31–32; Grobler, L., 2015, p. 286; *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC) para. 44.

45 Grobler, L., 2015, pp. 8 and 305.

46 Section 10 of the Constitution. This section provides that “[e]veryone has inherent dignity and the right to have their dignity respected and protected.”

47 Section 25(6) of the Constitution. This section states “[a] person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.”

48 Section 26(1) of the Constitution. This section makes provision that “[e]veryone has the right to have access to adequate housing.”

common-law construct of the usufruct, especially in so far as it pertains to a potential minimum standard of habitability for usufructuaries.

The starting point to investigate the implication of the Constitution on the outcome that is prescribed by the current position of the common law is to determine whether the common law conflicts with constitutional rights such as human dignity, and the others.⁴⁹ The common-law position is illustrated by the cases of *De Douallier* and *Praetorius* discussed earlier in this chapter. Although the cases of *De Douallier* and *Praetorius* were decided solely on common law principles and essentially prescribe the ambit of the common-law position regarding habitability in the context of usufructs, the cases essentially show how imaginative courts can be to protect constitutional rights and do not pertinently indicate any visible infringement of constitutional rights. This is because the court permitted the restriction to mortgage in the will and allowed the usufructuary to mortgage the property to effect necessary repairs aimed at placing the property in a habitable condition. However, if the outcome of the common-law position were that a court cannot lift conditions in a will, the rigid application of the common law in that regard would arguably have resulted in usufructuaries being denied their right to live in habitable property that protects their human dignity, security of tenure or access to adequate housing. In my view, such an outcome would directly impact on constitutional rights such as human dignity or access to adequate housing. In such instances, the usufructuary should arguably be able to rely on constitutional rights to argue that the usufruct is not habitable or that the development of the common law should be considered.⁵⁰ This is because such a rigid application of the common law would arguably be in direct conflict with constitutional provisions.⁵¹ Nevertheless, as highlighted already, the manner in which the cases of *De Douallier* and *Praetorius* were decided ensured that a usufructuary dwells in adequate housing that is habitable and accords with human dignity. In this regard, a need has not arisen to develop the common law and the common law as applied currently is arguably unproblematic.⁵²

Given that the common law remains intact, a further interesting question that arises is whether the common-law requirements of “fit for occupation” or “use and enjoyment”, which were developed by the courts, are adequate to provide a usufructuary with a minimum standard that ensures that the usufructuary lives in habitable property. I would argue that the common-law *fit for occupation* requirement or the entitlement of *use and enjoyment* are sufficient to provide usufructuaries with a minimum standard of habitability in the case of the property being uninhabitable. As a point of departure, a usufruct should be fit for human occupation.⁵³ The principle is that a usufructuary is entitled to the use of the usufruct.⁵⁴ The usufructuary cannot enjoy that use or even draw appro-

49 Walt, AJ., Van der, 2016, pp. 41–42.

50 *Ibid.*, pp. 43–44.

51 *Ibid.*, p. 44.

52 *Ibid.*, p. 42.

53 See part 2 above.

54 See parts 2 above and 4 below.

priate benefits from the usufruct unless it is fit for occupation. Consequently, the common law as it stands is likely to be sufficient to protect the interests of usufructuaries.

The way the court in *De Douallier* and *Praetorius* applied the common law in a flexible manner indirectly upheld constitutional rights due to the court's willingness to safeguard the interests of the usufructuaries.⁵⁵ Furthermore, the decisions of the court in *De Douallier* and *Praetorius* inherently indicate that the common-law construct of a usufruct is, in fact, part of a "single-system-of-law" which is shaped by the Constitution as the supreme law of the land.⁵⁶ As such, the common-law construct of a usufruct derives its force from the Constitution, and it is not immune to constitutional control and regulation.⁵⁷ As a result, the common-law construct of a usufruct does in effect promote the spirit, purport and objects of the Bill of Rights in terms of the Constitution.⁵⁸ It is essential to state that when the Constitution was put into effect it was intended that the law, including the common law, should reflect the recognised normative value-based system as found in the Constitution.⁵⁹ This is because the Constitution imposes new obligations on the owner concerning property rights, which the common law did not recognise as valid.⁶⁰ It follows from this that the owner (or heirs) cannot simply say that the usufruct property is his, and he can repair it when he wants to.⁶¹ The reason for this is that the moment the usufruct is constituted, the owner (or the heirs) are under the obligation to allow the usufructuary in a property that is fit for occupation to exercise his or her rights pertaining to the usufruct property.⁶² In this regard, the owner (or the heirs) may be required to

55 Section 2 of the Constitution.

56 *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC) paras. 44 and 49. See further Walt, AJ., Van der, 2016, pp. 38–39; Davis, DM., Klare, K., 2010, pp. 403, 430.

57 Walt, AJ., Van der, 2016, pp. 38–39; Walt, AJ., Van der, 2013b, p. 738; Van der Walt, AJ., 2013a, pp. 31–32; Walt, AJ., Van der, 2008, Normative Pluralism and Anarchy: Reflections on the 2007 Term, *Constitutional Court Review*, vol. 1, no. 1; pp. 77–128; Walt, AJ., Van der, 2014, The Modest Systemic Status of Property Rights, *Journal for Law, Property and Society*, vol. 1, no. 1; pp. 15–106; Grobler, L., 2015, p. 286; Davis, DM., Klare, K., 2010, pp. 403, 430, the authors mention that the common law must be interpreted and assessed within the scope and lens of the Constitution.

58 Section 39(2) of the Constitution. See further Muller, G., 2018, To Fell or Not to Fell: The Impact of NEMBA on the Rights and Obligations of a Usufructuary, *Tydskrif vir Hedendaagse Romeins-Hollandse Reg*, vol. 81, no. 4, p. 533.

59 Davis, DM., 2012, How many Positivist Legal Philosophers can be made to Dance on the Head of a Pin? A Reply to Professor Fagan, *South African Law Journal*, vol. 129, no. 1, p. 59; Woolman, S., 2007, The Amazing, Vanishing Bill of Rights, *South African Law Journal*, vol. 124, no. 4, p. 769; *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC) para. 49.

60 Compare *Daniels v. Scribante* 2017 4 SA 341 (CC) paras. 49 and 135, citing *Port Elizabeth Municipality v. Various Occupiers* 2005 1 SA 217 (CC) para. 23. See further Walt, AJ., Van der, 2016, p. 45.

61 See, for example, *Port Elizabeth Municipality v. Various Occupiers* 2005 1 SA 217 (CC) para. 20. Compare *Daniels v. Scribante* 2017 4 SA 341 (CC) paras. 133–142.

62 Mostert, H., et al., 2010, *The Principles of the Law of Property in South Africa*, Southern Africa, Oxford University Press, p. 251.

effect structural repairs, which are necessary to bring the usufruct property in a habitable state of repair.⁶³ Nevertheless, it was argued that an obligation in terms of habitability might not be informed directly by constitutional rights, as shown in part three above, but constitutional rights must still be given effect to by the common law. It remains to be seen whether an obligation to ensure habitability, in fact, rests on the owner of the property subject to a usufruct as will be questioned in part four below.

4. ON WHOM DOES THE OBLIGATION REST TO ENSURE HABITABILITY IN THE CONTEXT OF A USUFRUCT?

The purpose of this section is to examine whether the obligation to ensure habitability rests on the owner, the state, or the usufructuary. As previously mentioned, a usufruct ordinarily comes with the entitlement of use and enjoyment of the property for the benefit of usufructuaries.⁶⁴ Given that a usufruct is granted for the benefit of the usufructuaries, the usufruct property will arguably only be useful and enjoyable to the usufructuaries if it is habitable.⁶⁵ This implies a very particular standard of habitability for usufructuaries. Therefore, in this context, the owner (or heir) is obliged to ensure that the property is in a liveable or habitable condition during the continuation of the usufruct.⁶⁶ This is because the maintenance of extraordinary repairs of the property to keep it fit for human habitation are on the owner's account.⁶⁷ The owner is responsible for the permanent maintenance of the usufruct as permanent maintenance relating to the habitability of the property is arguably not done regularly.⁶⁸ For example, if a storm causes damage to the roof of the usufruct to the effect that it becomes impossible to live in the property, it is the owner who must repair the roof. Likewise, if the usufruct becomes seriously dilapidated with age or on account of weather or termites, the owner is obliged to make the required repairs. The reason for this is that the maintenance of the roof or the buildings is permanent in nature and therefore should be borne by the owner.⁶⁹

63 *Ibid.*

64 Walt, AJ., Van der, 2016, pp. 464 and 472; Muller, G., *et al.*, 2019, pp. 383–384; Merwe, CG., Van der, 2012, p. 125; Muller, G., 2018, p. 529.

65 *Ex Parte De Douallier* (1907) 24 SC 282 283; *Ex Parte Praetorius* 1915 CPD 819 821. Compare *Daniels v. Scribante* 2017 4 SA 341 (CC) para. 32.

66 Muller, G., *et al.*, 2019, p. 386; *Ex Parte De Douallier* (1907) 24 SC 282 283; *Ex Parte Praetorius* 1915 CPD 819 821; *Ex Parte Standard Bank Ltd: In re Estate Rodger* 1963 3 SA 683 (SR) 686–687; *Brett v. Barclays Bank (D C & O)* 1954 1 SA 260 (N) 263. Compare *Crosbie v. Crosbie's Executor* (1904) 21 SC 597 606.

67 Merwe, CG., Van der, 2012, p. 266; Muller, G., *et al.*, 2019, p. 386; Walt, AJ., Van der, 2016, pp. 478–479; Muller, G., 2018, p. 538, states that the owner is responsible for all the costs of extraordinary improvements to ensure the continued existence of the property.

68 Merwe, CG., Van der, 2012, p. 266; *Philps v. Cradock Municipality* 1937 EDL 382 389.

69 Merwe, CG., Van der, 2012, p. 266; Walt, AJ., Van der, 2016, p. 478; *Philps v. Cradock Municipality* 1937 EDL 382 389.

The case of *Ex Parte Estate Borland* (“*Borland*”)⁷⁰ is relevant in this regard. In this case, one of the farm properties of the testator was in a seriously dilapidated condition when the testator died.⁷¹ The farm was old due to age, and it was subjected to the plundering of termites. Thus, if reasonable steps were not taken to make necessary repairs on the farm, it would undoubtedly have fallen into a state of disrepair and would have been rendered useless and unfit for human habitation.⁷² Accordingly, the testator’s wife expended excess sums of money to effect necessary renovations, repairs and improvements. The wife, as one of the estate administrators, and other administrators approached the court to seek authority empowering them as administrators to reimburse her for the amount of money she used to preserve the property in good condition and to protect it from collapsing.⁷³

In *Borland*, the court applied the case of *Brunsdon’s Estate v. Brunsdon’s Estate* (“*Brunsdon*”)⁷⁴ and reiterated the general principle that usufructuaries are *not* entitled to claim reimbursement for improvements.⁷⁵ This is because one of the obligations of a usufructuary is to keep the usufruct in a state of good repair and to meet all ordinary expenses at his or her own costs. However, the court held that it was only when the expenses incurred in putting the usufruct property in a state of good repair are unique or extraordinary that the owner will have to reimburse the usufructuary for expenses incurred.⁷⁶ Based on the evidence before the court, it seemed clear that the property was dilapidated because it was old. As such, the court held that the preservation of the property in good condition by the usufructuary amounted to extraordinary repairs. As the testator’s wife had actually made the required repairs, the court was satisfied that she was entitled to compensation from the owner or his estate in the amount claimed.⁷⁷ The relevance of this case is that it indicates that the owner (or his capital estate) is responsible for repairs that are necessary to ensure that the property is in a condition that is fit for human habitation in the context of usufructuaries. This is because the costs of necessary repairs to preserve the property in a condition that is fit for human habitation or to protect the property from being declared unfit for human habitation are so special or extraordinary in nature that they should be met by the owner or paid from his or her capital estate.⁷⁸ In this regard, it should be noted that the option of the usufructuary effecting preserva-

70 *Ex Parte Estate Borland* 1961 1 SA 6 (SR).

71 *Ex Parte Estate Borland* 1961 1 SA 6 (SR) 7.

72 *Ex Parte Estate Borland* 1961 1 SA 6 (SR) 7.

73 *Ex Parte Estate Borland* 1961 1 SA 6 (SR) 7.

74 *Brunsdon’s Estate v. Brunsdon’s Estate* 1920 CPD 159.

75 *Ex Parte Estate Borland* 1961 1 SA 6 (SR) 8, citing *Brunsdon’s Estate v. Brunsdon’s Estate* 1920 CPD 159 174–175.

76 *Ex Parte Estate Borland* 1961 1 SA 6 (SR) 8, quoting *Brunsdon’s Estate v. Brunsdon’s Estate* 1920 CPD 159 174–175 and 178–179.

77 *Ex Parte Estate Borland* 1961 1 SA 6 (SR) 9–10.

78 Merwe, CG., Van der, 2012, p. 266; Walt, AJ., Van der, 2016, pp. 478–479; Muller, G., *et al.*, 2019, p. 386; *Brunsdon’s Estate v. Brunsdon’s Estate* 1920 CPD 159 172–178; *Ex Parte Estate Borland* 1961 1 SA 6 (SR) 9; *Ex Parte Standard Bank Ltd: In re Estate Rodger* 1963 3 SA 683 (SR) 686.

tion repairs and then claiming them back from the owner later is not always available to all usufructuaries, especially those who are poor.⁷⁹

In another case of *Ex Parte Standard Bank Ltd: in re Estate Rodger* (“Rodger”),⁸⁰ the testatrix bequeathed certain farms to her husband. When the husband died, the farms were left to the son. After the son’s death, the farms devolved to the grandson.⁸¹ In terms of the will, the beneficiaries had to lease other premises on the farms so that they could have money to cover living expenses.⁸² On one of the farms, there was property in a seriously dilapidated condition and to continue to rent the premises in a reasonable condition to tenants, it was necessary to have the property repaired and renovated. In this case, the bank was the administrator of the testatrix’s estate, and it obtained an estimated amount for the cost of the necessary work that had to be done. The bank sought authority to use the capital money of the estate to cover the estimated costs for the repairs.⁸³ In light of the facts of the case of *Rodger*, the court authorised the administrator to effect the required repairs using the capital of the estate.⁸⁴ This case confirms that if the usufruct has become dilapidated due to reasonable use, the lapse of time, or damage occasioned by an act of God or excessive weather conditions, it is the owner of the property that is essentially responsible to ensure the property is fixed to make it habitable. Van der Walt properly holds the view that unusual expenses which are necessary for long-term maintenance of the usufruct like ensuring the prevention of erosion or flooding on the property are the responsibility of the owner.⁸⁵ Corbett similarly submits that the owner is bound to repair anything in the usufruct which has become dilapidated with time and to reinstate it as it calls for heavy expenditure.⁸⁶ Likewise, Van der Merwe states that the owner is to handle the permanent maintenance of the property.⁸⁷ Hall and EA Kellaway also correctly mention that the owner should repair what has become reasonably useless or not habitable.⁸⁸

The above discussion clearly shows the default principles, which are compulsory whenever the owner grants a usufruct.⁸⁹ The case of *Lola v. Rimon* (“Lola”)⁹⁰ shows that the default principle as to the maintenance of the usufruct

79 Compare *Mpange v. Sithole* 2007 6 SA 578 (W) para. 55.

80 *Ex Parte Standard Bank Ltd: In re Estate Rodger* 1963 3 SA 683 (SR).

81 *Ex Parte Standard Bank Ltd: In re Estate Rodger* 1963 3 SA 683 (SR) 684.

82 *Ex Parte Standard Bank Ltd: In re Estate Rodger* 1963 3 SA 683 (SR) 684.

83 *Ex Parte Standard Bank Ltd: In re Estate Rodger* 1963 3 SA 683 (SR) 684.

84 *Ex Parte Standard Bank Ltd: In re Estate Rodger* 1963 3 SA 683 (SR) 686–687.

85 Walt, AJ., Van der, 2016, p. 478.

86 Corbett, MM., *Usufruct, Usus and Habitatio*, in: Hahlo, HR., Corbett, MM., Hofmeyr, G., Kahn, E., (eds.), 2001, *The Law of Succession in South Africa*, Cape Town, Juta, p. 376

87 Merwe, CG., Van der, 2012, p. 266.

88 Hall, CG., Kellaway, EA., 1973, *Servitudes*, Cape Town, Juta, p. 170.

89 It should be mentioned that where the usufruct is created in terms of an agreement between living parties, the parties may opt to waive the default principles. However, where constitutional rights are implicated, the parties cannot waive constitutional principles. See generally Merwe, CG., Van der, 2012, p. 266.

90 *Lola v. Rimon* (2012/42735) [2013] ZAGPJHC 65 (15 April 2013) SAFLII <<http://www.saflii.org/za/cases/ZAGPJHC/2013/65.html>>.

property can be transferred by a deed of usufruct between the parties to the owner.⁹¹ In *Lola*, L and R entered into a notarial deed of usufruct.⁹² Among other terms of the deed of usufruct, R was to maintain the property. This means that L was released from the common-law duty to effect ordinary repairs on the property. In this case, by implication, the duty to maintain the property was on the owner, R, in terms of the agreement.⁹³

At one point in time, L requested R to undertake repainting on the property. However, R refused to repaint the property because it was seemingly in good condition. Furthermore, repainting the property amounted to a luxurious expense. As previously mentioned, fit for human occupation includes necessary repairs but not luxurious repairs. In this regard, R asserted that his obligation to maintain the property was triggered when there was a need to effect reasonably necessary repairs to keep the property in good condition.⁹⁴

The crux of the matter concerned the alleged breach by R in failing to repaint the property.⁹⁵ The court illustrated the meaning of the requirement to maintain property, as noted in a notarial deed of the usufruct.⁹⁶ The word “maintain” from the Merriam-Webster dictionary means to keep the property in an existing state of repair, efficient or valid, or to preserve the property from failure or decline.⁹⁷ The court further noted that the word “maintain” from the Blacks Dictionary implies care for property or involvement in the general repair and upkeep of the property.⁹⁸ Finally, the court concluded that where the obligation to maintain the property is not expanded on in the agreement itself, the dictionary and ordinary meaning of the word “maintain” will prevail.⁹⁹ The duty to maintain is limited to keeping the property in the condition it was in at the time of signing the agreement and would exclude liability for other luxurious improvements.¹⁰⁰

In the end, it was concluded that L (as the usufructuary) failed to make out a case that R (as the owner) had neglected to maintain the property, by not

91 Para 2. See also Van der Walt, *The Law of Servitudes*, 480.

92 *Lola v. Rimon* (2012/42735) [2013] ZAGPJHC 65 (15 April 2013) SAFLII <<http://www.saflii.org/za/cases/ZAGPJHC/2013/65.html>> para. 6.

93 *Lola v. Rimon* (2012/42735) [2013] ZAGPJHC 65 (15 April 2013) SAFLII <<http://www.saflii.org/za/cases/ZAGPJHC/2013/65.html>> paras. 2 and 5.

94 *Lola v. Rimon* (2012/42735) [2013] ZAGPJHC 65 (15 April 2013) SAFLII <<http://www.saflii.org/za/cases/ZAGPJHC/2013/65.html>> para. 7.

95 *Lola v. Rimon* (2012/42735) [2013] ZAGPJHC 65 (15 April 2013) SAFLII <<http://www.saflii.org/za/cases/ZAGPJHC/2013/65.html>> para. 17.

96 *Lola v. Rimon* (2012/42735) [2013] ZAGPJHC 65 (15 April 2013) SAFLII <<http://www.saflii.org/za/cases/ZAGPJHC/2013/65.html>> para. 17.

97 *Lola v. Rimon* (2012/42735) [2013] ZAGPJHC 65 (15 April 2013) SAFLII <<http://www.saflii.org/za/cases/ZAGPJHC/2013/65.html>> para. 17.

98 *Lola v. Rimon* (2012/42735) [2013] ZAGPJHC 65 (15 April 2013) SAFLII <<http://www.saflii.org/za/cases/ZAGPJHC/2013/65.html>> para. 17.

99 *Lola v. Rimon* (2012/42735) [2013] ZAGPJHC 65 (15 April 2013) SAFLII <<http://www.saflii.org/za/cases/ZAGPJHC/2013/65.html>> para. 17.

100 *Lola v. Rimon* (2012/42735) [2013] ZAGPJHC 65 (15 April 2013) SAFLII <<http://www.saflii.org/za/cases/ZAGPJHC/2013/65.html>> para. 18.

repainting it, in the condition it was in at the time when the deed of usufruct was concluded.¹⁰¹ As such, R's failure to repaint the property did not amount to a breach of his obligation in terms of the deed of usufruct.¹⁰² The court held that the onus was on L as the usufructuary to prove on a balance of probabilities that R as the owner was obliged to put the property in the same condition it was in when the deed of usufruct was entered into.¹⁰³ Consequently, L did not discharge the onus to show that R indeed was in breach of the provisions of the deed of usufruct in relation to maintenance. The court could, therefore, not specifically compel R to perform under the agreement.¹⁰⁴

The judgment of *Lola* proves that a usufructuary is the one who must show why an owner is obliged to make repairs to the property in order to comply with his obligation to maintain under the agreement.¹⁰⁵ For example, if the painting of the property flakes off, the usufructuary must show that the property has deteriorated to the extent that the owner is obliged to paint the property to comply with his obligation to maintain the property in a good state of repair.¹⁰⁶ By implication of the common law principles, if the paint flakes off and it involves major expenses, the owner will have to cover the cost of the repair.¹⁰⁷

5. CONCLUSION

The principles discussed above brought to light the following notions, which need to be commented on as they help in establishing a standard of habitability in the context of a usufruct, and essentially begin to form the baseline for a definition of habitability in this context. These notions are “fit for human occupation”, “use and enjoyment”, and “maintaining the property in good repair”. “Fit for human occupation” means that the property is free from serious disrepair or dilapidation. “Fit for human occupation” translates to “habitability” when the property is safe and suitable for humans to occupy. The notion of “fit for occupation” helps in establishing a standard of habitability in the context of usufructs as it informs how the property should look at the outset of the usufruct. For the usufruct to be habitable, it arguably should be safe and suitable to inhabit and free from serious disrepair.

101 *Lola v. Rimon* (2012/42735) [2013] ZAGPJHC 65 (15 April 2013) SAFLII <<http://www.saflii.org/za/cases/ZAGPJHC/2013/65.html>> para. 19.

102 *Lola v. Rimon* (2012/42735) [2013] ZAGPJHC 65 (15 April 2013) SAFLII <<http://www.saflii.org/za/cases/ZAGPJHC/2013/65.html>> paras. 19 and 29.

103 *Lola v. Rimon* (2012/42735) [2013] ZAGPJHC 65 (15 April 2013) SAFLII <<http://www.saflii.org/za/cases/ZAGPJHC/2013/65.html>> para. 19.

104 *Lola v. Rimon* (2012/42735) [2013] ZAGPJHC 65 (15 April 2013) SAFLII <<http://www.saflii.org/za/cases/ZAGPJHC/2013/65.html>> paras. 30–31.

105 *Lola v. Rimon* (2012/42735) [2013] ZAGPJHC 65 (15 April 2013) SAFLII <<http://www.saflii.org/za/cases/ZAGPJHC/2013/65.html>> paras. 19 and 30–31.

106 *Lola v. Rimon* (2012/42735) [2013] ZAGPJHC 65 (15 April 2013) SAFLII <<http://www.saflii.org/za/cases/ZAGPJHC/2013/65.html>> paras. 19 and 30.

107 See specifically Merwe, CG., Van der, 2012, p. 266.

The idea of “use and enjoyment” in turn encapsulates the rights to use the usufruct and to benefit from its fruits.¹⁰⁸ The notion of “use and enjoyment” implies that the usufruct is habitable. This is because the usufructuary can arguably not use and reap benefits from the property that is not habitable. Thus, “use and enjoyment” of property translate to habitability when the purpose of the property is for human habitation or occupation. As such, if the owner undertakes to give the usufructuary the right to use the property which is not habitable, it defeats the initial purpose of conferring the right of use and enjoyment. This is because the state of disrepair of the property diminishes or negatively impacts the usefulness of the property. For the right to use and enjoy the property to be conferred (or even benefit the usufructuary) the property must arguably be habitable. Habitability and “use and enjoyment” are closely linked to one another in the sense that you cannot enjoy the use of the property without it being habitable.

The concept of “maintaining the property in good repair” means the upkeep of the existing property in a condition that a reasonable person would expect of a usufruct. “Maintaining in good repair” is limited to repairs that are necessary to render the property useful and fit to inhabit, and to protect the property from collapsing, deteriorating or falling into a state of ruin. This would mean that the owner or heir should ensure that the property is fixed to make it habitable, or necessary repairs are carried out to place the property in good condition. The notion of “maintain in good repair” does not include luxurious repairs. “Maintaining the property in good repair” translates to habitability when the existing structure of the property is kept in safe and suitable condition for the purpose for which the usufruct was granted. The notion of “maintaining the property in good repair” entails maintaining the property to ensure that the usufruct is in a habitable condition. Accordingly, the notion of “maintaining property in good repair” arguably helps to establish a standard of habitability in the context of usufructs. All these ideas or notions, in essence, begin to form the baseline for a definition of habitability. Habitability in light of these notions means a usufruct that is fit for human occupation in the sense that the property is suitable for the purpose for which the usufruct was granted. This includes having the full use and enjoyment of all benefits arising from the property and a usufruct property that is maintained in good repair. This essentially confirms a unique standard of habitability in the context of a usufruct.

The minimum standard of habitability is presumably in line with the Constitution. This is because the notions “fit for human habitation” or “use and enjoyment” or “maintain in good repair”, as developed in case-law, sufficiently protect the interests of usufructuaries. More importantly, these notions serve as a standard that could be used by usufructuaries to hold owners liable to ensure that the usufruct property is habitable. As such, there is arguably no need to develop the common-law construct of a usufruct as long it is applied flexibly by courts. As I argued in part three above, courts are interpreting the lifting of certain restrictions in the will flexibly, but if they are rigid in their approach, it may potentially result in constitutional invalidity as certain constitutional rights

108 Walt, AJ., Van der, 2016, pp. 464–465.

may be disregarded. This arguably points towards a minimum standard of habitability for a usufruct.

As argued, in part four above, the owner who grants the usufruct (his heir or his estate) bears the responsibility to ensure the habitability of a usufruct. The obligation entails that the owner should keep the usufruct property in the same condition throughout the usufruct. Where necessary, the owner must effect repairs for the benefit of the property so that the usufructuary may continue to enjoy the use of the property.

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III PANEL:
CLASSICAL ISSUES IN THE 21st CENTURY

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DIFFERENCES OF PROPERTY TRANSFER SYSTEMS IN EUROPE – THE CHALLENGE OF SUBSTANTIVE UNIFICATION OF CONTRACT LAW IN THE 21st CENTURY

Abstract: *Although there is a tendency towards substantive unification of contract law, the conflict-of-law approach still proves to be necessary. Tendencies in Europe in the late 20th and early 21st century show a continuance of the commitment to build a unique European legal area, which includes a substantive unification of contract law. A significant obstacle, or rather a challenge is in the existence of differences between national legal systems in terms of property right transfer methods. This situation is a logical consequence of national legal traditions and of the development of rules regarding this issue in Europe, where there are still two different basic systems of passing of property: the French system, by which the final preferred purpose and effects of a legal transaction are achieved by the conclusion of the contract itself and, on the other hand, the German system, which implies that by concluding the contract, the contracting parties accept the obligation to transfer ownership rights in the next step. The authors have conducted research on whether these two systems are irreconcilable. The paper further analyses whether it is possible and necessary to reach a unique solution by which this question would be universally regulated in the European legal area. Upon finding reasons for the fact that leading countries are still not prepared to relinquish their legal traditions on this issue, the authors examine the practical legal importance and consequences of the described differences. Going a step further, the paper concludes that the described differences are concerning legal theory and history, and that the practical legal importance of the issue is not of fundamental significance. The legal analysis shows that the central question is not always about the moment of the transfer of rights. The crucial issue is the moment of risk transfer, which usually is the issue of higher legal importance and of practical legal consequences. This is further accentuated by the fact that the moments of property transfer and risk transfer do not necessarily coincide. In this way, the practical legal importance of the primary differences is relativized and reduced.*

Keywords: transfer of property rights, German system, French system, risk transfer, sales contract

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1. INTRODUCTION

The transfer of ownership is one of the conditions for the functioning of the transfer of goods, and such transactions are being performed every day, both at the national and international level. Their number as well as their value have positive influence on economic growth and the overall wellbeing of a society. Thus, within the national legal systems, the transfer of ownership has been regulated with special care.

The ownership may pass by legal instruments *inter vivos* and by legal instruments *mortis causa*. In the first case, legal effects appear during the lifetime of the parties involved, whereas in the second case, effects appear upon the death of one of them. In this paper, we have limited our research to the transfer of ownership by means of legal instruments *inter vivos*, which are undertaken voluntarily. Additionally, we have limited the subject of the research to the transfer of ownership of corporeal movables, since the problem of conflict of law¹ which is a complicated issue and demands special knowledge and skills to be solved, occurs with this type of movables.

The contract serves as the basic legal instrument for transfer of ownership of movables. Most often it is the sales contract, but the ownership may pass by an exchange or gift contract as well, or by means of other specific contracts, envisaged in a certain legal system, that are capable of producing the said legal effect, such as lease contracts² etc. The ownership passes under a special regime typical of those contracts. In Serbian law, and this also applies to the majority of other legal systems, ownership cannot be transferred by a contract that is not fit to produce this legal effect in the legal system.

In comparative law, the transfer of ownership on movables by means of legal instruments *inter vivos* is not regulated by the same rules. This can be partly explained by the historical circumstances, and in the scope of this issue one can also start from the point of differentiating between continental and common law legal systems. Continental systems mainly accept the concept of transfer of ownership in two steps, which is based on Roman law, while English law, and other systems under its influence, followed their own development path that was shaped over time according to rules that were confirmed as efficient and just by the practice and appropriate regulations of those systems.³

1 With the transfer of the right of ownership on immovables, as a rule, there are no significant problems as with movables, owing to the exclusive jurisdiction of the authorities of the state on whose territory the immovables are located and due to a worldwide generally acceptable solution that the law of the state where the immovables are located applies (*lex rei sitae*).

2 About the specifics and common types of real estate leasing contracts see: Dobrić, V., Jovičić, K., 2019, Pravna (ne)sigurnost ugovora o lizingu nepokretnosti u savremenom srpskom pravu, *Anali Pravnog fakulteta u Beogradu*, 2, pp. 129–131.

3 In the area of contractual law, the difference between continental and Anglo-Saxon legal systems is reflected in relation to contractual liability, i.e. the fact that it is subjective (based on fault) or is objective (the debtor's fault is irrelevant). See: Jovičić, K., Vukadinović, S., 2018, Contractual liability – legal regimes in comparative law, *Teme*, 2, pp. 650–656; Jovičić, K.,

However, the division in the systems of passing ownership according to the division into continental and common law legal systems is one that is too general and does not reflect the specific criterion regarding this issue. In relation to this, one should start from the fact that the rules for the transfer of ownership were formulated very early. Namely, there was always a clear difference between laws according to which ownership is transferred onto the transferee by means of simple consent of the wills (*solo consensu*) and those in which that legal effect is expressed only when the transferor, on the basis of consent of will, hands over the object to the transferee with the intention of transferring the ownership (*traditio* – transfer).⁴

This division was preserved in civil codes of the 19th century, which took over the rules from existing customs and other sources, which were, at that time, elaborated and organized into a complete and rounded system.⁵ Contemporary legal rules governing the transfer of ownership also regulate the contracts which are apt to produce that legal effect. Besides that, they give answer to the question in which moment the ownership passed from the transferor to the transferee.⁶

Even today, we classify the legal systems of the transfer of ownership according to the same criterion into two basic groups: consensual and traditional. The representatives of the first group are French,⁷ Italian,⁸ Belgian⁹ and English law,¹⁰ whereas the traditional system is typical of German law,¹¹ and it is applied

2013, Contractual Liability in the Contract for the Sale of Goods in French Law, in: Nikolić, O., Petrov, V., (eds.) *Introduction to French Law*, pp. 262–265.

4 Van Vilet, L., Transfer of movable property, in: Smit, J, 2012, *Elgar Encyclopedia of Comparative Law*, Second ed., Edward Elgar Publishing Ltd., p. 886.

5 Legal theory makes difference between legal acts of dispositions (with immediate legal impact) and obligatory legal acts (with immediate impact). In that sense, Vodinelić emphasizes that legal affairs of disposition are all those by means of which direct impact is made onto already existing rights or obligations, changing them, limiting them, transferring them or terminating them. The very change is also the final aim of the affair, and it is achieved by the act (the act achieves its own purpose). Contrary to that, obligatory legal acts create the obligation, and when the obligation is accomplished, the final purpose of the acts is achieved. In more detail: Vodinelić, V., 2014, *Civil law: introduction into civil law and the general part of civil law*, Union University Faculty of Law and Public Company Official Gazette, Belgrade, pp. 459–460.

6 Van Vilet, L., 2012, p. 886. See also: Zimmermann, R., 1996, *The Law of Obligations, Roman Foundations of the Civilian Tradition*, Oxford University Press, pp. 271–272.

7 Article 1583, Code Civil (CC – French Civil Code).

8 Article 1376, Codice Civile (Italian Civil Code).

9 Article 1583, Belgian Civil Code.

10 Article 18(1) Sale of Goods Act. American Law is under the influence of English Law as well, also providing that the transfer of ownership occurs at the moment when the contracting parties determine so, and, as for individually determined movables, that legal effect occurs even at the moment of conclusion of a legally valid contract if the parties did not agree otherwise. See UCC – Article 2–401(1). However, the specific notion regarding Anglo-American law is that the buyer at the time of conclusion of the contract does not acquire the right of the item being transferred to him as the owner, until the moment he expresses his will to pay the price or upon fulfilling that obligation. In more detail: Draškić, M., Stanivuković, M., 2005, *Contracting Law of international trade*, Belgrade, pp. 282–283.

11 § 433 Bürgerliches Gesetzbuch (BGB).

by numerous continental law systems, such as, the Austrian,¹² Swiss,¹³ Russian,¹⁴ Spanish,¹⁵ in Serbian Law,¹⁶ etc.

2. CONSENSUAL SYSTEMS

Consensual systems are characterized by the transfer of ownership in one step – on the basis of the fact that a valid contract has been concluded. The transfer is realized at the time when the contract is concluded, notwithstanding the fact whether the object of the contract, at that very moment, is with the transferor or with a third entity, or whether it is, on any basis, in the possession of the transferee. Thus, it is deemed that the contract which has capacity to transfer the ownership in these systems has a legal effect.

Alongside ownership, the risk of accidental loss or damage of the object is transferred to the new owner, according to the rule that the thing perishes to the owner (*res perit domino*).¹⁷ Furthermore, the creditors of the new owner may from the moment of conclusion of the legally valid contract settle on the debtor's (transferee's) property, regardless of whether the object is in his possession at that moment or not.

This systematic rule, however, is not applicable to all situations. Thus, for example, when the object of the contract does not exist at the time of its conclusion but is going to be produced later, the earliest time when ownership may be transferred is when this item has been produced. A similar situation occurs with the transfer of ownership of generic things that are within the mass from which they should be separated. In this situation, ownership can be transferred onto the transferee only after the transferor, in conformity with the contract, separates the items from the mass for the new owner (i.e., performs individualization).¹⁸

English Law, which can be placed within this very group, furthermore has certain specific characteristics which make it distinct. The ownership is transferred at such time as the parties to the contract intend it to be transferred,¹⁹ therefore, this system is also called voluntary. If the parties do not agree on this particular issue, ownership is transferred onto the transferee in conformity with the dispositive legal rule (default rule) at the moment of conclusion of the legally valid contract.²⁰

12 §§ 424–426 Allgemeines Bürgerliches Gesetzbuch (ABGB).

13 Art. 184 of the Swiss Code of Obligation (CO).

14 Art. 454 of the Civil Code of the Russian Federation (Гражданский кодекс Российской Федерации) of 1996.

15 Art. 1445 Código Civil.

16 Art 454 of the Serbian Law on Obligations.

17 There are exceptions to this rule where provided by the relevant regulations.

18 Draškić, M., Stanivuković, M., 2005, p. 285.

19 Article 17. Sale of Goods Act. In legal literature the English system is also designated as the voluntaristical system. See also: Krulj, V., 1972, *Impacts of the Sales Contracts – ownership, transfer, risk, price*, Belgrade, p. 45.

20 Art. 18. para. 1. Sale of Goods Act.

The will of contracting parties in relation to the moment of transfer of ownership is dominant in Nordic laws as well (this applies to Norway, Denmark, Finland and Sweden), so those laws may be defined as consensual, according to the presented criterion for classification. However, the Nordic law regime for the transfer of ownership is even more specific and it is characterized by the absence of the default rule that determines in a unique (unitary) manner the moment when the ownership passes. That means that these jurisdictions do not accept that all legal consequences – such as possession, the right of protection of possession,²¹ the right to claim ownership, the right of the creditor (of the new owner) to settle on the thing acquired by the contract, etc. – take effect at the same time. In Nordic (Scandinavian) law, the basic starting point is that different powers of ownership are seen as independent of each other, not as a unique concept. In practice, this means that protection against the various claims that are made regarding the transfer of property rights can arise at different moments in time.²²

The basic starting point of this system is that the answers to all contentious questions that arise in practice regarding the transfer of ownership are more related to the specific circumstances of the case and not to the unique legal concept of the right of ownership. The central concept of these systems is not the right of ownership as an individual civil right, but the legal protection of the owner of things when a third party disturbs the owner in using those things, or takes them away from him,²³ i.e., violates his rights. In order for protection to be effective, the facts of the specific case need to be duly considered, and for each individual legal consequence of the transfer, the moment when it comes to effect is separately determined. In other words, ownership is transferred to the transferee in fragments, and according to the time occurrence of the legal aftereffects, caused by the transfer onto the contracting parties. The reason for such a factual position is explained by the need for pragmatism, which is given priority over the need for the creation of a unique legal concept of the right of ownership and its transfer. This point of view is designated as a functional system and is not result of any legislative technique, or any theoretical concept; it is instead a depiction of the judicial practice, customs and principles of contractual law.²⁴ Thus, for

21 On the subject of protection in possessory proceedings: Vodinelić, V, 2013, What is Protected in the Proceedings in Disputes for Disturbance of Possession? On the Notion and Legal Nature of Possession, *Zbornik Pravnog fakulteta u Zagrebu*, 63 (3–4), pp. 763–798 and another part of this work: Vodinelić, V., 2014, What is the purpose of possessory proceedings? On the reasons for possessory protection of mere possession, *Pravni zapisi*, 1, pp. 5–65.

22 Rakneberg Haug, K., *The historical development of the Scandinavian functional approach to transfer of ownership: a tale of change and continuity*, Center for the Study of European Contract Law Working Paper No. 2017/07, Amsterdam Law School Legal Studies Research Paper No. 2017–39, pp. 1, 3–5. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3043131.

23 Lilja, M., National Report on the Transfer of Movables in Sweden, in: Faber, W., Lurger, B., (eds.), 2011, *National Reports on the Transfer of Movables in Europe*, vol. 5: Sweden, Norway and Denmark, Finland, Spain, Salier, pp. 29–30.

24 Rakneberg Haug, K., 2017, p. 5. See also: Lilja, M., 2011, pp. 27–30; Kuusinen, M., National Report on the Transfer of Movables in Finland, in: Faber, W., Lurger, B., (eds.), 2011, *Na-*

example, the transfer of ownership on the basis of a deed of gift may sometimes be of significance for the establishment of the moment of transfer of ownership (occurrence of a certain legal effect of the right of ownership), and this moment does not have to be the same as the moment when the ownership is transferred by means of a sales contract. Bearing in mind that the deed of gift is a contract of will as well, the principle of conscientiousness and honesty, effective in contractual law, has more significance in sales contracts, which create obligations for both parties and are onerous. Similarly, one same fact – for example, the fact that the transferee paid or failed to pay for the item that he acquires – may in some cases (most cases) have the biggest significance for the acquirement of the right of ownership, while in some cases, the very same fact has no significance.²⁵

3. TRADITIONAL SYSTEMS

In traditional systems, two steps are clearly distinguished when discussing the transfer of the right of ownership: first, a contract is concluded which is apt to produce the needed legal effect (*iustus titulus*) and on the basis of which the transferor is obligated to transfer the object of the contract in a suitable manner to the transferee (*modus acquirendi*) and to transfer the ownership in such a manner. These two steps are mutually interrelated, and the transfer which is not based on a legally valid contract that is apt to transfer the ownership will not cause the change of the legal owner of that right. The transfer itself is, as a rule, a factual action which is the principal contractual obligation of the transferor and based on which the time of transfer of ownership is determined. The conclusion of the contract and the handover may be performed at the same time or at different times.

The purpose of the transfer is to provide the publicity of the change in the right of ownership, with the aim of providing better legal protection for the legal owner of that very right.²⁶ Such arrangement of the transfer of ownership is based on regulations concerning the sales contract in Roman law (*emptio venditio*).²⁷ The characteristic of the system is that the contract on the transfer of ownership does not have a legal effect on property but an obligational one as it creates a contractual obligation for the transferee to transfer the ownership by an

tional Reports on the Transfer of Movables in Europe, vol. 5: Sweden, Norway and Denmark, Finland, Spain, Salier, pp. 316–318 and 320–323.

25 Faerstad, J., Lilja, M., National Report on the Transfer of Movables in Norway and Denmark, in: Faber, W., Lurger, B., (eds.), 2011, *National Reports on the Transfer of Movables in Europe*, vol. 5: Sweden, Norway and Denmark, Finland, Spain, Salier, pp. 233–234.

26 Popov, D., 2012, The Delivery of Goods as (*modus acquirendi*) of Property, *Zbornik radova Pravnog fakulteta u Novom Sadu*, pp. 169–185.

27 The transfer of ownership in two steps is the system which is based on Roman law and in which ownership is transferred by means of the contract on sale (*emptio venditio*). The contract was legally concluded by simple conformity of the wills, however, by itself, did not produce the legal effect of the transfer of ownership from the seller to the buyer. In order to achieve that, it was necessary that the seller deliver the item to the buyer (*traditio*), which is a separate action in relation to the concluded contract.

action of handing it over (*traditio*). Transfer is the basic legal obligation of the transferor and if he fails to perform it, the transferee has the right to demand the complete fulfillment of the contract by means of enforcement.²⁸

Traditional legal systems may be further divided into two subgroups: the causal and the abstract, depending on whether the transfer of ownership requires the existence of a legally valid contract which is apt to transfer the ownership, or not.²⁹

3.1. TRADITIONAL CAUSAL SYSTEMS

Most legal systems are placed in this sub-group, the characteristics of which have been described within the presentation of the systems of traditional transfer of ownership. This means that the transfer of ownership is only possible under the condition that the obligational contract by means of which the ownership is being transferred has been concluded in a valid manner. If that condition has not been met, the transfer of items performed on the basis of such contract will not result in the transfer of the ownership onto the transferee. Moreover, if the contract agreement has been cancelled afterwards, then by the force of law (*ex lege*) the transfer of the ownership that happened as a legal effect of this very contract is cancelled. This is due to the fact that without legal base (*iustus titulus*) there exists no cause which could provoke the transfer of the ownership. The act of transfer cannot cause this legal effect without the contract agreement that has been concluded in a valid manner.³⁰

3.2. TRADITIONAL ABSTRACT SYSTEMS

This system is related to German law and is (still) present in Scottish law.³¹ The contract which transfers the ownership is viewed as a special legal act of an obligational attribution and as such, it produces legal effects toward the parties who concluded it (*separation theory – Trennungsprinzip*). On the basis of the contract agreement, the transferor undertakes the obligation to transfer the right of ownership onto the other contracting party, as a rule, by transferring items in a suitable manner.

The action of transfer within this legal construction represents an independent legal action in relation to the contract in question³², and its validity

28 The transferor is obliged to transfer the items within the stipulated term and in a suitable manner. The manner of transfer, as a rule, depends on the type of the item that is being sold, for example: physical transfer for movables; symbolic transfer on the basis of physical transfer of the documents for e.g. CMR, warehouse, etc., individualization for items determined by the origin, etc.

29 This division is not applied on consensual systems where the aim of the contract is to transfer the ownership, thus, the issue of the transfer is not questionable.

30 Van Vliet, L., 2003, *Iusta Causa Traditionis and its History in European Private Law*, *European Review of Private Law*, vol. 3, pp. 343–344.

31 Carey Miller, D., Combe, M., Steven, A., Wortley, S., National Report on the Transfer of Movables in Scotland, in: Faber, W., Lurger, B., (eds.), 2011, *National Reports on the Transfer of Movables in Europe*, Vol. 2: England and Wales, Ireland, Scotland, Cyprus, Salier, pp. 349–351.

32 Van Vliet, L., 2012, p. 734.

is estimated independently, without taking into consideration the validity of the contract agreement.³³ Ownership is thus transferred onto the conscientious transferee even if the contract agreement has never been concluded, for example, due to the non-existence of the agreement of wills, or, in the meantime, the contract in question has been cancelled.³⁴ Therefore, the described affair is an abstract legal action, but, at the same time, it is a legal act of property nature, due to the fact that the transfer of items is one of the prerogatives for its validity.³⁵ Moreover, it is important that the transferor has transferred the item with the purpose to transfer, in that very manner, the ownership onto the transferee, as well as that the transferee took over that item with the purpose to establish the right of ownership over it.³⁶

4. SPECIFIC CHARACTERISTICS OF THE TRANSFER OF THE RIGHT OF OWNERSHIP IN TRANSACTIONS INVOLVING A FOREIGN DIMENSION

The issue of transfer of ownership, as a rule, is not the subject of international conventions, which is a clear indicator that the states are not yet ready to overcome mutual differences by accepting a uniform rule. It is also not the common subject of regulation in the new, formally non-binding international uniform law instruments, such as UNIDROIT Principles of International Commercial Contracts or The Principles of European Contract Law. The exception is the Draft Common Frame of References, which opted for the traditional system.³⁷

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- 33 Legal aftereffects of dividing the obligational and the property nature of the action may be numerous. For example, the seller becomes the owner of the items until the ownership is transferred onto the buyer, therefore, he can validly transfer the item onto a third entity, which means that the buyer could not demand the very item from that third party. Also, the seller's creditors may, in the bankruptcy procedure, for example, obtain the payment from the item that is being sold, however, only on the item regarding which the seller had not transferred the right of ownership onto the buyer – i.e., the buyer could not demand the separation of that item from the bankruptcy mass. Furthermore, the seller may, by unilateral declaration, and despite the concluded contract on sale, preserve the ownership of the items and condition its transfer onto the buyer by the complete payment of the price, due to the fact that for the transfer of property it is necessary that conformity of both parties exists at the time of transfer of items. More about that: Krulj, V., 1972, pp. 58–63.
- 34 The seller or the transferor of ownership in this very situation may demand the return of the ownership by turning to the notion of the unjustified enrichment. See § 812 BGB and further on.
- 35 This principle of abstractness, which is based on the theory elaborated by von Savigny in the 19th century, is characteristic for German law, and among other European countries is still present in Scottish law. About this issue, one may see in more detail: Karsten, T., Germany (paragraph dedicated to the German law), in: von Ziegler, A., Debattista, C., Plegat, A., Windahl, J., (eds.), 2011, *Transfer of ownership in International Trade*, Kluwer Law International, p. 203–223.
- 36 Schutte, F., 2012, The Characteristics of an Abstract System for the Transfer of Property in South African Law as Distinguished from a Causal System, *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad*, 3, pp. 123–124.
- 37 See: DCFR, Art. VIII-2:101(1)(e).

Because of the stated circumstances, the transfer of ownership in legal acts in which a foreign dimension is present is performed in a traditional manner, by applying rules of international private law. Those rules are formulated as collision norms, which instead of stipulating how to behave meritoriously in a certain situation, direct to the national law whose rules should be applied in that case.

It is usually thought that the collision method is the least desired method in international business operations because at the moment of their conclusion it is difficult to foresee with confidence which law is going to be applicable for solving a possible dispute, since applicable law may be different depending on the issue which might later become contentious. To overcome this problem, the parties entering into an agreement with a foreign dimension simply define the law that would be applicable for the agreement, which they, as a rule, are entitled to do when entering the contract suitable for transferring ownership over movable property.

In legal theory, the question has already been asked whether tradition, deeply rooted in the rules of national laws governing the manner of transfer of ownership, is sufficient to explain the cause of the problem.³⁸ We hold that it is not sufficient, and that it is necessary to examine in more detail other factors that have impact on this very notion.

Primarily, it is necessary to consider whether the collision method, beside the existence of the aforementioned drawback, has certain advantages in regulating the issue of the manner of transfer of the right of ownership. In doing so, it is logical to start from the specific characteristics of the collision rule, i.e. from its aim which is to point out to the national law/laws whose application is possible in a specific situation. Which rule it is going to be depends on the circumstances of the case and their connection with the certain state. In the European legal system, the prevailing opinion is that for property rights over movables one should apply the laws of the place where the item is located (*lex rei sitae*).³⁹ Alternative binding points are also allowed in some legal systems, but they do not call into question the dominance of the *lex rei sitae* principle.⁴⁰ There is a significant exception to this rule, for items in transit (*res in transitu*), which, on the way from their departure (dispatch) to the final point of destination, cross the territory of different countries, making their connection with the territory in which they were located at the time of the conclusion the contract which transferred the ownership, as a rule, not significant. For items in transit, collision norms most

38 Good, R., Kronke, H., McKendrick, E., 2015, *Transnational Commercial Law – Text, Cases and Materials*, Oxford University Press, Oxford, p. 611.

39 Varadi, T., 1990, *International Private Law*, Forum, Novi Sad, pp. 226–227; Kitić, D., 2019, *International private law*, Union University Faculty of Law, Belgrade, p. 194; Pak, M., 1986, *International Private law*, Naučna knjiga, Belgrade, pp. 887–890; Čolović, V., 2018, Qualification of collision rule, *Strani pravni život*, 3, pp. 10–12.

40 Varadi states that, alternatively as a binding point, even in the Middle Ages, there appeared to be a principle of personal law of the owner of the items; however, it was not widely present in comparative law. There were suggestions that the binding point formulated as being a framework in the sense that it directs the Law of the closest connection, which the judge will determine in each specific case bearing in mind its specific circumstances. More: Varadi, T., 1990, pp. 226–227.

frequently direct to the application of the law of the place (state) of the final destination (*lex loci destinationis*).⁴¹

The aforementioned solutions are applied to all issues that relate to the applicable law for property law relations. However, as the subject of this paper is the transfer of ownership on movables by means of legal acts *inter vivos*, it is necessary to mention the collision rules for legal acts *inter vivos* i.e., contracts that are apt to produce that legal effect. The basic principle in comparative international private law is that for these contracts the applicable law would be the law of the country where the party who is to effect the performance which is characteristic of the contract (which relates to the obligation of the contracting party to whom another contracting party is owing money) has, at the time of conclusion of the contract, his residence, providing that the contracting parties did not agree otherwise. The law that is applicable for the contract, as a rule, is applied for the issues of its existence and material validity. However, it does not necessarily have to be applicable for the issue of the transfer of ownership, even if the parties agree on the applicable law as to the contract.⁴² In order to achieve that for certain, it is necessary that the contracting parties explicitly provide for the law that is applicable for the transfer of ownership, as it is the only guarantee that the same law will be applicable not only for the main business, but also for the transfer of the right of ownership, minimizing the risk that the law applicable for the contract and the law applicable for the transfer of ownership will have different, and possibly even conflicting rules.⁴³

Furthermore, the procedure for determining the applicable law in a specific case requires the court to apply a suitable collision norm. To fulfill this task, the court must classify the factual scope of the case under a certain legal category which is the subject of the collision norm. This is a specific challenge in international private law because the law applied by the court and the foreign law, which the relation in question is connected with, even when they do have the same legal categories, do not always have the same interpretation.⁴⁴ It is precisely with the division of items into movable and immovable⁴⁵ that this

41 Items in transit change place and this creates a void that causes the problem of application of the governing point of connecting *lex rei sitae* onto the legal acts which are concluded at the time when the items are in transit (outside the point of dispatch and the point of destination), regarding the fact that the venue where they are located at the time of the contract's conclusion does not have special significance in order to be a relevant point of connection.

42 Gourion, P., Peyrard, G., 2001, *Droit du commerce international*, 3è éd., Paris, L.G.D.J., p. 117, stated according to: Kayibanda, R., Passing of Property in Goods in Contracts of International Sale of Goods, *Estey Centre Journal of International Law and Trade Policy*, p. 79., available at: <https://law.usask.ca/documents/research/estey-journal/kayibanda14-2.pdf>.

43 Laemmler, T., 2007, *Transfer of Ownership in International Sales of Goods*, (Essay) Schaffhausen, 2007, p. 1 and Art. 1 (1) of United Nations Convention on the Contracts for the International Sale of Goods (CISG), p. 27., available at: https://open.uct.ac.za/bitstream/handle/11427/4434/thesis_law_lmmtho001.pdf?sequence=1.

44 Besides, the problem of qualification in international private law appears due to the existence of legal gaps in domestic law (a specific business operation regulated by a legal institution which is not known in domestic law) i.e. when domestic law is not familiar with the legal institution of a foreign law.

45 Apart from the movable items according to its nature, other items are classified as movables on the basis of the Law.

problem becomes clearly evident in practice, and is described as a dispute of qualifications.⁴⁶

A generally accepted rule in comparative international private law is that the court starts from domestic law (*lex fori*) when applying collision norms. This is justifiable not only since the court is most familiar with the domestic law, but also because that way the solutions contained in one system, which are mutually harmonized, are applied.⁴⁷ The court, thus, commences from the domestic law also when qualifying factual statements, legal relations and legal institutions, and on the basis of that chooses the domestic collision norm which directs to the national law applicable for the whole relationship.⁴⁸ However, by this approach, it is possible that the legal category i.e. the subject of the collision norm differs from the legal category of the applicable law; for example, on the basis of the domestic law, the matter concerns a movable item whereas the same item within the foreign law is qualified as immovable (e.g. it is discussed whether a boat mooring is a movable or immovable item, whether a raft where people live is a movable or immovable item, whether a trailer for dwelling is a movable or immovable item, and similar).⁴⁹ Such differences cause different aftereffects not only within the substance of property law, the contractual⁵⁰ and international private laws, but within taxation law as well – i.e.,⁵¹ they cause differences in the taxation treatment of these items and of transactions by means of which the right of ownership on them is transferred. Apart from the aforementioned, subsequent qualification of the legal category (the subject of the collision norm) according to the law applicable for the legal relation in question (*lex causae*) might have, as a result, a referral to some other foreign law, or even, a referral back to the domestic

46 Lorenzen, E., 1941, Qualification, Classification or Characterization Problem in the Conflict of Laws, *The Yale Law Journal*, vol. 50, pp. 744–745. Wheeler Cook, W., 1941/2, Characterization in the Conflict of Laws, *The Yale Law Journal*, vol. 51, pp. 194–195.

47 In court practice of many countries this solution has been adopted, for example in Belgium and in France. This is explicitly pointed out by the Article 3078 para. 1 OG of Quebec, Art. 12.1. of the Spanish OG, Art. 10 Egyptian OG. (cited according to: Kitić, D., 2019, p. 129.) English courts also apply the rule that classification is performed according to the *lex fori*.

48 Legal theory has alternatively offered a viewpoint that the qualification, apart from *lex fori*, should be performed according to the law applicable for the basic legal act (*lex causae*); however, this suggestion could not be applied in practice due to illogical occurrences: the law which should be established by application of the collision rule being applied in order for the collision rule that is going to be applied to be determined.

49 Although at first sight it seemed simple, the practice of the European Court shows that the division of items into movable and immovable is a complex issue. On the matter, see: Ramaekers, E., 2014, Classification of Objects by the European Court of Justice: Movable Immovables and Tangible Intangibles, *European Law Review*, 39 (4), pp. 447–469, available at: <https://ssrn.com/abstract=2471677>.

50 For analysis of contractual liability in comparative law, see: Jovičić, K., Vukadinović, S., 2018, Contractual liability – legal regimes in comparative law, *Teme*, 2, pp. 647–660.

51 In addition to the above mentioned, a whole set of other laws, such as: Law on planning and construction, Law on transfer of usage rights to property rights on construction land with compensation, Law on investments, Law on execution and ensuring, etc. See: Knežević Bojović, A., Vukadinović, S., 2016, Analysis of the results of public-private dialogue – the case of Economic caucus of the Serbian National Assembly, *Srpska politička misao*, 3, pp. 294–295.

law, which might significantly complicate the solving of a disputable relation. Therefore, double qualification of the subject of the collision norm within the comparative practice is very rare and is more on the level of exception.⁵²

However, this principle is not an imperative in cases dealing with property laws. In the moment when the object of the contract should be qualified as a movable or immovable item, as a rule, it is known which law is applicable for that very issue, because the starting point for the collision norms of most legal systems is that the question is to be solved based on the law of the place where the item is located (*lex rei sitae*).⁵³ Bearing that in mind, in cases of transfer of the rights of ownership over movables, the classification of the nature of the items as movable or immovable is done according to the same law that is applicable even for the disputable issue, which represents an advantage – the decisions of the court in these cases are made easily enforceable since the enforcement on the item, as a rule, will be demanded in the state where that item is located. This means that although the collision norms of most legal systems direct to the application of the law of the place where the item is located, the court's task to rule on the applicable law is not so simple, and it is an even greater challenge to correctly apply the foreign law determined that way. It presupposes that the process of qualification should be initiated in order to identify the legal institution which is defined by the collision norm. To achieve this, the court first has to establish the content of the relevant foreign law (or several laws), but also by-laws, customs, the jurisprudence and other sources of the national law in question.⁵⁴

The application of a uniform solution causes the same, or even bigger difficulties for judges. First of all, the uniform solutions of the international sources of law, which regulate an issue, including the issue of transfer of ownership, are formulated in a substantial rather than in a collisional manner with the aim to achieve, if possible, a compromise between the applicable, and sometimes conflicting solutions of national laws. Those compromising solutions might be unacceptable for states, and risky as well, since the judges in the respective states might not have experience in the application of these solutions. Moreover, in civil law systems where there are no precedents, i.e., where the decisions of the courts do not have the same binding impact as in the Anglo-Saxon system, the risk of different application of the same rule is greater than in a common law system, and there is a lot of room for discretionary action by the judges, which may lead to legal insecurity.⁵⁵

5. FINAL CONSIDERATIONS

The legal instrument that facilitates the transfer of ownership by means of legal acts *inter vivos* is a contract, and a legally binding contract which is able to produce that legal effect is a mandatory condition for the transfer of ownership

52 Kitić, D., 2019, pp. 130–131.

53 *Ibid.*, p. 129.

54 Belović, J., 2019, Unification of law as a legal transplant model – the closest connection principle and Rome I Regulation, *Harmonius*, Belgrade, p. 52.

55 More detailed: Good, R., Kronke, H., McKendrick, E., 2015, pp. 609–612.

in all legal systems in comparative law. In consensual legal systems, the contract is not only obligatory but also a sufficient condition for the transfer of ownership, whereas in legal systems which opted for the traditional concept, it is also necessary that the transferor performs the activity of transferring the items in order for the ownership to be transferred onto the transferee.

The analysis and comparison of the mentioned systems show that the consensual system is easier for application than the traditional one. This is confirmed not only by the fact that the transfer of ownership occurs on the basis of just one condition, but also by the fact that this condition – i.e., legally binding conclusion of the contract, is relatively easy to prove in practice. The traditional system is, in contrast to the consensual, more complex, above all because instead of one it requires two conditions, and also, because the transfer of items represents one factual activity which is not always easy to prove in practice.

Bearing in mind that the time of conclusion of the contract in consensual, i.e., the time of transfer of items on the basis of concluded contracts in traditional legal systems, is the moment of the transfer of ownership, it can be concluded that the consensual system is more convenient because it leaves less room for contentious situations between the transferor and transferee regarding the transfer of ownership. However, in those systems, there is a risk that the transferor is late with the transfer of items to the transferee or that he fails to fulfill that obligation altogether. In relation to that, the question that appears crucial is whether the situation in which the previous owner does not transfer the item to the new (current) owner renders the whole action unsuccessful. In other words, is this the reason why in most cases the transferee of ownership would terminate the contract? We hold that the answer to this question is negative because the transferee, i.e. the new owner has at his disposal more than one legal remedy for solving that situation. Those legal remedies comprise not only the requests which the legal system recognizes for the party which remains loyal to the contract against the party which fails to honor the contract, but also the legal means the law recognizes for the legal owner within the scope of property protection, which the transferee possesses as the legal holder of the right of ownership.

Additionally, the consensual and traditional systems can also be compared in view of the legal security of the transferee of the right of ownership from the disturbances of third parties, since the right of ownership belongs within the group of property rights and, as such, has absolute impact (*erga omnes, contra omnes*). In this context, the issue of securing the publicity of the change of ownership plays the most significant role in a system of the transfer of ownership. In traditional systems, the requirement of publicity is observed through the necessity of the action of transfer of items, and through linking the transfer of ownership with the time of the transfer. In consensual systems, this requirement is not a legal condition for the transfer of ownership and the new owner can, as a result, be exposed to a greater risk of disturbances. However, even more importantly, the new owner is in a situation where he has to assume the risk of accidental loss or destruction of items for the period between the conclusion of the contract and the transfer, during which he does not have control over the condition of the item. Considering the above, the traditional system might be viewed as more convenient.

In legal transfer of goods, which cannot be performed without the transfer of the right of ownership, disputes between the transferor and the transferee most frequently relate to the distribution of risks for the accidental damage or distortion of the object of the contract. The general rule says that the thing perishes with the owner (*res perit domino*), giving elevated significance to the issue of the moment of transfer of ownership in practice. However, practice shows that there is still no consensus regarding a uniform solution to this issue.

The problem of establishing the moment of transfer of ownership in international business operations has been present for a long period of time and the traders understood for long that the failure to solve it has been to their detriment. By using the freedom of contracting, which they have thanks to the autonomy of will in contractual law, the traders formed and started to apply special rules for the transfer of risk, which proved to be successful in practice. These rules became an integral part of INCOTERMS clauses and as such they have been successfully applied in international trade for almost one hundred years.

Bearing in mind everything that has been mentioned, it can be concluded that the difference between the consensual and the traditional legal systems has more to do with legal theory and history, and that the practical legal significance is not of fundamental importance, since the legal analysis has shown that the central, and sometimes a legally more important issue concerns the moment of transfer of risk – and not only the moment of transfer of the right of ownership. This is even more important because the transfer of the right of ownership and the moment of transfer of risk do not necessarily have to coincide.

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THE TRADITIONAL PRINCIPLE *SUPERFICIES SOLO CEDIT* AND THE MODERN WORLD – PROPERTY RELATIONSHIPS ON WIND-PARKS, SOLAR POWER PLANTS, ELECTRIC ENERGY GRID AND TRANSMISSION LINES ETC.

Abstract: *Certain legal forms/institutes remained unchanged since Roman law and are considered as the core principles of civil i.e. property law. The principle superficies solo cedit is undoubtedly among them. The private law codifications in the continental law countries almost without exceptions provide for the rules that the plot of land is main legal object and everything which is by nature or mechanically connected to it, belongs to the owner of the land. A comparative overview shows that in Europe only a few countries do not have such approach and there the buildings are legally separated from the land and constitute a separate object of the rights in rem. Without exception, these are some former socialist countries. These countries still have some kind of separation between building and land which could be understood as a consequence of the nationalization measures, undertaken during the socialism, which generally have affected immovable property i.e. land.*

One of the most important reform moves in Bosnia and Herzegovina (hereafter: B&H), Croatia and Slovenia was the reintroduction of the principle superficies solo cedit, which also brought denationalization of the building's land in the cities and urban conglomerations. In this paper, the evolution of this principle in the countries of former Yugoslavia will be briefly addressed as well as the consequences of its reintroduction into the property law. Although the principle superficies solo cedit plays a crucial role in the new property law in several successor countries of former Yugoslavia, at the same time it represents an obstacle to some new needs and challenges caused by developments in the field of technique, technology and renewable energy. Generally, the wind turbine and equipment, solar panels and equipment, geothermal and biomass equipment, cable infrastructure etc. do not belong to the owner of the land. An acquisition of the land is not a viable solution at least for two reasons: it would drastically increase the costs of the enterprise and the equipment is not intended to remain permanently on the land.

A vast range of the questions emerges here, followed by the numerous and very different solutions in comparative law. In certain legal orders, this equipment is considered as movable, or simple components of the plot of land, which can be subjects of separate rights in rem. In some countries the problem is circumvented through the building right, which can be encumbered and registered in the land register.

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The main research topic of this paper is the question: what exceptions of the principle *superficies solo cedit* are necessary and feasible in order to properly regulate proprietary relationships between the owner of the land and the owner of the cable infrastructure, wind-parks, solar power plants, to enable effective financing and to guarantee creditors' security. In order to formulate the answer, some selected legal orders have been researched (B&H, Montenegro, Croatia, Slovenia, Serbia as well Germany and Austria). The dogmatic question of whether these buildings/installations and equipment are movable or immovable assets arises here. This dogmatic question has important practical implications in the field of the credit and mortgage law. This paper addresses a question of whether a loan for financing solar equipment, wind turbine equipment which is installed on plot of land (or on a roof of a building) and which does not belong to the owner of the land, can be secured by a security right in rem and registered in the land registries or can be encumbered as movable?

It is concluded that in comparative law both solutions are possible, often within the same legal order; the solution, according to which the installation and equipment are considered as a movables or simple component of the real estate has several advantages for the operators and creditors.

Key words: superficies solo cedit, the notion of immovable, mortgage on renewable energy equipment, renewable energy, mortgage on cable infrastructure

1. INTRODUCTION

Property law can be seen as a very traditional branch of law. In the civil law and especially in the property law a phenomenon can be found, which cannot be found in other branches of law or at least not to that extent: namely some institutes and principles routed in Roman law, created two thousand years ago, are used almost unchanged even today in most of the European civil codifications. This is the case with the *superficies solo cedit* principle.

It seems that some fundamental institutes and principles of private law have a neutral nature and may exist in different social and economic patterns, which enabled legal transfer and reception of law throughout history. The former Yugoslavia and B&H are an appropriate example for that.¹ It appears that transfer or transplantation of law in certain areas of private law from one into another

1 This fact enabled the implementation of law or legal rules from laws that were in force before 1941 in the Kingdom of Yugoslavia for more than 30 years in the socialist Yugoslavia, as at that time the reception of Roman law in Europe. For more Povlakić, M., Property Law in Bosnia and Herzegovina, in: Jessel-Holst, Ch., Rainer, K., Trunk, A., (Edts.) 2010, *Private Law in Eastern Europe: Autonomous Developments or Legal Transplants*, Max-Planck-Institut für ausländisches und internationales Privatrecht, Materialien zum ausländischen und internationalen Privatrecht, 50, Tübingen, Mohr Siebeck, 205–236, p. 214–215. Not only former Yugoslavia, but also other former socialist countries had similar experiences, for example Poland. See Maczynski, A., Die Entwicklung und die Reformpläne des polnischen Privatrechts, in: Welser, R., (Hrsg.), 2008, *Privatrechtsentwicklung in Zentral- und Osteuropa*, Veröffentlichungen der Forschungsstelle für Europäische Rechtsentwicklung und Privatrechtsreform an der Rechtswissenschaftlichen Fakultät der Universität Wien, Band I, Wien, Manz, p. 115.

legal order is possible, regardless of transplant-sceptics.² The doctrine had already determined that there are two types of transfers. Some legal institutes are culturally deeply embedded, while others are less dependent on the culture and society. The transfer of the former is very difficult and seen as “organic”, while the transfer of the latter is relatively easy and characterized as “mechanical”.³ The former Socialist Federative Republic of Yugoslavia (hereafter: SFRY) and Bosnia and Herzegovina (hereafter: B&H) could again be taken as an example: their legal history features examples of both mechanical and organic transfers.⁴ The superficies *solo cedit principle* belongs to the institutes which can be mechanically transferred, and this was also the case in the former Yugoslavia, with the exceptions caused through certain nationalization measures.

Unlike the European private law, or international private law, consumer protection etc., property law is to certain extent caught in the national borders, so that the international aspects are not predominant, and international conferences dedicated to the property law or international founded projects are not in focus. This is surely partially a consequence of the legislative competences of the European union; EU has no competences to intervene in the proprietary legal orders⁵. Once, the focus was on transformation of property orders in former so-

- 2 Teubner believes that the term „Legal transplant“ is a misleading metaphor; in his opinion, the legal irritant is a better term for this phenomenon. Also, he is skeptical about the „convergences thesis“. Teubner, G., 1998, Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences, *The Modern Law Review*, Vol. 61, 11–32, pp. 12.
- 3 Kahn-Freund, O., On Uses and Misuses of Comparative Law in: Kahn-Freund, O., 1978, *Selected Writings*, London, pp. 298., cited upon Teubner, 1998, p. 17. See also Bečić, M., 2018, *Pravni transplanti i pravni pluralizam: transformacija stvarnog prava u Bosni i Hercegovini 1878–1918.*, Sarajevo, doctoral thesis, unpublished, pp. 38.
- 4 In the areas of private law closer to the market (property law, law on obligations), the legal institutes are more neutral, and their transfer was more successful while for instance, the institutes of the law on succession and of the family law have not been transferred to a large extent. There are lot of examples for that, and here only a few will be mentioned – concept of the protection of the possession, concept of the proprietary claims, real and personal servitudes etc. The same matrix repeats in the European Community, where the harmonization or unification efforts are more intensive in the area of contract law (impacting directly the functioning of the common market) than in the family or succession law, where social, moral, cultural values are more expressed. In this sense, Verbeke, A.-L., Henri L.-Y., Harmonisation of the Law of Succession in Europe, 459–479, p. 460–462; Martiny, D., Is Unification of Family Law feasible or even Desirable?, 429–457, p. 429–431, 451 (both in: Hartkamp A., et al., (Edits.) *Towards a European Civil Code*, 2011, Fourth revised and expanded edition, Wolter Kluwer International BV, The Netherlands, *Ars Aequi Libri* Nijmegen.. However, some more recent developments show that those areas of law are not anymore exclusively a matter to be regulated by national law; instead, they are under the influence of values and principles which are set in some international agreements, primarily in the agreements sourced in the international human rights law. More about these principles by Schwenzer, I., 2007, Grundlinien eines modernen Familienrechts aus rechtsvergleichender Sicht, *RabelsZ*, 71, 705–728, p. 711–712.
- 5 Art. 345 Treaty of the Functioning of the EU, Consolidated version, OJ C 326/47 from 26. October 2012. How this rule should be interpreted, especially with regard to the free movement of goods see Basedow, J., 2016, Die Entwicklung des Eigentumsrechts in der Europäischen Union, *ZEUP*, 573–590, p. 576–578.

cialist countries⁶, but this process is almost completed. From time to time there are publications on international property law or comparative studies⁷ or international conferences⁸, such as the Conference on challenges of the property law in 21st century.

Perhaps the Conference on challenges of the property law in 21st century has hit the mark. One can say: “*E pur si muove*.”⁹; there are some new developments in property law, and it can become interesting and topical, at the moment, as the several presentations at this Conference have shown, due to the recent development in the digital world. At this place the words of the famous French scholar René Savatier could be quoted – he wrote that the end of the 19th and the beginning of the 20th century spread to the legal dogmatic a large fan of the intangible, immaterial goods, which were unknown until this moment.¹⁰ And this happened again in the 21st century with the digital assets, data etc.

But one can ask why the two thousand years old and widely uncontested *superficies solo cedit* principle should be discussed within the Conference dedicated to the modern challenges in the field of property law? The starting point of this paper is the dilemma whether the *superficies solo cedit* principle is eligible to properly regulate proprietary relationships between the owner of the land and the owner of the wind turbines/ wind turbines equipment, solar power plants i.e., solar equipment, biomass or geothermal plants i.e., biomass and geothermal equipment, electronic energy grid and transmission lines etc.?

The objective of this paper is to research whether this principle represents an obstacle for the development of modern technologies. Almost all mentioned technologies are connected to renewable energies, which significantly adds to

6 Here several examples could be listed: Roggemann, H., (Hrsg.) 1996, *Eigentum in Osteuropa*, Verlag Berlin, Österreich Verlag, Berlin; Drobnig, U., et al. (Hrsg.) 1998, *Systemtransformation in Mittel- und Osteuropa und Ihre Folgen für Banken, Börsen und Kreditsicherheiten*, Tübingen; Gesellschaft für technische Zusammenarbeit (Hrsg.) 2003, *Das Budapester Symposium, Beiträge zur Reform des Sachenrechtes in den Staaten Südosteuropas / Budimpeštanski simpozijum, Doprinosi reformi stvarnog prava u državama Jugoistočne Evrope*, Bremen, Tiemen; Josipović, T. (Red.) 2009, *Stvarnopravna uređenja tranzicijskih zemalja – stanje i perspektive*, Zagreb; Hinteregger, M., Borić, T., (Hrsg.) 2009, *Sicherungsrechte an Immobilien in Europa: Grazer Beiträge zum Recht der Länder Südost-Europas und der Europäischen Integrationen*, Graz, Band I; Jessel-Holst, Ch., Rainer, K., Trunk, A., (Edts.) 2010, *Private Law in Eastern Europe: Autonomous Developments or Legal Transplants*, Max-Planck-Institut für ausländisches und internationales Privatrecht, Materialien zum ausländischen und internationalen Privatrecht, 50, Tübingen, Mohr Siebeck.

7 Erp, S. van, Akkermans, B., (Edits.) 2012, *Property Law, Cases, Materials and Text on Property Law*, Hart Publishing, Oxford and Portland, Oregon; Bar, Ch. von, 2015, *Gemeineuropäisches Sachenrecht*, Band I, C. H. Beck, München, and Bar, Ch. von, 2019, *Gemeineuropäisches Sachercht*, Band II, C. H. Beck, München.

8 See the footnote no 6 – the published books represent the collection of papers from the correspondent conferences and symposia.

9 “And yet it moves!”, the famous phrase attributed to Galileo Galilei, after being forced to recant his claims that the Earth moves around the Sun.

10 Savatier, R., 1959, *Les Méthamorphoses économiques et sociales du droit privé d'aujourd'hui*, Dalloz, Paris, p. 122.

the importance of this topic. A further very important connected issue is the issue of an effective financing of the mentioned installations and how to guarantee security to the creditors. The focus of the research is the legal framework in B&H, but the regulation in the region and comparative law beyond the region will be considered as well, aiming at answering the question what are the issues and challenges for the doctrine of civil law that come with the new technologies and how these challenges have been met in different legal orders?

2. ROMAN LAW PRINCIPLE *SUPERFICIES SOLO CEDIT* AND ITS IMPACT ON THE MODERN PROPERTY LAW

Superficies solo cedit principle was formed as a principle in the Roman law; Roman classic jurisprudence has stated that plot of land (*solum*) and everything which is firmly attached to the land, such as buildings, produces of the plot of land, as long as they are connected to the land, seed after being sown and plants after being planted form an unit and represent one unique legal subject.¹¹

This principle is widely accepted across Europe as the following picture shows (the countries marked in ocher).¹² The majority of European codifications of civil law have accepted it.¹³

11 Milotić, I., *Vlasništvo maslina na Lunu (otok Pag) i načelo superficies solo cedit*, 2013, *Zbornik Pravnog fakulteta u Zagrebu*, 63, (5–6) 1319–1350, str. 1321. More about the *superficies solo cedit* principle in Roman law instead of many see bei Petrak, M., 2010, *Traditio iuridica*, vol. I: *regulae iuris*. Zagreb, Novi informator, p. 129–130.

12 vdp Think Tank Runder Tisch Grundpfandrechte, Chard II.39.

The vdpGrundpfandrechte database presents the analyses of the permanent vdp workshop „Round Table – Security Rights over Real Property“ with experts from more than 35 jurisdictions, which is dedicated to monitoring legal relationships of security rights over real estates and rights equivalent to land as well as special purpose vehicles in an international comparison. The results are recorded in the vdpGrundpfandrechte database, which can be used by lending and real estate industries via a web application. For more see <https://www.vdpexpertise.de/produkte/risikomodelle-zur-verwertung-von-grundpfandrechten/vdp-grundpfandrechte/>

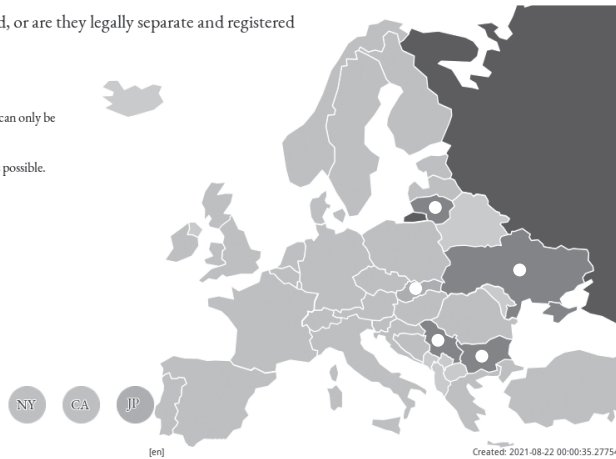
The results of this analyses have been published in Stöcker, M., O., Stürner, R., 2012, *Flexibilität, Sicherheit und Effizienz der Grundpfandrechte in Europa*, Band III, Ergebnisse des Workshops des Runden Tisches „Grundpfandrechte“ in Berlin 2010/2011, 3. erweiterte Auflage, Schriftenreihe des Verbandes deutschen Pfandbriefbanken, Band 50, Berlin, Verband deutscher Pfandbriefbanken, p. 31–32. Regarding the *superficies solo cedit* principles there were no changes since 2012 in the Chard II.39, presented above.

13 Art. 552–553 of the French Civil Code (hereafter: Code civil), § 297 of the Austrian Civil Code (hereafter: ABGB), §§ 93–94 of the German Civil Code (hereafter: BGB), Art. 5:2 of the Dutch Civil Code (hereafter: BW). See more Erp, S. van, Akkermans, B., 2012, pp. 280. Further the Article 505 of the Czech Civil code, Article `812 and 934 of the Italian Civil Code, Art. 1001 of the Greek Civile Code.

II. Public Disclosure Requirements and Protection of Trust

39.) Are buildings generally part of the land, or are they legally separate and registered separately?

- 4 Part of the land (*superficies solo cedit*)
- 3 Not part of the land but the land and the buildings can only be mortgaged together.
- 2 Very often still legally separate, but consolidation is possible.
- 1 Always legally separate



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Nowadays, only a few European countries do not acknowledge this principle (the countries colored with white dots). Without exception, these are some former socialist countries (for example Russia, Lithuania, Ukraine, Bulgaria, Slovakia, Serbia)¹⁴. Some former socialistic countries still have some kind of separation between building and land which could be understood as a consequence of nationalization measures, undertaken during socialism, which generally affected immovable property i.e. land.¹⁵

In Roman and European law this principle apparently converges with natural order (*naturalis ratio*). However, certain economic reasons have led to the abandonment of this principle in history even in the Roman empire. In the Justinian codification a legal institute *superficies* was formulated as a right *in rem*,

- 14 In Serbia the process of the denationalization of urban constructing has as a consequence that the land and the building become one entity. However, not the building follows the land but vice versa; the owner of the building acquires the land. See Art. 106. of the Law on Planning and Construction of the Republic Serbia [*Zakon o planiranju i izgradnji Republike Srbije*], Official gazette [*Službeni glasnik Republike Srbije*] 72/09, 81/09 – corr., 24/11, 121/12, 42/13 – Const. court, 50/13 – Const. court, 98/13 – Const. court, 132/14, 145/14, 83/18, 31/19, 37/19, 9/20, 52/21. The same measures were also implemented in B&H and Croatia, but they cannot be considered as the introduction of the *superficies solo* principle. This is an interim measure aiming at resolving the former socialist proprietary relationships on urban constructing land. Full recognition of this principle requires an explicit provision in property law.
- 15 For Czech Republic see Bohata, P., 2014, Tschechische Republik: *Superficies solo cedit*, *WiRO*, 241–244, p. 241. Bohata sees this separation, which was carried out in the Czechoslovak Civil code from 1951, as a direct influence of the law of the Soviet Union. Also Gromotke, C., *Eigentumsrechtliche Probleme bei Auslandsinvestitionen in der Tschechischen Republik*, in: Herwig R., (Hrsg.), 1996, *Eigentum in Osteuropa*, Berlin, p. 288. For former Soviet Union and German Democratic Republic see by Gerasin, S., 2005, *Die Anpassung des Sachenrechts der DDR an der Bundesrepublik Deutschland: Deutsche Erfahrung in Russland*, *WiRO*, no. 10, p. 297. For former SFRY see Simonetti, P., *Pravno jedinstvo nekretnine i njenih posebnih dijelova* in: Simonetti, P. 2001, *Rasprave iz stvarnog prava*, Rijeka, Pravni fakultet Sveučilišta u Rijeci, pp. 172; Powlakić, M., 2020, *Pravno (ne)jedinstvo nekretnine – povodom dvije recentne odluke sudova u Federaciji BiH i Republici Srpskoj*, *ZIPS*, no. 1430 – septembar 2020, 37–51, p. 39.

which has enabled its holder to use the building, and to build on the plot of another owner. This right was transferable and hereditary.¹⁶ Before it was acknowledged as a right *in rem*, the *superficies* has had a longer evolution.¹⁷ But, here is relevant that the Roman studies state that this institute was born due to need to mitigate the negative consequences of the strict application of the *superficies solo cedit* principle.¹⁸ In the situation where the ownership of land in the urban settlements was concentrated among few owners, it was necessary to enable those persons, who could not purchase the land and be owners, to build and to use the buildings over a longer period of time.

The same economic and social reasons in the modern legal orders have led to introduction of a building right (*Erbbaurecht*). Following *superficies solo cedit* principle, the civil codes in Europe did not originally contain regulation on *superficies* or *emphiteusis* as separate property rights.¹⁹ The social and economic development in the 20th century, the scarcity of constructing land in the cities and its ever-increasing prices, led to the new legal solutions. Some countries, such as Germany²⁰, Austria²¹, France²², Nederland²³, have introduced *superficies* (the hereditary building right, *Erbbaurecht*) for the same economic and social reasons as the Roman right at that time. It was a need to enable less wealthy people to acquire their own home.²⁴

An interesting example in customary law of the Croatian island Pag between 18th and 20th century can be mentioned here as a further example of deviation from this principle. It was possible that the owner of a plot of land and the own-

16 Horvat, M. 1980, *Rimsko pravo*, Zagreb, Školska knjiga, p. 166.

17 The different legal solutions were found for this situation such as to lease the plot (locatio-conductio), or to purchase the right to use the building. By the activity of Pretor this right was protected as a right *in rem*, to be finally recognized as such in the Justinian codification. Šarac, M., Lučić, Z., 2006, *Rimsko privatno pravo*, Sarajevo, Pravni fakultet Univerziteta u Sarajevu, p. 156.

18 Šarac, M., Lučić, Z., 2006, p. 166–167.

19 Erp, S. van, Akkermans, B., 2012, p. 281.

20 Erbbaurechterordnung from 1. January 1919, Reichsgesetzblatt, p. 72. For more about German *Erbbaurecht* see Schwab/Prütting, 2006, *Sachenrecht*, 32. Auflage, München, Verlag C.H. Beck, pp. 335; Baur/Stürner, 2009, *Sachenrecht*, 18. Auflage, München, C.H. Beck, pp. 385.

21 Gesetz vom 26. April 1912, betreffend das Baurecht, RGBL Nr. 86/1912, Gesamte Rechtsvorschrift für Baurechtsgesetz, Fassung vom 26.07.2021, available <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10001732>.

For more about Austrian *Baurecht* see Koziol, H., Welsner, R., Kletečka A., 2014, *Bürgerliches Recht*, Band I: Allgemeiner Teil, Sachenrecht, Familienrecht, 14. Auflage, Wien, Manz, pp. 480; Iro, G., 2000, *Bürgerliches Recht IV: Sachenrecht*, 2. überarbeitete Auflage, Wien – New York, Springer, pp. 191.

22 Law no 64–1247 from 16 December 1964 (Construction and Housing Code).

23 The old Dutch Civil code followed here the French law and did not provide for the *superficies*. Erp, S. van, Akkermans, B., 2012, p. 281. The new Dutch Civil Code from 1992 regulated this institute (Art. 5:104 WB). The Dutch law prescribed that the *superficies* entitles its holder to use or construct the building, but beside the building – any construction other than a building, including plants (tree and bushes). *Ibidem*, p. 282.

24 Simonetti, P., 2013, *Odluke prava građenja i superficijarnog prava*, *Zbornik Pravnog fakulteta Sveučilišta u Rijeci* (1991) v. 34, br. 1, 3–35, p. 11–12; Erp, S. van, Akkermans, B., 2012, p. 281.

er of an olive tree are different persons.²⁵ The person who has grafted the olive tree became its owner and had right to access the trees over the land of another person. These competences made up the content of the property right on olive tree, and they have not been seen as limitation of property right over the plot of land. The ownership of the olive tree and the land plot were two hierarchically coordinated property rights, each with its powers and precisely defined scope.²⁶ The respective owner of the land has allowed the respective owner of the olive tree growing on its land a free access to the tree. Other persons, designated by the olive tree owner, were also allowed to access to the tree.

These two examples can be very illustrative for this research paper: although the *superficies solo cedit* principle is one of the basic civil law principles, the exceptions were provided by legislators (customary law or case law) if certain economic needs had to be met. Under different historical, social, or economic circumstances, the solutions were found which have meant the abandonment of this principle to solve some economic or social needs. And this is precisely the point at which modern property law finds itself in this moment regarding the proprietary relationships between owners of different kinds of buildings/equipment and owners of plots of land.

3. SUPERFICIES SOLO CEDIT PRINCIPLE IN THE SUCCESSOR COUNTRIES OF FORMER SFRY

3.1. PROPERTY LAW REFORM AND REESTABLISHMENT OF THIS PRINCIPLE

In the countries, successors of the former socialistic Yugoslavia, this principle was abandoned in the urban settlements due to nationalization of constructing land; the process has started in 1958 and continued until 1990 in Croatia²⁷, 1995 in Serbia²⁸ or 2003 in B&H²⁹. *Superficies solo cedit* principle was never

25 Milotić, I., 2013, Vlasništvo maslina na Lunu (otok Pag) i načelo superficies solo cedit, *Zbornik Pravnog fakulteta u Zagrebu*, 63, (5–6) 1319–1350, p. 1324.

26 *Ibidem*, p. 1331.

27 After the last amendments to the Law on Construction Land of the Republic of Croatia were adopted in 1990, it was no longer possible for municipalities to declare a plot of land as urban construction land and to thereby transform it into state property. For more see Simonetti, P., 2009, *Prava na nekretninama*, Rijeka, Pravni fakultet Sveučilišta u Rijeci, p. 710.

28 In Serbia there were different and contrary provisions on legal status of the urban construction land, but this controversy was terminated by enacting of the Law on Constructing Land of the Republic Serbia [*Zakon o građevinskom zemljištu*] in 1995. Similarly, as in Croatia, the municipalities were entitled to determine certain plot of land as an urban constructing land, but this land was not automatically transformed into state property. For more, Lazić, M., 2011, Pretvorba (transformacija) prava na nekretninama u društvenom vlasništvu u Republici Srbiji, *Zbornik Pravnog fakulteta Sveučilišta u Rijeci* (1991) v. 32, br. 1, 215–233, p. 222.

29 The enacting of the Law on constructing land in both entities (Republic Srpska, Federation B&H) has terminated this possibility. See Art. 15. of the Law on constructing land of the Federation B&H [*Zakon o građevinskom zemljištu Federacije BiH*], Official gazette of the Federation B&H [*Službene novine FBiH*] 25/03; Art. 15. of the Law on constructing land of the Republic Srpska [*Zakon o građevinskom zemljištu Republike Srpske*] Official gazette [*Službeni*

explicitly regulated but also not explicitly prohibited in legal order of the former socialist Yugoslavia.³⁰

In the former Kingdom of Yugoslavia between two world wars the civil codification was never enacted and in its different parts Austrian Civil Code (hereinafter: ABGB), Serbian Civil code (*Srpski građanski zakonik*) from 1844, and General Proprietary Law for Princedom Montenegro (*Opći imovinski zakonik za knjaževinu Crnu Goru*) from 1888, have been applied. Each of these three civil codifications has provided for the *superficies solo cedit* principle.³¹ These civil codes have applied not only until World War II, but in the new socialist state SFRY as the so called “legal rules” as well. The Law on Termination of Validity of Laws adopted before April 6, 1941 and during the Occupation (hereafter: Law on Termination), enacted in 1946³² enabled the application of the so called “legal rules” in cases when a certain relationship had not been regulated by the new socialist law, and when the relevant legal rule was not contrary to the Constitution, to other mandatory rules or the morals of the socialist state.³³ The *superficies solo cedit* principle was among those “legal rules” which could be applied.

In 1958 the Law on nationalization of rental buildings and constructing land in urban settlements³⁴ was passed. The construction land in cities and other urban settlements was in its totality nationalized and legally separated from the buildings erected on it. These solutions were contrary to the *superficies solo cedit* principle, and for these reasons the preconditions for application of this “legal rule” in cities and urban settlements were not fulfilled. In the case law a prevailing view was that this principle could still be applied regarding the privately owned plots.³⁵ At the time of dissolution of former Yugoslavia, in all its parts, the buildings, which could be privately owned, and constructing lands in towns

glasnik RS] 86/03. In Brčko District B&H this possibility was excluded after enactment of the Law on property and other rights in rem in 2001 (see footnote 38). For more see Povlakić, M., Transformacija prava na građevinskom zemljištu – Never-ending story?, 2019, *Zbornik radova sa XVII Međunarodnog savjetovanja „Aktualnosti građanskog i trgovačkog zakonodavstva i pravne prakse“*, Mostar 14th–16th June 2019, 145–191, p. 151–158.

30 Puhan, I., *Superficies solo cedit* in: *Enciklopedija imovinskog prava i prava udruženog rada*, tom III; 1978, Beograd, Savremena administracija, p. 232, nr. 17 and 18; Simonetti, P., 2009, *Prava na nekretninama*, Pravni fakultet Sveučilišta u Rijeci, Rijeka, pp. 57.

31 Serbian Civil Code, Art. 189, Art. 802 of the General Property Code of Montenegro, § 293 Austrian Civil code.

32 Official gazette of the Democratic Federal Yugoslavia [*Službeni list DFF*], no. 86/46.

33 For more about implementation of „legal rules“ see Konstantinović, M., Stara “pravna pravila” i jedinstvo prava in: *Zbornik građanskih zakonika Stare Jugoslavije*, 1960), Titograd, Grafički zavod Titograd, p. 3; Nikolić, D., 2013, *Uvod u sistem građanskog prava*, Novi Sad, Univerzitet u Novom Sadu, Pravni fakultet, Centar za izdavačku delatnost, p. 182–184; Gams, A., Đurović, Lj., 1990, *Uvod u građansko pravo*, Beograd, Naučna knjiga, pp. 52; Rašović, Zoran P., 2006, *Građansko pravo*, Podgorica, Pravni fakultet, p. 38–39; Kovačević Kuštrimović, R., Lazić, M., *Uvod u građansko pravo*, 2008, Niš, Punta, p. 78; Borić, T., 1996, *Eigentum und Privatisierung in Kroatien und Ungarn*, Wien-Berlin, Verlag Österreich, Berlin Verlag, p. 52.

34 Official gazette FNRJ [*Službeni list FNRJ*] no. 52/1958, 3/1959, 24/1959, 24/1961, 1/1963.

35 Puhan, I., *ibidem*, p. 233, no. 22.

and other urban conglomerations, which were exclusively owned by the public entities, were considered as different real estates.³⁶

The first codification of property law in former SFRY from 1980,³⁷ did not provide for the legal definition of immovable or a classification of assets, nor did it provide for the *superficies solo cedit* maxim. The application of “legal rules” has continued regarding this issue, but as elaborated above, only related to plots of land privately owned (outside of urban settlements).

In all successor countries of the former Yugoslavia the (re)introduction of this principles was accompanied by the denationalization of urban constructing land, which opens the door for a reestablishment of this principle.³⁸ One of the most relevant novelty, introduced within the process of reform of property law in B&H as well as in some other countries of the region (Croatia, Slovenia), was an explicit introduction of the *superficies solo cedit* principle, after nearly five decades of its neglecting.

The new property laws in B&H³⁹ provide for the totally new legal definition of real estate. A former real estate legal definition, according to which land, buildings, apartments and business buildings have been considered as real estates/im-

36 About the separation of building and plot of land see Simonetti, P., 2001, pp. 165.

37 Law on basic proprietary relationships [*Zakon o osnovnim svojinskopравnim odnosima*], Official gazette of SFRY [*Službeni list SFRJ*] no. 6/1980, 36/1990.

38 More about this context see Josipović, T., *Prilagodba hrvatskog građanskopravnog poretka europskom povratkom na načelo superficies solo cedit* in: Gesellschaft für technische Zusammenarbeit (Hrsg.) 2003, *Das Budapester Symposium, Beiträge zur Reform des Sachenrechtes in den Staaten Südosteuropas / Budimpeštanski simpozijum, Doprinos reformi stvarnog prava u državama Jugoistočne Evrope*, Bremen, Tiemen, p. 99–100; Simonetti, P., 2008, *Prava na građevinskom zemljištu*, Rijeka, Pravni fakultet Sveučilišta u Rijeci, pp. 417. In Croatia the reestablishment of this principle is considered in context of reestablishment of market economy and together with renewal of land registries as a precondition for modern real estates' transactions. See Gavella, N., in: Gavella, N., et al., 2007a, *Stvarno pravo*, II. izmijenjeno i dopunjeno izdanje, Zagreb, Narodne novine, p. 86.

The same can be observed in B&H. For more Powlakić, M., 2009, *Transformacija stvarnog prava u Bosni i Hercegovini*, Sarajevo, Pravni fakultet Univerziteta u Sarajevu, p. 98.

In this sense Juhart, M., in: Breden, A., et al., 2002, *Novo stvarno parvo*, Maribor, Linea (Zbirka Codex iuris), p. 211.

For Serbia: Živković, M., *Tranzicija i propisi o izgradnji* in: Vasić/Krstić (Eds.), 2014, *Pravna sigurnost u uslovima tranzicije*, Zbornik radova sa Naučnog skupa Prilozi projektu 2013 „Razvoj pravnog sistema Srbije i harmonizacije sa pravom EU“, Beograd, Pravni fakultet Univerziteta u Beogradu, p. 233; Lazić, M., 2011, p. 222.

In the Czech Republic as well the introduction of this principle was one of the most important reform measures. For more see Bohata, P., 2014, *Tschechische Republik: Superficies solo cedit*, *WiRO*, p. 241.

39 Art. 7 Par. 2 of the Law on property and other rights of the Brčko District of B&H – hereafter PL BDB&H [*Zakon o vlasništvu i drugim stvarnim pravima Brčko Distrikta BiH*], Official Gazette of Brčko district B&H [*Službeni glasnik BD BiH*] no. 11/2001, 8/2003, 40/2004, 19/2007; Art. 6 Par. 2 of the Property Law of the Republic Srpska – hereafter PL RS [*Zakon o stvarnim pravima Republike Srpske*], Official gazette RS [*Službeni glasnik RS*] no. 124/2008, 58/2009, 95/2011, 60/2015, 18/2016 – Decision of the Constitutional court, 107/2019.; Art. 6 Par. 2 of the Property Law of the Federation B&H – hereafter PL FB&H [*Zakon o stvarnim pravima Federacije BiH*], Official gazette FB&H [*Službene novine Federacije BiH*] no. 66/2013, 100/2013.

movable assets,⁴⁰ was replaced by the new legal definition of real estate under which only the plot of land is immovable unless the law provides otherwise. Under this principle the plot of land is the main legal object and everything which is by nature or mechanically connected to it, represents its part and belongs to the owner of that land. The same solutions can be found in Croatian⁴¹ and Slovenian law.⁴² Behind this new legal definition of immovable is one of the most important achievements of the reform of property law in these countries, namely the reintroduction of *superficies solo cedit* principle.⁴³ This has consequently modified several other institutes of property law (acquisition by accession, condominium/ownership of residential apartments etc.).⁴⁴

All three property laws in B&H prescribe the *superficies solo cedit* principle as an imperative, allowing that exceptions can be provided only by the law⁴⁵; only by law the ground and building can be legally separated. The property law in B&H, provides only for several exceptions of this principle. First one is the situation when a buildings of various types, are built above or below ground by a concessionaire on the asset which is a public good – in this situation the buildings and devices do not share the same legal status as the ground, are not considered as a public good, but a subject of property right (Art. 7 par. 6 PL FB&H, Art. 7 par. 4 PL RS, Art. 7 Par. 4 PL BDB&H). This provision could be appropriate

- 40 Art. 1 of the Law on Transfer of Immovable Assets of the Socialistic Republic B&H [*Zakon prometu nepokretnosti SRBiH*], Official gazette of SR B&H [*Službeni list SR BiH*] no. 38/1978, 4/1989, 29/1990, 22/1991; Official gazette of the Republic B&H [*Službeni list RBiH*] no. 21/1992, 3/1993, 18/1994; Art. 10 par. 3 of the Law on Proprietary Relationships of the Federation B&H [*Zakon o vlasničko-pravnim odnosima FB&H*], Official gazette of FB&H [*Službene novine FBiH*] no. 6/1998, 29/2003; Art. 2 par. 3 of the Law on the Land Registries of the Federation B&H [*Zakon o zemljišnim knjigama FBiH*] Official gazette FB&H [*Službene novine FBiH*] no. 58/02, 19/03, 54/04.
- 41 Art. 9 of the Law on property and other rights *in rem* of Republic of Croatia [*Zakon o vlasništvu i drugim stvarnim pravima*], consolidated version, Official gazette of Republic of Croatia [*Narodne novine Republike Hrvatske*], no. 81/2015, 94/2017.
- 42 Art. 8 and 54 of the Property law of Republic of Slovenia [*Stvarnopravni zakonik*], Official gazette of the Republic Slovenia [*Uradni list Republike Slovenije*], no. 87/2002, 91/2013, 23/2020. For more see Rijavec, Vesna et al., 2006, *Pravna ureditev nepremičnin*, Ljubljana, Založba, p. 116, 122–123; Breden, A., in: Breden, A., et al., 2002, p. 18.
- 43 In the first years of application of this principle, the countries in the region were struggling with it. In B&H there are some recently rendered judgements which demonstrate how difficult it is to change the paradigm after 50 years of the socialistic model of property order. The courts can hardly understand that plot and building represent one unit, and that they cannot be separately transferred, encumbered, or separately enforced over. For more see Povlakić, Meliha, *Pravno (ne)jedinstvo nekretnine – povodom dvije recentne odluke sudova u Federaciji BiH i Republici Srpskoj*, *ZIPS*, 1430, septembar 2020, 37–51, pp. 42. For Croatian experience see Gavella, N., in: Gavella, N., et al., 2007a, *Stvarno pravo*, II. izmijenjeno i dopunjeno izdanje, Zagreb, Narodne novine, p. 89.
- 44 Gavella, N., in: Gavella, N., 2007a, p. 88; Rijavec, V., et al., 2006, p., 116, 122; Povlakić, M., in: Babić, I., et al., 2014, *Komentar zakona o stvarnim pravima Federacije BiH*, Sarajevo, Privredna štampa, p. 156.
- 45 In the comparative law there are solutions under which the parties are enabled to separate the entitlement to a bulidng from the entitlement to the land. Erp, S. van, Akkermans, B., 2012, p. 280; Simonetti, P. *Pravno jedinstvo neketnine i njenih posebnih dijelova* in: Simonetti, P., 2001, p. 169.

solution when the wind turbines, solar panels etc. are erected on public good by virtue of a concession and/or within private-public partnership.

The building right⁴⁶ represents the second possibility to legally separate the ground and buildings of various types. This is not explicitly foreseen by law in B&H as an exception of the *superficies solo cedit* principle. This principle is abandoned if the relation between ground and building is considered, but if the relation between building right as an (artificial) immovable asset and building is considered, then this principle is fully effective (the building is built and connected to the building right as immovable).⁴⁷ For these reasons in B&H building right is not understood as an exception of the *superficies solo cedit* principle. However, the buildings constructed by virtue of the building right are legally separated from the ground. Further exception concerns the component of the immovable assets, machines/equipment/devices which are connected to the immovable asset and fittings (*Zubehör, pripadci*). However, the fittings are not a part of immovable asset but serve for its better use and for these reasons fittings are not relevant for this research⁴⁸, but both other items, the components of the immovable assets and machines/equipment/devices are (see below 4.3). In addition, the property law in entities prescribe that real servitude can empower its holder to have a part of its building or equipment of the ground belonging to another person (Art. 231 par. 3 no. 1 PL FB&H, Art. 219 Par. 3 lit. 1 PL RS).

The Law on property and other right *in rem* of Republic Croatia (hereafter: PL CRO) provides for the same definition of the immovable assets as property law in Bosnia and Herzegovina (Art. 9 par. 1 PL CRO).⁴⁹ The same exceptions of this principle as in B&H are foreseen in Croatian property law.⁵⁰

Slovenian Property Code from 2002 (hereafter: PL SLO)⁵¹ reintroduce the *superficies solo cedit* principle as one of the general principles of the property law (Art. 8 PL SLO). Only the land is an immovable asset (Art. 18 Par. 1 PL SLO). Everything which is connected to the land is part of it, unless the law provides otherwise. Scholars consider that this principle is applied very consistently, with only a few exceptions (ownership on residential apartments, building right)⁵²; the component of the immovable asset or machines/equipment/devices in the sense of this paper are not in this act mentioned as an exception.

46 Art. 298–314 PL FB&H, Art. 286–302 PL RS, Art. 74–90 PL BDB&H.

47 Simonetti, P., 2008, *Prava na građevinskom zemljištu*, Pravni fakultet Sveučilišta u Rijeci, p. 418–419; Povlakić, M., in: Bikić, E. et al., 2013, *Notarsko pravo*, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, Otvoreni regionalni fond za jugoistočnu Evropu – Pravna reforma, Sarajevo, p. 400; Velić, L., in: Babić et al., (2014) *Komentar Zakona o stvarnim pravima Federacije BiH*, Sarajevo, Privredna štampa, pp. 762, 765, 771.

48 The machines/equipment/devices for producing of the renewable energy do not principally serve for this purpose.

49 PL CRO was the model for all three property laws in B&H.

50 Art. 280–296 PL CRO provides the hereditary building right, Art. 9 par 4 provides for the separation of the building from the ground which is public good by virtue of the concession. Art. 9 par. 5 PL CRO provides for a further exception regarding machines/equipment/devices and art. 196 prescribes an exception in connection with a real servitude (Art. 196 PL CRO). More about these exceptions Gavella, N., in: Gavella, N., et al., 2007a, p. 90–91.

51 Official gazette of Republic Slovenia [Uradni list Republike Slovenije] no. 87/02, 91/13, 23/20. Available at <http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO3242> (10.10.2021)

52 Rijavec, Vesna et al., 2006, p. 116.; Breden, A., in: Breden, A. et al., 2002, p. 18.

In Serbia and Montenegro this principle is not explicitly accepted. In Montenegro the former legal definition of immovable was retained.⁵³ Not only the plot of land but the buildings of any kind are considered as immovables asset separated from the plot of land. Despite this legal regulation, the doctrine states that *superficies solo cedit* applies in Montenegro; it is fully effective when it comes to sowing and planting, but not when it comes to building on the ground of another owner. The ownership on the residential apartments is seen as an exception as well.⁵⁴

In Serbia, the old Yugoslav Law on basic proprietary relationships is still in force.⁵⁵ This law does not contain any definition of the immovable assets, *superficies solo cedit* principle⁵⁶, or in general of the assets, subject of the *right in rem*, and their components or fittings. The scholars define the immovable asset as the former Yugoslavian law have done it (plot of land, building, apartment etc.).⁵⁷ Nevertheless, it is stated that the superficies solo cedit is accepted in Serbian law, with some exception.⁵⁸ The Serbian scholars differentiate between simple and fully incorporated components, arguing for the same rule for simple components and fittings.⁵⁹

4. LEGAL INSTITUTES WHICH CAN SEPARATE GROUND AND BULIDINGS/EQUIPMENT ETC.

4.1. INTRODUCTION

Although this principle was just introduced in some of the successor countries, the next issues arise related to demands of the new technologies (e.g. production of renewable energy, telecommunication cable, and infrastructure etc.). A strict application of the *superficies solo cedit* principle would lead to the conclusion that each building/machine/equipment/device, which are laxly or firmly

53 Art. 19 par. 3 of the Law on the Proprietary Relationships of Montenegro [*Zakon o svojinsko-pravnim odnosima*] Official Gazette [*Službeni list Crne Gore*] nr. 19/2009. For more see Rašović, Z., P., 2005, *Stvarno pravo*, 2. izdanje, Podgorica, Službeni list SCG, Pravni fakultet, p. 10–12.

54 Rašović, Z., P., 2005, p. 14–15; Rašović, Z., P., 2009, *Komentar Zakona o svojinsko-pravnim odnosima*, I knjiga, Podgorica, Pravni fakultet, p. 81–85.

55 Law on the Basic Proprietary Relationships [*Zakon o osnovim svojinsko-pravnim odnosima*] Official Gazette of SFRY [*Službeni list SFRJ*] 6/1980, 36/1990; Official Gazette of SRY [*Službeni list SRJ*] 22/96; Official Gazette of Serbia [*Službeni list Republike Srbije*] 115/2005.

56 Also here re-recognition of this principle is tied to the reform of the ownership of urban constructing land. It was hesitantly and not always consistently carried out in Serbia, starting with the Constitution of 2006, which has allowed the private ownership on the urban contracting land and the Law on Planning and Construction from 2009 and the Act on the Conversion of the Right of Use of Urban Building Land into the Property Right Against Payment [*Zakon o pretvaranju prava korištenja u pravo svojine na gradskom građevinskom zemljištu uz naknadu*]. Official gazette of the Republic Serbia [*Službeni glasnik Republike Srbije*] nr. 64/2015, 9/2020. For more see Živković, M., 2014, p. 231; Lazić, M., 2011, p. 224.

57 Kovačević Kuštrimović, R., Lazić, M., 2006, *Stvarno parvo*, Niš, Sven, p. 29.

58 *Ibidem*, 30. Stanković, O., Orlić, M., 1989, *Stvarno pravo*, 4. izdanje, Beograd, p. 13.

59 Stanković, O., Orlić, M., 1989, p. 32–33; Kovačević Kuštrimović, R., Lazić, M., 2006, p. 18.

fixed to the plot of land, would be considered as it part; the accession would lead to a loss of autonomy of these items and to an extinction of the ownership right on them. Everything that is built or connected on the plot (buildings, machines, equipment) would become a part of the land. Generally, the buildings of any kind could not be separate subjects of the proprietary rights (*rights in rem*) and they cannot be separately registered, transferred, encumbered etc. This result is not acceptable for the operator, who would then have only one option – to purchase the plot or several plots of land. This is often not the best economic solution. Therefore, it should be considered whether some exceptions of this principle should be foreseen and could existing institutes of property law separate the plot of land and some kinds of buildings, which would be more favorable for the operator.

Although there might be different structures – buildings, equipment, or devices in connection with renewable energy, the same legal issues arise. That is why solar panels and solar equipment, wind turbines and their equipment, hydropower and geothermal equipment, biomass power plants, electric energy grids and transmission lines (built above or below ground), telecommunication cables and cable infrastructure etc. will be in this paper generally described as “buildings” and/or “equipment”. All these items are usually connected to the ground, but this connection can be more or less firm. As previously stated, in the majority of European countries the *superficies solo cedit* principle applies with a consequence that these buildings and equipment should be considered as a part of the plot of land. However, the land does not necessarily belong to the equipment owner and building/equipment does not occupy the whole parcels where-by the buildings/equipment could be erected on the parcels belonging to several owners. An insistence on applying *superficies solo cedit* principle would lead to some illogical solution and undesirable economic consequences.

Taking as an example the wind turbines – they can be built on the different parcels of the land, of-shore or on-shore. When built on-shore, the question arises whether the only possibility for the investor is to purchase different parcels from different owners, consequently to build on its giant parcel and to offer as credit security this parcel with the buildings which will be erected on it? Or a solution that does not presume the ownership on the plot is more feasible? The investment would be less expensive, and the investor is more flexible to abandon the wind turbines and equipment after their economic cycle is fulfilled.⁶⁰ If the wind turbine and equipment are considered as a separate asset, they could be considered movable. The solution of this problem is not interesting only from the aspect of profitability of investment, but it has a significant impact on credit. For the security of the credit, transactions are decisive whether the wind turbine and equipment are considered as movable or immovable assets and whether they can be encumbered as movable or immovable?

The question which should be answered below is how to find a solution to separate the property over the ground and property over buildings/equipment and to determine devices of civil laws which represents the most favorable solution?

60 The wind turbines have an economic cycle of approximately 30 years.

4.2. WHAT BUILDINGS ARE NOT PART OF THE GROUND ON WHICH THEY ARE CONSTRUCTED?

The property laws in B&H define that the building is a part of the plot only if the connection between them is of a permanent nature.

In Montenegrin law, the building is considered as a part of the plot when it is intended that it permanently remains on the plot unless the law provides otherwise (Art. 19 Par. 13 PL MN). The doctrine states that the connection should be permanent and solid. The building should be firmly attached to the ground.⁶¹ It is not enough that the building is only loosely connected to the ground or only situated on it.

The Croatian PL has two contradictory provisions. One of them prescribes that everything that is relatively permanently connected to the land is part of it (Art. 9 par. 1 PL CRO) and another that everything that is built above or below the ground with an intention to permanently remain attached to the ground is considered as its part (Art. 9 par. 3 PL CRO). The latter is more appropriate to meet the challenge discussed in this paper. When there is no intention that a building permanently remains attached to the land, it is considered as a separate asset, can be owned and encumbered separately from the plot. The first provision is less favorable: wind turbines, solar panels etc. are not permanently attached to the plot but for a longer period of time, which could be considered as relatively permanent connection with a consequence that the building is considered as part of a plot of land according to the Art. 9 par. 1 PL CRO. This inconsequence has caused a discussion in the doctrine. The discussion was about the telecommunication lines, but the legal issues that arise related to all mentioned buildings and equipment are the same.⁶²

The main issue which arises in these countries is whether a certain building (wind turbine, solar panels, biomass power plants, geothermal equipment, energy transmission lines and energy grid etc.) is permanently and firmly attached to the ground? According to the legal solutions in B&H and Montenegro, it would be possible to consider the wind turbines, solar turbines or another equipment as separated from the plot, since they are not permanently attached to the ground. In Croatia, this is disputable due to the inconsistent provisions of the PL CRO. In Slovenia and Serbia, the answer is uncertain because of the lack of any legal regulation. Slovenian and Serbian scholars consider that the connection between land and building or some other thing should be permanent.⁶³

For a better understanding of what permanent connection can mean, an example from German case law will be given here. A wind turbine was erected by a husband on the plot of land belonging to his wife in the mid-1990s. The

61 Rašović, Zoran. P., 2009, p. 84.

62 Against the classification as the real estate Ernst, H., *Stvari elektronične komunikacijske infrastrukture* in: Gavella, N. et al., 2011, *Stvarno pravo*, Svezak 3, Zagreb, Narodne novine, p. 502. The cable grid is considered as if it were a movable. *Ibidem*, p. 510–511. The other authors put focus on „relatively permanent“ connection, which classifies this grid as part of immovable. Bajt, J., *Stvarnopravno uređenje glede infrastrukturnih objekata u Republici Hrvatskoj*, 2009, *Zbornik Pravnog fakulteta u Zagrebu*, vol. 59, (2–3) 371–419, p. 380.

63 In this sense Breden, A., in: Breden, A., et al., 2002, p. 18. For Serbia see Kovačević Kuštrinić, R., Lazić, M., 2006, p. 30.

husband had leased the area on which the turbine was located, together with the access road, from his wife. The assumption of the husband was that the wind turbine would only have a limited useful life, which he had estimated at around 20 years; after this period, the turbine would have had to be dismantled. He sold the wind turbine in 2006 to the third person. By the contract dated the same day, the buyer of the turbine leased from land owner the part of the land on which the turbine was located. Later, the plot of land was sold, and new owner believed that the wind turbine is an essential part of it. He sought that the court declares his ownership of the wind turbine. The German Federal court (*Bundesgerichtshof*) has decided in this case in appeal procedure against the Decision of the Higher Regional Court (*Oberlandesgericht*) Oldenburg.⁶⁴ The court argues on the basis of § 95 (1) sentence 2 BGB (German Civil Code) that a connection only for a temporary purpose within the meaning of Section 95 (1) sentence 1 of the BGB is not excluded even when the turbine is to remain on the plot for its entire (economic) life. According to the court of appeal, the plaintiff is not the owner of the wind turbine because it is not an integral part of the property sold to the plaintiff, but a non-essential component of the ground. At the time of the erection of the wind turbine, the intention was to connect it to the ground only for a temporary purpose. Despite the application of *superficies solo cedit* principle, the German court found as decisive that the connection between the equipment and the ground is temporary. According to the established case law of the German Federal Court, a connection is made for a temporary purpose if its subsequent removal is intended from the outset. Whether the connection is permanent or temporary shall be decided by the will of the parties. However, it must be possible to reconcile this with the facts appearing externally.⁶⁵

German scholars share this point of view, and they consider that the turbine and similar equipment have a status of a special legal asset, which does not belong to the owner of the plot of land, and which can be pledged independently; the security right over the real estate does not extend to this equipment.⁶⁶

This position of the German Federal Court can be pathbreaking for the countries in the region; the solution of the Montenegrin and Bosnian and Herzegovinian law can be interpreted in line with this decision and Slovenian and Serbian scholars endorse it as well. Here it would be essential how to determine the inner will of the person who attaches certain building/equipment to the ground.

64 Urt. v. 7.4.2017 – V ZR 52/16. <https://lexetius.com/2017,1146> (20.05.2021).

65 In this verdict several other verdicts are listed where the court had the same argumentations. See BGH, judgment of July 4, 1984 – VIII ZR 270/83, BGHZ 92, 70, 73; Senate, judgment of May 20, 1988 – V ZR 269/86, BGHZ 104, 298, 301; judgment of November 26, 1999 – V ZR 302/98, NJW 2000, 1031, 1032; judgment of September 23, 2016 – V ZR 110/15, juris para. 16). In these verdicts, the court considered that if a tenant, lessee or other person entitled under the law of obligations connects an object, in particular a building, with the land not belonging to him, there is a presumption that he is only acting in his own interest and not at the same time with the intention of letting the object fall to the owner of the land after the end of the contractual relationship, i.e. that the connection has only been established temporarily – for the duration of the contractual relationship.

66 See for example Baur/Stürner, 2009, no. 3.15, p. 16.

However, it must be possible to reconcile this with the facts appearing externally. It should be the task of the doctrine and courts to define these criteria.

4.3. COMPONENTS OF THE IMMOVABLE ASSET AND FITTINGS

The property laws in B&H and Croatia differ between essential components (constituents) and non-essential (simple) components (Art. 10 Par. 1 and 2 PL FB&H, ART. Art. 10 Par. 1 and 2 PL RS, Art. 9 Par. 1 and 2 PL BD B&H, Art. 6 Par. 1 and 2 PL CRO). The latter can be separated from the main asset without destroying it. Whereas the essential component cannot be a subject of the independent rights unless the law provides otherwise, the simple components can be the subjects of separate rights, which do not extend to the main asset.⁶⁷ However, there is an essential difference between regulation in B&H and Croatia. In the entities of B&H (Federation B&H and Republic Srpska), if the rights on simple components are entered in a public register, they continue to exist even if a third party acquires the immovable asset; the entry in the register destroys the *bona fides* of the third party (Art. 10 Par. 3 and 4 PL FB&H, Art. 10 Par. 3 and 4 PL RS). These provisions of the property law take into consideration the solution of the Framework Law on Pledges in B&H⁶⁸ which enables that the simple components of an asset be separately encumbered, that these security rights be registered in an electronic register with the effect against the third party.⁶⁹ The entities' property laws provide for a non-rebuttable presumption that the third person is aware of a registered security right. In Brčko District B&H the legal solutions slightly differ. Also, here a simple component can be a separate subject of the right *in rem*, but these rights expire when a *bona fide* third party acquires the whole asset (Art. 9 par. 2 and 3 PL BDB&H). There is any non-rebuttable presumption here, as in the entities, according to which good faith is excluded if the right was registered in a public register, but since the Law on Registered Pledges in B&H applies also in District the provisions of the PL BDB&H should be interpreted on the same way as the entities' property laws.

These provisions could be a valuable solution, especially for purposes of financing of planned entrepreneurial activities. The building/equipment/devices could be leased, purchased under retention of title or purchased with the granted credit. All these creditors could have appropriate security by registering their leasing rights, (retained) ownership or pledge right into an electronic pledge register.⁷⁰

The PL CRO prescribes that the same rights can exist on the simple components as on the whole asset unless the third person has certain separate rights on a simple component. The one who claims that such a right exists, has to prove it (Art. 6 Par. 1 and 2 PL CRO). Different than the legal solutions in B&H, there

67 See Gavella, N., in: Gavella, N. et al., 2007a, p. 74.

68 Framework Law on Pledges in B&H [*Okvirni zakon o zalozima u BiH*], Official Gazette of B&H [*Službeni glasnik BiH*] no. 54/04.

69 For more about effects of the registered security rights against third parties in Southeastern European countries see Povlakić, M., 2018, Aufbau und Funktion der Register für Mobiliarsicherheiten in Südosteuropa, *Evropski pravnik / European Lawyer Journal*, no. 1, 29–76, p. 62–69.

70 The possibility to register all these security rights exists in B&H and Montenegro. *Ibidem*, p. 45.

is no legal presumption of the existence of such a right if this right is registered. The priority has been given to the third *bona fidae* person; the entry into the register does not destroy automatically *bona fidae* of the third persons.⁷¹ The *bona fidae* is presumed and the right on the simple component can easily expire. This solution is not suitable to separate ground and simple components and to offer effective security to the creditor.

Relating to the components of the (immovable) asset, the Montenegrin law regulates only the situation regarding the simple components. They can be subjects of the separate rights *in rem*. These rights continue to exist even after the transfer of ownership of the whole asset. Only if this component was the ownership of the transferor, it could be transferred to the third person (Art 16 Par. 2). And the contrary, if the simple component was the ownership of another person, it will not be acquired by the successor. The law does not explicitly prescribe that acquirer should be *bona fidae*, but Art 16 Par. 3 excludes an application of the previous provision if the conditions for the acquirement of the property from non-owner and usucapio are fulfilled; the main precondition for these acquirement grounds is *bona fidae*.

The PL SLO does not differ between an essential and non-essential component of the asset.⁷² A part of the immovable asset cannot be a subject of the independent rights *in rem* until separation (Art. 16 Par. 1 PL SLO). Unlike in B&H, it would not be possible to register separate rights on the component of an immovable. Non-possessory security rights over movable are regulated in Art. 170 – 177a. In 2020 these provisions were amended significantly, more precisely Art. 171, 173, 177, and new Article 177a was added. Art. 173 provides for non-possessory security rights over movables, with the possibility to register these rights in a special register, if items have identification numbers. The equipment also can be a subject of the security right, under the condition that is localized (Art. 173 Par. 1 PL SLO). No provision regulates the situation when an encumbered item or equipment becomes a part of the ground. If the pledge right, registered in the special register can continue to exist after accession, it could be a valuable solution for the financing of the operation connected to the production of renewable energies. The new formulated Art. 177 and newly added Art. 177a provide for the protection of the holder of the security right – the register is publicly accessed, and no one can be *bona fidae* regarding the registered data. The amended provisions regarding the non-possessory security rights over movables applied from July 2020, so there is no relevant experience with the application of this institute. However, the provisions on effects against the third parties could be very suitable to secure the loan for operating wind turbines, solar panels, etc.

As stated above the fittings and the possibility that fitting can be the subject of separate rights are not relevant for this paper. However, regulating the fittings, the entities' property laws contain special rules on machines/equipment/devices. If a pledge right is registered on machines/equipment/devices, this registered pledge continues to encumber these assets even after they accede to the

71 Gavella N., in: Gavella, N., et al., 2007a, p. 74.

72 Rijavec, Vesna et al., 2006, p. 122.; Breden, A., in: Breden, A. et al., 2002, p. 33.

immovable asset. This right continues to exist after the immovable asset is sold to the third party. The third part cannot be *bona fidae* if the security right is registered in the public register. In this context as well, the legal regimes of the ground and this machine/equipment/device diverge (Art. 14 par. 3 PL FB&H, Art. 14 par. 4 PL RS).

PL CRO also contains the exception regarding the machines or similar devices. Even when they are a part of the real estate, they will not be considered as such, but as an independent asset, if the owner of the real asset allows to register a remark in the land register, with the content that these items belong to another person (Art. 9 Par. 5 PL CRO). This remark is valid for five years.

The PL MN contains similar rules as in B&H. Even if a movable asset (machine or similar device) meets all requirements to be classified as a fitting, due to its specific relation to the immovable, it will not be considered as such, if the third person has a right to this movable, which is registered in a public register e.g. a security right (Art. 18 par. 6 PL MN).⁷³

This short comparative review has shown that those legal systems, which provide for the possibility that the simple components of immovable or machines/equipment/devices can be subjects of the separate right *in rem*, which can be registered and have effects against third parties, are better equipped to deal with the challenges posed by renewable energies before the civil law. These solutions enable effective financing of entrepreneurial activities in the field of renewable energies.

4.4. BUILDING RIGHT

The building right represents a further possibility to separate proprietary relationship over the building of various kinds and equipment, on one hand, and ground, on the other hand. The reform of the property law in B&H, Croatia, and Slovenia has introduced the (hereditary) building right as a new right *in rem*, which was until then unknown in these countries. The owner of the plot can burden it with the building right, which entitled its holder to construct a building above or below ground owned by another person but to be the owner of the constructed building.

In mentioned legal orders there are not any restrictions regarding kind of building, which can be erected by virtue of the building right. This should be seen as a chance since without strict limitations, these provisions could be flexibly applied and interpreted, which would mean that it is possible to establish the building right for the purposes of construction of various kinds of buildings, equipment, different devices, electric energy transmission lines, electric grid, etc. above or below ground.

The building right (*Erbbaurecht*, *pravo građenja*) can be one among the answers for the problem analyzed here. A particular moral of superficies in Roman law or the olive trees story on Croatian island Pag is the possibility of coexist-

73 Rašović, Zoran. P., 2009, pp. 75–78.

ence of two proprietary rights on one asset or more precisely of two mutually closely connected assets. The *superficies* or property right on olive trees have been seen as a separate right *in rem*, whereas the plot is owned by another person. Some scholars consider the Roman *superficies* as fragmentation of the ownership, “awarding the right-holder of the right *dominium utile* and the owner of the land *dominium directum*”.⁷⁴ This thesis has contradicted the conception of the coexistence of two separate property rights. Two separate property rights can exist on two separate legal assets.

In B&H and Croatia it is explicitly provided for the double nature of the hereditary building right.⁷⁵ It is a limited right *in rem* (*ius in re aliena*), but at the same time, it is (virtual) real estate. The way of registration in the land register reflects the double nature of this right. Again, there are two separate rights *in rem* – (encumbered) ownership on the plot of land and ownership of a virtual real estate (the right itself).⁷⁶ This right can be transferred, encumbered, and inherited and a building erected on it is a part of this right, which is legally defined as immovable. The *superficies solo cedit* principle is not abandoned – the building is part of the immovable, but in this case, the immovable is not a plot but a right to build / *superficies*.⁷⁷ The holder of the building right is the owner of the buildings/equipment etc. It can encumber the building right to secure the loan, which could be needed for its enterprise.

In Slovenia, the building right is very scarcely regulated (Art. 256 – 265 PL SLO) and there is no explicit provision that equalizes this right with the ground, but the scholars share this opinion upon which the building right has a double nature.⁷⁸ In addition, Art. 256 Par. 3 PL SLO prescribes that the rules regulating the transfer of the ownership on land accordingly apply to the transfer of the building right.

This concept of the building right is represented also in Germany⁷⁹, Austria⁸⁰. Another example is Italian law, where the building is separated from the land and the building itself is considered as independent real estate.⁸¹

74 Erp, S. van, Akkermans, B., 2012, p. 281.

75 Art. 298 Par. 2 PL FB&H, Art. 286 Par. 2 PL RS, Art. 74 Par. 2 PL BD B&H, Art. 280 Par. 2 PL CRO. More about the double nature of the building right Simonetti, P., 2013, p. 20; Gavella, N., in: N. Gavella et al., 2007b, *Stvarno pravo*, Svezak 2, Zagreb, Narodne novine, p. 80–81; Povlakić, M., 2013, p. 399.

76 It is fiction that a right represents an immovable asset. Juhart, M., in: Breden et al., 2002, p. 212.

77 For more see, Simonetti, P., 2013, p. 8, 12. In this sense also Polakić, M., 2009, *Transformacija stvarnog prava*, Sarajevo, Pravni fakultet Sarajevo, p. 108; Medić, D., 2019, *Stvarno pravo Republike Srpske*, 4. izmijenjeno i dopunjeno izdanje, Banja Luka: Panevropski univerzitet Apeiron, Banja Luka, Fakultet pravnih nauka, p. 578.

78 Juhart, M., in: Breden, a., et al., 2002, p. 220.

79 § 11 Par. 1 of the German Regulation on Hereditary Building Right [*Verordnung über das Erbbaurecht*] from 15. January 1919.

80 § 6 Par. 1 of the Austrian Law on Building Right [*Baurechtsgesetz*]. For more see Koziol, H., Welser, R., Kletečka A., 2014, p. 481, no. 1386.

81 Simonetti, P., 2013, p. 8.

The institute of the building right enables effective financing of the enterprises in the field of renewable energies since it can be pledged as an immovable, even before the building is constructed respectively the machines/equipment/devices are attached to the ground. The security right is then registered in the land register the creditor is properly secured, but the transaction costs could be very high (see under 5).

4.5 REAL SERVITUDES

In all these countries it will be possible to establish real servitudes which will enable the owner of an immovable asset (dominant land/tenement) to use the plots of another owner (servient land/tenement) by constructing some of the mentioned buildings/equipment. These two immovable assets should not be necessarily neighboring.

This could solve the issue researched here, but the problem arises since the real servitudes are *per definitionem* a relationship between the owner of the servient land/tenement and the owner of the dominant land/tenement, but the operator of a wind turbine, solar panel or other building/equipment/devices should not be necessary the owner of the land. For this reason, the real servitudes are dogmatically not a proper solution for this problem in these countries. The property laws in B&H, Croatia, and Slovenia provide for a possibility to establish the real servitude for a certain person not only for the owner of the dominant land (Art. 229 PL FB&H, 217 Art. PL RS, Art. 189 PL CRO, Art. 226 PL SLO). This “irregular” servitude solves the mentioned problem (the operator should not be the owner of the land), but a further problem arises since the rules governing the personal servitudes accordingly apply to the irregular servitude, especially rules governing the transfer of these irregular servitudes. It means that these servitudes are connected to a certain person and are not transferable.

PL CRO, PL FB&H, and PL RS provide for the possibility to create an easement with the content of having a part of the building on the land of another person (Art. 196 Par. 1 and 2 PL CRO, Art. 231 Par. 3, no. 1 PL FB&H, Art. 219 Par. 3, lit. a) PL RS.). At the first glance, it looks like an immediate vicinity is required, but on closer inspection, it could be concluded that the law does not explicitly require it. If so, this kind of real servitude could be used for the operation in the field of renewable energies. In Croatia, the cable infrastructure and transmission lines are explicitly mentioned in this context (Art. 196 Abs. 2 PL CRO). There is no obstacle to applying this provision to all kinds of equipment and devices mentioned here. However, this solution faces another problem – if the buildings/equipment/devices located on several parcels belonging to different owners (a problem appears especially when it comes to the transmission cable and lines which erect over a huge number of parcels of the plot) it would be necessary to negotiate with several persons, conclude several (notarized) contracts and to register the real servitude in several land registers, which increase the transaction costs.

5. CONCLUSION

This short overview on the offered legal solutions in the region has demonstrated that first, there is no explicit legal solution for the relatively new challenges these countries are facing regarding renewable energies, and second, that some existent institutes of the civil law could be used to regulate proprietary relationships between the owner of plot and owner of the building and equipment/machines/devices for the production of the renewable energies and its transmission, as well as effective financing of them.

Between different solutions, two stand out in particular. It looks like the same result could be achieved if a) considered equipment as a simple component of the plot, or as a movable (machines/equipment/devices), which could be encumbered with the non-possessory registered right or b) by establishing the building right. Both legal constructs enable the separation of the ground and buildings of various kinds/equipment, but there are, although, significant differences between them. In the first solution, the legal transaction is less expensive and (at least in B&H) non-possessory registered pledge is more flexible, less expensive (in B&H this process is fully digitalized), does not require the involving of the notary (different in Croatia and Slovenia) and can be performed in a short time. In the register, only security right is registered (retention of title, leasing, non-possessory pledge) and not the ownership on installations/equipment. But this fact is sufficient in B&H, Montenegro, and Slovenia to exclude a *bona fidae* acquirement of the land together with the equipment/machines/devices. The situation is different in Croatia. As presented under 4.4. the purchaser of land is protected stronger than the pledgee, who bears the burden of proof that the purchaser knew or should have known that the installation/equipment is charged with the security right.

This problem does not occur when the building right is established. The operator is a holder of the building right, the buildings/equipment is a component of the building right. This right is registered in the land register, as well as the mortgage. Therefore, the property on buildings/machines/equipment is clearly determined, the pledge right is registered. This solution offers more security for the operator and its creditor. However, this transaction is more expensive. If only the buildings/machines/equipment is registered in the electronic registry of the security right, this operation is negotiated between the operator and its creditor. In B&H whole process is accomplished through the creditor itself, in Slovenia and Croatia the notary must be included. But even here, it is only one transaction that should be notarized. By establishing the building right, it should be negotiated with all owners of the parcels of land where the building, equipment, transmission lines are positioned, each contract should be notarized. In addition, the pledge right contract should be notarized as well, and the mortgage should be registered in the land register separately for each parcel. There is no doubt that this is a more costly intensive solution.

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IV PANEL:
POST-YUGOSLAVIAN CHALLENGES
IN PROPERTY LAW
.....

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PROPERTY OF FROZEN ASSETS IN EX-YUGOSLAV BANKS IN THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

Abstract: *The Federal Government of the former Yugoslavia introduced restrictions as regards the disposal of bank assets by the banks' clients. Such measures were taken to face the challenge of the economic crisis that occurred towards the breakup of Yugoslavia. "Frozen assets" was an informal designation of the bank assets of individuals hit by the restrictions. The problem of frozen bank assets was inherited by the successor states of Yugoslavia. They legislated on the issue, mostly preserving the restrictions, by enacting similar statutes, which, however, were not identical.*

The European Court of Human Rights dealt with the issue of frozen bank accounts i.e. assets in successor states of the former Yugoslavia by giving rulings in two types of cases. In one of them, the applicants were nationals of the successor states, while in the other they were non-nationals i.e. foreigners.

With regard to the first type of cases, the ECtHR sustained the restrictions on the enjoyment of property, finding no violation of human rights. In contrast, in the second group of cases, the Court found violations. The authors' final remark is that the case-law of the Court, considered as a whole, is to some extent inconsistent on the issue. They nevertheless refrained from criticism, because their primordial task was to display the case-law of the ECtHR.

Keywords: human rights, property, frozen assets, bank accounts, peaceful enjoyment, ex-Yugoslavia, case-law.

1. INTRODUCTION

Protection of property was introduced into the field of human rights in Europe in 1952 by the First Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms.¹ While discussing the draft of the First Protocol in the then Consultative Assembly of the Council of Europe,

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1 Hereinafter they will be referred to as First Protocol and Convention.

a British MP, Lord Layton, stated it was the first plunge into the water, adding that, “if we find we can swim at all, we can gradually go for longer and longer distances and achieve more complete results.”² The British MP wanted to stress the fact that it was the beginning of property protection at the international level. At the level of national law it had already been efficient for centuries, marking the modern civilization, based on the free market and private initiative.

The protection of property at the international level, as carried out in the Convention system has made significant steps. The Europeans proved that Lord Layton’s prediction was right. They managed to swim long distances and indeed achieved remarkable results as regards protection of property. However, in the course of time complex developments in economic and social spheres brought new issues and questions to the agenda. The protection of property has had some troublesome challenges. It suffices to mention the austerity measures, adopted in many European countries at the beginning of this century. They were aimed at reducing government budget deficits, by introducing spending cuts and tax increases. As such, these measures affected the property of individuals and were challenged both at the national and international levels.

The austerity measures were widely spread in Europe and applied in many countries. However, some similar measures affecting the free enjoyment of possessions had been introduced in some countries even before the economic crisis of the first decade of the 21st century. An example of those were the measures taken by the government of the former Yugoslavia. These measures created a problem that was inherited by the successor states of the former country which emerged following its dismantling. Following the ratification of the Convention by the successor states, applications were filed against these countries with the European Court of Human Rights.³ The initial government move consisted in blocking bank assets of individuals, who were not able to use their deposits because of the government’s measure. The measure was given the name of *freezing* the bank accounts. The deponents could not recover their deposits from the banks, which were considered to be *frozen* in the banks, despite the fact that the Federal Government of Yugoslavia was the guarantor of deposits.⁴ Therefore, the whole class of cases that are of interest for this paper fall within the scope of the so-called banking cases in the Court’s case-law regarding Article 1 First Protocol.⁵ Two classes of cases can be identified in which successor states of ex-Yugoslavia were respondents before the Court. One of them concerns the frozen assets of the nationals of successor states and the other dealt with the frozen assets of foreigners. Notably, the foreigners concerned were for the most part former citizens of ex-Yugoslavia.

2 Cf. Popović, D., 2009, *Protecting Property in European Human Rights Law*, Eleven International Publishing, p. 1

3 Hereinafter referred to as Court.

4 Komnenić, D., 2018, *Pravo na mirno uživanje imovine i Evropski sud za ljudska prava*, Službeni glasnik, p. 103.

5 On banking cases in general cf. Council of Europe (ed.), 2017, *Guide on Article 1 of Protocol No. 1 – Right to Property*, pp. 39–41; Popović, D., 2009, pp. 113–122.

2. FROZEN ASSETS OF NATIONALS

The foreign currency accounts of individuals in ex-Yugoslav banks were declared by the Federal Government of the country to be frozen or blocked in the sense that the individuals could no longer use them and had to wait for further legislation on the subject.⁶ The successor states of Yugoslavia inherited the problem, mostly maintaining the “frozen” character of the bank accounts, but they also introduced legislation of their own to cope with it. The laws of successor states were similar, albeit not identical. The essential trait was that the use of property consisting of bank assets was hampered. An individual possessing money deposited in hard currency in a bank remained the owner of the money but could not withdraw it from the bank. The laws of successor states allowed the deponents to dispose of their assets only in certain situations, provided for by the respective legislation of those states.

The leading case was *Trajkovski v. the Former Yugoslav Republic of Macedonia*.⁷ The applicant was a national of Macedonia. The country’s official name today is the Republic of North Macedonia; in the time when the application was filed with the Court it was officially referred to as the Former Yugoslav Republic of Macedonia. The applicant complained under Article 1 of the First Protocol, alleging that there was interference with the peaceful enjoyment of his possessions. He based his claim on the restrictions previously imposed by the Yugoslav legislation, that were substantially maintained in the new domestic legislation of the respondent state.

The new Macedonian legislation, which replaced the former Yugoslav, was adopted in April 2000. It provided for government bonds, which were to be handed over to the owners of hard currency accounts affected by the freezing measures. The government bonds were aimed to enable the owners deprived of the possibility to recover their assets from the banks to do so by way of annual instalments. The Government was to start paying off the assets transferred into bonds in annual instalments as of 2002. Meanwhile, the owners of the government bonds were nevertheless entitled to use them as means of payment for certain purposes enumerated in the law. Among these were purchasing of negotiable instruments, and shares in companies that were in the process of privatisation, as well as purchasing government-owned apartments, agricultural land and/or construction sites. On the grounds of such provisions in the national legislation, the respondent government claimed that the case fell within the second phrase of Article 1 First Protocol. In other words, the respondent government’s thesis was that the domestic legislation introduced modes of regulation of the use of property.⁸

6 On the functioning of the whole mechanism in the former Yugoslavia and the initial bank account freezing measures cf. Komnenić, D., 2018, pp. 104–107.

7 ECtHR, *Trajkovski v. the Former Yugoslav Republic of Macedonia*, no. 53320/99 (2002). On the case cf. Komnenić, D., 2018, pp. 107–111; Popović, D., 2009, pp. 118–119.

8 D. Komnenić, 109–110.

The Court declared the application inadmissible. The core of the Court's reasoning consisted in the assessments of the effects of the respondent state's legislation of the year 2000. The Court observed in this respect that the domestic legislation provided sufficient possibilities to the holders of the frozen bank accounts to make use of their money. In the Court's view, a fair balance between public and private interests had been struck by the domestic legislation.

The Court's case-law was not settled after the decision rendered in *Trajkovski*. In another case concerning frozen bank accounts in which the respondent state was a successor state of the former Yugoslavia, the Court declared the application admissible. It was three years after the decision on inadmissibility in *Trajkovski*, and the new application was lodged against Bosnia and Herzegovina.⁹ The lady applicant in *Jeličić v. Bosnia and Herzegovina* had a domestic judgment rendered in her favour, by which the domestic court ordered the bank to recover the amount of the deposit to the applicant, who was the account holder. The domestic judgment had become final, but remained unenforced. Therefore, the applicant complained both under Article 6 of the Convention and Article 1 First Protocol. As to the latter complaint the applicant based her claim on the interference with her property caused by the legislation of Republika Srpska, one of the entities of Bosnia and Herzegovina, which was competent to legislate on the issue. The Court ruled in favour of the applicant on both counts.

As regards the complaint under Article 6 of the Convention, the Court ruled that because of the non-execution of a final judgment given at the domestic level of jurisdiction, the essence of the right to access to court was impaired, which constituted a breach of Article 6.¹⁰

The Court's conclusion on the complaint under Article 6 of the Convention served as pretext for the ruling on Article 1 First Protocol. In a rather short reasoning, the Court's crucial stance was that "*the impossibility of obtaining the execution of a final judgment in an applicant's favour constitutes an interference with his or her right to the peaceful enjoyment of possessions*".¹¹ In the paragraph to follow, the Court referred to the reasons stated in respect of its ruling on the complaint under Article 6 of the Convention. That was what led the Court to find a violation of Article 1 First Protocol in this case. The Chamber was unanimous.

The decision in *Trajkovski* and the judgment in *Jeličić* had much in common. Both cases were based on sets of facts originating in the legal heritage of ex-Yugoslavia with regard to frozen bank accounts. In both cases, the successor states basically maintained the legal regime of frozen assets. The scarcity of reasoning on the ruling on Article 1 First Protocol in *Jeličić* does not allow extensive comments. However, there was a circumstance which provided a difference that could be considered decisive for distinguishing the two cases. It consisted in the

9 ECtHR, *Jeličić v. Bosnia and Herzegovina*, no. 41183/02, final decision as to the admissibility of 15 November 2005 and final judgment of 31 October 2006. On the case cf. Komnenić, D., 2018, pp. 111–115; Popović, D., 2009, pp. 119–120.

10 *Jeličić*, para. 46.

11 *Jeličić*, para. 48.

fact that in *Jeličić* there was a final judgment given at the domestic level of jurisdiction, which remained unexecuted.

The evolution of the Court's case law continued. In a case against Serbia, the Court had to decide in essence whether to follow the ruling in *Jeličić* or the inadmissibility decision given in *Trajkovski*. The case was *Molnar Gabor v. Serbia*.¹² The applicant had a domestic judgment rendered in his favour, ordering the respondent bank to recover the whole amount he had deposited with the bank. The judgment became final, but remained unexecuted. The applicant complained before the Court under Article 6 of the Convention and Article 1 First Protocol. The Court declared the application admissible.

Considering the merits of the case, the Court made reference to *Trajkovski*, stating that it was to “respect the legislature’s judgment as to what is in the general interest unless that judgment is manifestly without reasonable foundation”.¹³ In the paragraphs to follow, the Court found that the applicant had not had “an enforceable legal title”, because the domestic legislation of the respondent state “barred the enforcement” of the final judgment given in the applicant’s favour.¹⁴ Notably, the Serbian legislation on the subject was quite similar and in essence identical to the legislation of the respondent states in *Trajkovski* and *Jeličić* cases. The Court found no violation of either Article 6 of the Convention, or of Article 1 First Protocol, but the Chamber was not unanimous. On both counts the Court’s judgment was rendered by a majority of 4 to 3.

In their joint dissenting opinion judges Tulkens, Popović and Karakas referred to the ruling in *Jeličić* so as to disagree with the majority on both counts. In their view, the right of access to court was impaired, as well as the right to peaceful enjoyment of possessions. The dissenting judges put in clear cut terms that they considered the ruling in *Jeličić* “to be binding in this case as a leading precedent”.¹⁵ One of the authors of this paper was on the bench in this case, the fact which makes his comments reiterate the reasoning of the dissenting opinion. The other author, commenting on the case, first distinguished it from *Trajkovski*.¹⁶ In the second step of her analysis, however, D. Komnenić confronted the cases of *Trajkovski* and *Molnar Gabor* on the one side, to the *Jeličić* case on the other.¹⁷ The confrontation led to the conclusion that the proportionality issue spoke in favour of distinguishing *Jeličić* from the other two cases. In the author’s view, the scope of interference was at stake and it was larger in *Jeličić* than in the other cases, because of the amount deposited with the bank. The authors maintain their disagreement on this point.

The evolution of the Court’s case-law showed signs of stabilisation after the ruling in *Molnar Gabor*. Thus for instance, the Court referred to that

12 ECtHR, *Molnar Gabor v. Serbia*, no. 22762/05, Judgement of 8 December 2009. On the case cf. Komnenić, D., 2018, pp. 115–120.

13 *Molnar Gabor*, para. 47.

14 *Molnar Gabor*, paras. 48 and 49.

15 *Molnar Gabor*, dissenting opinion of judges Tulkens, Popović and Karakas.

16 Komnenić, D., 2018, pp. 118–119.

17 *Ibid.*, p. 119.

judgment in a case against Serbia in which the issue was whether the interference with the deposits in a pyramidal bank constituted a breach of Article 1 First Protocol. The case was *Ribić v. Serbia*.¹⁸ The applicant complained of the non-enforcement of three domestic judgments given in his favour, concerning deposits on frozen bank accounts in a pyramidal bank. The respondent government invoked the rule in *Trajkovski*. The Court, deciding on admissibility and sitting in a panel of three, judge Popović on the bench, declared the application inadmissible. In the reasoning, the Court distinguished the case from *Molnar Gabor* on the grounds that the respondent government had accepted to recover only the deposits on frozen accounts in non-pyramidal banks. However, the Court stated that its conclusions in *Molnar Gabor* were “*mutatis mutandis equally applicable in the present case*”. The ruling in *Molnar Gabor* appeared to be the landmark.

In another case against Bosnia and Herzegovina, the Court used the pilot judgement procedure in coping with the issue of frozen bank accounts. The case was *Suljagić v. Bosnia and Herzegovina*, and the applicant was a national of the respondent state.¹⁹ The applicant complained of the fact that he had been unable to freely dispose of his foreign currency savings because of the restricting measures leading to the freezing of his bank account. His savings were deposited with a bank that had its head office in Bosnia and Herzegovina. The applicant’s savings were transformed into government bonds entitling him to partial annual payments, but the issuance of the bonds was irregular, so the applicant could not use his money. The Court ruled in favour of the applicant, applying the third rule of Article 1 First Protocol, and finding a violation of that provision.²⁰

The Court observed in the judgment that many similar cases were pending. There were some 1,350 applications pending, filed by 13,500 applicants.²¹ That is why the Court implemented the pilot judgment procedure under Article 46 of the Convention, however, without indicating a specific measure of redress. The Court nevertheless adjourned for six months the proceedings in similar cases against Bosnia and Herzegovina.²² In the operative part of the judgment, the Court unanimously ordered the respondent state to ensure that the government bonds are issued, and the instalments effectuated – together with the default interest at the statutory rate in the event of late payment. The *Suljagić* case introduced the pilot judgment procedure into the class of cases concerning frozen bank accounts in which the applicant was a national of the respondent state. The Court also used that procedure to deal with the cases in which the applicants were foreigners.

18 ECtHR, *Ribić v. Serbia*, no. 16735/02, admissibility decision of 14 December 2010.

19 ECtHR, *Suljagić v. Bosnia and Herzegovina*, no. 27912/02, Judgement of 3 November 2009. On the case cf. Komnenić, D., 2018, pp. 122–126; see also Leach, Ph., Hardman, H., Stephenson, S., Blitz, B. K., 2010, *Responding to Systemic Human Rights Violations*, Intersentia, pp. 21–22.

20 *Suljagić*, para. 38.

21 *Suljagić*, para. 63.

22 *Suljagić*, paras. 64 and 65.

3. FROZEN ASSETS OF FOREIGNERS

As mentioned above, the “foreigners” in the class of cases concerning frozen bank accounts were for the most part citizens of the former Yugoslavia who filed applications against the successor states of the former country different from the one of which they were nationals. Since the most influential banks had their seats and head offices in Slovenia and Serbia, these two countries were mostly targeted by applicants. The case which was in a certain sense the forerunner of the whole line of cases in the Court’s case-law was one against Slovenia.

However, the leading case, in which the Court finally entrenched the issue, was the one in which the applicants filed complaints against all successor states of ex-Yugoslavia, except Montenegro. The exception of Montenegro was due to the fact that after the dismantling of the short-lived State Union of Serbia and Montenegro in 2006, it was Serbia that became liable for the obligations of the previous State Union under international law. Serbia thus became a successor state of the former Yugoslavia instead of the former State Union of Serbia and Montenegro.

The forerunner in this class of cases was *Kovačić and Others v. Slovenia*.²³ The facts of the case were the following: the applicants were Croatian nationals who had deposited foreign currency savings with the Ljubljana Bank, which had its head office in Ljubljana, the capital of Slovenia. It was one of the strongest banks of the former Yugoslavia, which conducted business all over the country. The applicants’ foreign currency savings had been deposited in Ljubljana Bank branches in Croatia. The applicants complained of interference with the peaceful enjoyment of their possessions, because they could not recover their deposits. The Court’s Grand Chamber struck the case out of the list because the applicants had managed to achieve satisfaction for their claims at the domestic level in Croatia, by seizing assets of the Ljubljana Bank. Although the Court observed in paragraph 256 of the judgment in *Kovačić* that there were several thousands of similar cases pending against successor states of ex-Yugoslavia, the judgment in this case could not serve as a landmark. It was struck out of the list of cases due to specific circumstances, the main of which consisted in the fact that the applicants had achieved compensation at the national level.

The Court gave a landmark ruling in the case of *Ališić and Others*, with the judgment given in 2014.²⁴ The applicants were three citizens of Bosnia and Herzegovina who complained that they could not withdraw their foreign currency savings from two different banks. These were Ljubljanska banka – Sarajevo branch office, and Investbanka – Tuzla branch office. Ljubljanska banka, which was denoted as Ljubljana Bank in the *Kovačić* judgment, had its head office in Ljubljana (Slovenia) whereas Investbanka had its head office in Belgrade (Serbia).

23 ECtHR, *Kovačić and Others v. Slovenia*, nos. 44574/98, 45133/98 and 48316/99 GC, Judgment of 3 October 2008 [GC]. On the case cf. Komnenić, D., 2018, pp. 128–134.

24 ECtHR, *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia*, no. 60642/08, 16 July 2014 [GC]. On the case cf. Komnenić, D., 2018, pp. 134–147.

The applicants had, however, deposited their money in Bosnia and Herzegovina, respectively in Sarajevo and Tuzla, where the two banks had their branch offices. They invoked Articles 13 and 14 of the Convention and Article 1 First Protocol before the Court.

The Chamber judgment was given on 6 November 2012. The composition of the Chamber was such that it included sitting judges elected on the lists of all successor states of ex-Yugoslavia, except the judge from Montenegro. The Chamber found there was no violation of Article 14, but found a violation of Article 13 as well as a violation of Article 1 First Protocol. The Chamber was unanimous that Serbia violated Article 13 of the Convention and Article 1 First Protocol. By 6 votes to 1, the Chamber found the same violations committed by Slovenia. Pursuant to the requests of the Serbian and Slovenian governments, the case was referred to the Grand Chamber, which delivered its judgment on 16 July 2014. Both in the Chamber and the Grand Chamber judge Popović was on the bench.

The complexity of the case led the Court to display at large its background in paragraphs 12 to 52 of the judgment. The banking system of the former Yugoslavia was presented in outline. It was followed by the banks' handling of foreign currency deposits and redepositing scheme, as well as the last Yugoslav reforms and the circumstances existing in the respondent states.

The Court had to decide first on the issue of jurisdiction. Notably, all of the respondent governments argued that the applicants "*were not within their own jurisdiction [...] but within that of other respondent States*".²⁵ The Grand Chamber rejected the respondent governments' preliminary objections concerning jurisdiction and upheld the Chamber's stance on the issue.²⁶

One of the major points in *Ališić and Others* was the Court's principal approach to the case. It primarily encompassed two questions. The first was whether the case concerned the protection of individual human rights, or maybe fell within the area of succession of states in international law. The other issue was the one of applicable rule, in hypothesis that the case belonged to the realm of individual human rights protection. As to the first question marking the Court's approach to this case, the Grand Chamber reproduced the Chamber conclusions. The other question was rather complex.²⁷ Notably, the Chamber was of the opinion that the issue of the so-called old foreign-currency savings basically "*was a succession matter*". The Court held, however, that "*the applicants' inability to use their savings for more than twenty years, precisely because of the failure of the respondent States to settle it, had amounted to the violation*" of Article 1 First Protocol. In other words, the inactivity of the respondent states and their failure to protect individual human rights by a mutual agreement gave rise to the Court's jurisdiction. A case that should have been a state succession matter was thus transformed into a human rights case. The protection of property was at the origin of such transformation.

25 *Ališić and Others*, para. 75.

26 *Ališić and Others*, paras. 76–81.

27 *Ališić and Others*, para. 83.

The Court's conclusion was that in the exceptional circumstances of the present case it was beyond reasonable doubt that the applicants' foreign currency savings constituted possessions for the purposes of Article 1 First Protocol.²⁸ Notably, there was an issue of protection of property, and Article 1 First Protocol was applicable to the case, but the problem for the Court was to determine the rule under that article which was to apply. In dealing with this issue, the Court started from the fact that the applicants were unable to use their savings for more than twenty years. This was because they were not nationals of those successor states of the former Yugoslavia in which they had deposited their savings.

The issue of the applicable rule was thoroughly discussed in the text of the judgment in *Ališić and Others*. The Court appeared to be inclined to apply the third rule of Article 1 First Protocol. The freezing measures taken by the former Yugoslav government, as well as by those of the successor states, had the appearance of the control of the use of property. Cases concerning the freezing of bank accounts usually fall within the scope of the third rule of Article 1 First Protocol.²⁹

The Court declined that way of reasoning because of the lengthy period of twenty years throughout which the applicants were deprived of the possibility to use their deposits. At that stage the Court raised the question of the existence of a possible *de facto* deprivation of property in the sense of the second rule of Article 1 First Protocol. The Court established in that respect that the applicants' entitlements regarding their frozen bank accounts were not totally extinguished, which made the Court dismiss the second rule as well. That is why the Court has concluded that "*the alleged violation of the right of property cannot be classified as falling into a precise category*". Eventually, the Court held that the case should be examined "*in the light of the general principle laid down in the first rule*" of Article 1 First Protocol.³⁰

The Court then proceeded to the determination of the alleged violation of human rights. It followed the pattern of the three step analysis. In its first step, the Court established that the respondent states had respected the principle of lawfulness. It was not disputed by the parties. The measures on which the interference with the applicants' possessions was based were prescribed by law. Most of them originated in the legislation of the successor states. The second step of the analysis consisted of the question whether the interference with the applicants' property had a legitimate aim. The Court's answer was in the affirmative. The governments' measures aimed at freezing of foreign currency accounts were taken in the public interest, considering the difficult economic situation in the successor states of ex-Yugoslavia.³¹

At this point in its reasoning the Court came to the issue of the fair balance between public and private interests and raised the question whether such a balance was struck in this case. In response, the Court first concluded that Ljubljanska banka – Ljubljana and Investbanka – Belgrade, were liable for their branch

28 *Ališić and Others*, para. 80.

29 Cf. Council of Europe (ed.), 2017, p. 40, with reference to the Court's case-law, the decision in *Trajkovski* as one of the examples referred to.

30 *Ališić and Others*, para. 99.

31 *Ališić and Others*, paras. 103–107 (for the first and the second steps of the analysis).

offices' liabilities in Bosnia and Herzegovina.³² Having found that the two banks were liable for the accounts in foreign currency savings, deposited in their branch offices in Bosnia and Herzegovina, the Court turned to another question: could the successor states in which the banks had their head offices be liable for the alleged human rights violations in terms of the Convention? The head offices of the respective banks were in Slovenia and in Serbia. The crucial elements in the Court's analysis in this regard were the facts that the two banks were effectively controlled by the respective governments of Slovenia and Serbia. They were under the supervision of the competent government agencies of the two countries.³³

The respondent governments of Slovenia and Serbia made efforts to challenge the thesis according to which they should be held liable for the frozen property assets in this case. They invoked the territoriality principle of the rules on state succession under international law. The Court disagreed and based its judgment on the equitable proportion principle.³⁴ Last but not least, the Serbian government invoked the ruling in *Molnar Gabor*, which said that the respondent state was entitled to refuse to recover the foreign currency savings and provide only the payment of the banks' debts under such accounts by annual instalments, based on government bonds. The Court distinguished this case from *Molnar Gabor* on the grounds that the respective applicant filing the complaint against Serbia in the case at hand "did not qualify for such gradual repayment" under Serbian law.³⁵

The Court's final conclusion was that the authorities of Slovenia and Serbia failed to strike a fair balance between public and private interests, which resulted in making the applicants bear a disproportionate burden. The Court found violations of Article 1 First Protocol committed by Slovenia in respect of two applicants and by Serbia in respect of one.³⁶

The Court also ruled that Slovenia and Serbia had breached Article 13 of the Convention because the applicants were deprived of effective domestic remedies to protect their property in those two countries. At the same time the Court found no violation of Article 14 of the Convention.³⁷

One of the outstanding features of the judgment in *Ališić and Others* was the implementation of the pilot judgment procedure. The Court stated its reasons for introducing it. The violations found in this case concerned many people. At the time when the Grand Chamber judgement was given there were more than 1,850 similar applications pending with the Court, introduced on behalf of more than 8,000 applicants.³⁸ The Court noted that the governments of Slovenia

32 *Ališić and Others*, paras. 108–113.

33 Cf. *Ališić and Others*, para. 116 (for Slovenia) and para. 117 (for Serbia).

34 *Ališić and Others*, para. 121.

35 *Ališić and Others*, para. 119.

36 *Ališić and Others*, paras. 124–125.

37 *Ališić and Others*, paras. 131–136 for Article 13, and paras. 137–138 for Article 14 of the Convention.

38 *Ališić and Others*, para. 144. On pilot judgments in general cf. O'Boyle, H., & Warbrick, 2018, *Law of the European Convention on Human Rights*, Oxford University Press, pp. 149–151 (their emergence and developments); Schabas, W., 2015, *The European Convention on Human Rights – A Commentary*, Oxford University Press, pp. 640–641 (concerning the Court's case load); Popović, D., 2013, *European Human Rights Law – A Manual: An Introduction to*

and Serbia had to apply “*all necessary arrangements, including legislative amendments within one year*” in order to enable the applicants to recover their foreign currency savings under the same conditions as all other individuals. The Court also observed that the inability to use their foreign currency savings for more than twenty years caused distress and frustration to the applicants. However, the Grand Chamber did not find it necessary to indicate any general measure of redress in this respect.³⁹

4. CONCLUSIONS

The class of cases concerning frozen foreign currency accounts in banks of the former Yugoslavia can be considered a closed chapter from the standpoint of developments of the Court’s case-law. As such, it calls for reflections and comments from various aspects. It is important to underline that the class of cases discussed in this paper had a subdivision, as mentioned above. The Court treated the cases in which the applicants were nationals of the respondent states as a separate group. In the other group of cases, the applicants were non-nationals of the respondent states. Most of them, however, had been nationals of the former Yugoslavia. The Court’s case-law showed slightly different approaches in the landmark rulings given in respect of the two groups of cases.

With regard to the ruling in *Molnar Gabor*, which was the landmark judgment in the first group, two conclusions appear to be valid. The Court founded its ruling on the third rule of Article 1 First Protocol, on the one hand, and it complied with the measures taken by successor states in respect of freezing of bank accounts, on the other. The judgment in *Jeličić* appears to be an exception in this line of the Court’s case-law. In contrast, as far as the cases of non-nationals are at stake, the Court took the opposite stance. In *Ališić and Others*, which was the leading case, the Court applied the first rule of Article 1 First Protocol and at the end of the day disapproved of the measures taken by the state, at least in one single aspect. It was the duration of the impediment to use one’s property. Notably, the Court found that the restrictive measures with regard to property of frozen bank accounts created a long lasting inability on the side of the account holders to use their money. Therefore, the Court found a violation of Article 1 First Protocol in the second group of cases, and found no violation of the same provision in the first group of cases – both groups belonging to the same class of frozen assets in ex-Yugoslav banks.

In the second group of cases, the non-nationals of the respondent states who filed applications with the Court complained of being discriminated against under Article 14 of the Convention, read in conjunction with Article 1 First Protocol. Their complaints were founded on the conduct of respondent governments towards them as well as on the fact that certain provisions of domestic

the Strasbourg Court and its Jurisprudence, Eleven International Publishing, pp. 322–324 (as regards Article 1 First Protocol).

39 *Ališić and Others*, paras. 144–150; Popović, D., 2013, *European Human Rights Law – A Manual: An Introduction to the Strasbourg Court and its Jurisprudence*, p. 324 (as regards Article 1 First Protocol).

legislation applied exclusively to nationals of the respondent states concerned. The Court found no reason to rule on the issue, probably because of the fact that it had found a violation of human rights on another count. It can be argued that the Court gave preference to the protection of property over the discrimination issue. There will certainly be some dissatisfaction with this stance of the Court among human rights lawyers.

For the cases of frozen accounts in ex-Yugoslav banks the Court implemented the pilot judgment procedure, both in the class of cases in which the applicants were nationals and in those in which they were non-nationals of the respondent states. Such an approach seemed to be appropriate and justified, due to a large number of persons who were targeted by the governments' restrictive measures. It resulted in more than 1,350 applications, as observed in *Suljagić*, and more than 1,850 applications pending at the date of judgment in *Ališić and Others*. However, in both cases the Court declined to indicate any specific measure of a general character in order to cope with the problems. Although this may seem susceptible of criticism, it is basically justified. The Court ordered the respondent states that committed breaches of human rights to apply necessary arrangements, so as to repair the violations of human rights. The effect of the pilot judgment procedure was also procedural, because it enabled the Court to alleviate its heavily burdened case load.

Last but not least, there is a question of an overall assessment of this part of the Court's case-law from the standpoint of protection of property in general. Two major issues are of primordial importance in this respect. One is the efficiency of the protection of property and the other is the consistency of approach to it in the case-law. As far as the efficiency of the protection of property is concerned, it is noteworthy that it applied at the level of international jurisdiction. The Court used the pilot judgment procedure under Article 46 of the Convention, which appeared to be indispensable in the class of cases under discussion. The number of applications filed with the Court, as well as the number of persons targeted by the impugned government measures at the domestic level, clearly spoke in favour of the implementation of the pilot judgment procedure. In principle, referring cases back to the national level increased the efficiency of protection. The mechanism of enforcement of judgments is more efficient at the level of national jurisdictions than it is at the level of an international court.

One more feature is also of importance in respect of the effectiveness in human rights protection. Notably, the Court entrenched the crucial issue for the whole class of cases by adopting the approach in *Ališić and Others*: that the cases based on applications filed by non-nationals of the respondent states fell within the scope of human rights protection. The problem was thus taken out of the field of never-ending negotiations of the successor states of the former Yugoslavia, dealing with the succession of the former state. This is probably the Court's most important contribution, with regard to this class of cases, to the development and enlarging the scope of human rights protection in general.

Eventually, there is a question of consistency in the Court's approach to the whole class of cases concerning frozen bank accounts in the successor states of the former Yugoslavia. As indicated above, the Court approved the restrictions

and the freezing measures in one group of cases, while disapproving them, at least in one aspect and for a specific reason, in the other. Can the Court's case-law be reproached of inconsistency? Or perhaps, we should agree with Oliver Wendell Holmes and what he wrote in the 1880s, which appears to be still valid in our time: "*The law is always approaching, and never reaching, consistency.*"⁴⁰ It is more important to learn what the case-law is, than try to criticise it.

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40 Holmes, O. W., 2010, *Common Law*, London 1882, as quoted by Orth, J. V., 2010, *Reappraisals in the Law of Property*, Surrey (UK) – Burlington VT (USA), 2010, p. 136; Popović, D., 2011, *The Emergence of the European Human Rights Law: an Essay on Judicial Creativity*, Eleven International Publishing, pp. 111–120.

Duško Čelić*

CHALLENGES OF REGULATING IMMOVABLE PROPERTY RIGHTS IN KOSOVO AND METOHİJA

Abstract: *Following the cessation of Nato's unlawful aggression against the Federal Republic of Yugoslavia, and on the basis of the United Nations Security Council Resolution no. 1244 of 10 June 1999, the United Nations Interim Administration (UNMIK) was established on the territory of the Autonomous Province of Kosovo and Metohija. Acting contrary to the letter and spirit of UNSCR no. 1244, UNMIK did not respect the existing legal order in Kosovo and Metohija, both generally and in the area of property rights in Kosovo and Metohija, but instead established, by a series of quasi-legal interventions ("regulations"), a legal order independent from the rest of the Federal Republic of Yugoslavia, or the Republic of Serbia. By Regulation "On the law applicable in Kosovo", established on December 12, 1999 and implemented on June 10, 1999, UNMIK proclaimed that in Kosovo and Metohija "the law in force in Kosovo on March 22, 1989" would be applied!? In the area of property relations, this quasi-legislative policy of UNMIK has resulted in the transformation of already existing particular, subregulated, unsystematized and non-codified law in the field of property relations in the territory of the Republic of Serbia (and thus in the Autonomous Province of Kosovo and Metohija) into "legal chaos" of mutually inconsistent and contradictory legal rules, contained in an even greater number of sources than was the case until June 10, 1999. In particular, the paper analyzes quasi-legislative activities in regulating immovable property rights by the de facto authorities following the unilateral declaration of independence of "Kosovo" on February 17, 2008, and looks at the possible consequences of such decisions on the survival and protection of these rights, especially the rights of persons that were forcibly displaced from Kosovo and Metohija after 10 June 1999.*

Keywords: United Nations Interim Administration in Kosovo and Metohija (UNMIK)
– immovable property rights – UNMIK's quasi-legislative policy – retroactive interruption of continuity with the legal system of Yugoslavia/Serbia
– "laws" issued by de facto authorities

I INTRODUCTION

In the territory of Kosovo and Metohija, due to the concurrence of numerous circumstances of legal and non-legal nature, there are numerous problems, both in the exercise and in the regulation of human rights in general, and in the realization of property rights on real estate. Numerous historical discontinu-

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ities and social instability, which is generally not an ally of the rule of law and the systematic regulation of property rights, have contributed to this. Pursuant to United Nations Security Council Resolution no. 1244 of 10 June 1999¹, the United Nations Interim Administration (UNMIK) was established on the territory of the Autonomous Province of Kosovo and Metohija, and these problems were further complicated.

The problems are so numerous and complex that it is very difficult to enumerate and systematize them in a paper of such limited scope and character as this one. Therefore, we will try to locate some of those that we consider the most important in this matter, leaving aside, on this occasion, issues related to the status of Kosovo and Metohija.

First, there is the question of valid law in the general legal order on the territory of Kosovo and Metohija. UNMIK decisions and their quasi-legal regulations have introduced general retroactivity in this territory with regard to the applicable law in general, as well as with regard to the applicable law in the field of property rights. In this paper, we will point out the possible motives for such decisions of UNMIK, the lack of justification for such actions of UNMIK, as well as the consequences related to property rights on real estate.

Another significant problem is reflected in the quasi-legislative activity of the de facto authorities in Kosovo and Metohija after February 17, 2008, which substantially interferes with the legislation in this area. First, it should be said that the de facto authorities in Kosovo and Metohija codified property law, with the adoption of the Law on Property and Other Real Rights in 2009, although basic social conditions for codification such as the stability of social rights, and above all property relations had not been reached. In the course of quasi-legal regulation of property rights in Kosovo and Metohija, the fact that this is a post-conflict society in which elements of ethnic conflict between the majority Albanians and Serbs have not yet been removed, has been completely ignored. Moreover, the fact that the most vulnerable social group in terms of exercising their rights, including property rights, encompasses over 220,000 people, mostly Serbs, who were expelled from Kosovo and Metohija due to Albanian violence after June 10, 1999 and are unable to return to their properties, is still completely ignored. With this “law”, some institutions of property law are regulated in a significantly different way compared to the rest of Serbia. In addition, there are differences between the Albanian text and the Serbian text of the Law on Property and Other Real Rights – although both languages are official in Kosovo and Metohija – which creates additional problems in applying this Law and in ensuring legal certainty. International missions in Kosovo and Metohija also noted the problem of significant discrepancies between the Albanian and Serbian versions of the Law, along with substantive errors contained in the Serbian version of the Law.² In this paper, we will try to point out some of the key issues that may affect

1 UNSC Resolution 1244, UN doc. S/RES/1244 (10 June 1999).

2 “Almost all drafting is done in Albanian. Significant discrepancies between the two official language versions are still found in newly adopted legislation, and significant errors exist in the Serbian language versions of laws in force.” OSCE Mission in Kosovo, *Bilingual legislation in Kosovo*, 2018, p. 5.

the incorporation of immovable property rights of forcibly displaced persons, and in particular the regulation of maintenance issues.

An extremely important issue for the acquisition, termination and protection of property rights on real estate is the issue of public real estate records. The importance of an orderly and reliable register of real estate and rights thereon is especially emphasized in post-conflict societies, where the legal culture and awareness of the importance of respecting the rule of law are at a low level. The United Nations Interim Administration in Kosovo and Metohija (UNMIK) has realized the importance of this issue; however, the way it tried to reconstruct the public real estate register is far below the standards of legal profession, in terms of methodology, content, and nomotechnics respectively. An attempt to overcome the dualism in keeping records of real estate and of rights thereon in Kosovo and Metohija by concluding a “Technical Agreement on Cadastre” between the authorities of the Republic of Serbia and the de facto authorities in Kosovo and Metohija, resulted in failure: the Law on Kosovo Property Comparison and Verification Agency was adopted unilaterally, which was *prima facie* inconsistent with the agreement. This introduces additional confusion and legal uncertainty in this extremely important area, especially regarding the right to access to justice and the right to peaceful enjoyment of property of persons expelled from Kosovo and Metohija.

II “APPLICABLE LAW” IN KOSOVO AND METOHİJA – GENERAL RETROACTIVITY AND ITS CONSEQUENCES

1. FAILURE TO RESPECT SOVEREIGNTY AND THE EXISTING LEGAL ORDER

According to the text of the Resolution, the content of the UN mandate in Kosovo and Metohija is limited by the respect for the sovereignty and territorial integrity of FR Yugoslavia.³ This restriction has been mentioned several times, both in the main text and in the annexes to the Resolution. By the term sovereign power, we mean “a state power that does not depend on any other government on the outside, and is higher on the inside than any other government.”⁴ However, the respect for the sovereignty of FR Yugoslavia, from the point of view of its content, should be interpreted systematically, having in mind the entire text of the Resolution. This means that the sovereignty of FR Yugoslavia in Kosovo and Metohija is limited in terms of performing military and civilian security functions, the performance of which is “transferred” to multinational military and civilian security forces in Kosovo and Metohija. Even if we treated the international military and civilian forces, established in Kosovo and Metohija pursuant to

3 On the character and content of the UNMIK mandate, see: Čelić D, 2004, Kosovo i Metohija: protektorat, „suštinska autonomija” ili nezavisni entitet?, Isailović Z, (ed.), *Ustavne promene u nas*, Pravni fakultet, Kosovska Mitrovica, p. 135–145.

4 Vladislavljević M, 1935, Suverenost i međunarodno pravo sa gledišta ustava uopšte, *Arhiv za pravne i društvene nauke*, Beograd, 1–2, p. 53.

UNSCR 1244, as occupation, which is not the case here, the occupation does not entail a change of sovereignty.⁵ When it comes to the territorial integrity of FR Yugoslavia, it had to be unconditionally respected. The fact that the Resolution calls for the establishment of “broad autonomy and substantial self-government for Kosovo”⁶ could in no way be interpreted as limiting the territorial integrity of FR Yugoslavia (i.e., the Republic of Serbia as its successor state), but on the contrary: autonomy implies the framework of the state in which it is realized; therefore, autonomy, even if it is “substantial”, is a confirmation and by no means a negation of the territorial integrity of our country.

The Secretary-General of the United Nations was authorized by the Resolution “to establish the presence of international civilian forces in Kosovo so that an interim administration for Kosovo could be established under which the people of Kosovo would enjoy substantial autonomy within FR Yugoslavia and be provided by a transitional administration.”⁷ At the same time, the Resolution “requires the Secretary-General to appoint ... a Special Representative to oversee the presence of international civilian forces ...”⁸

On July 25, 1999, the Special Representative of the Secretary-General adopted Regulation no. 1999/1, in which he prescribed for himself powers which were, apparently, much broader than those given by the Resolution.⁹ With this decree, the Special Representative of the Secretary-General assigned to himself all legislative, executive and judicial power on the territory of Kosovo and Metohija.¹⁰ With regard to legislative, executive and judicial jurisdiction, it is also worth noting that Kosovo and Metohija, according to the Serbian Constitution in force, does not have territorial autonomy.¹¹

2. TERMINATION OF LEGAL CONTINUITY WITH YUGOSLAV/SERBIAN LEGAL ORDER

While appropriating all power in Kosovo and Metohija, the Special Representative went a step further: he prescribed the conditions under which “the laws that were in force on the territory of Kosovo before March 24, 1999 will continue to apply in Kosovo.”¹² By means of a new regulation, passed on December

5 Vučinić Z, 2006, *Međunarodno ratno i humanitarno pravo*, Službeni glasnik, Beograd, 2006, p. 387.

6 The UNSC Resolution 1244 uses the expression “substantial autonomy and meaningful self-administration for Kosovo”.

7 UNSC Resolution 1244, point 10.

8 UNSC Resolution 1244, point 6.

9 “Such ambiguities are a consequence of the Security Council’s general mandate, which is often interpreted very arbitrarily by the Special Representative.” Milisavljević B, 2007, *Nove mirovne misije Organizacije ujedinjenih nacija*, Pravni fakultet Univerziteta u Beogradu, p. 179.

10 UNMIK/REG/1999/1, Art. 1.

11 Constitution of the Republic of Serbia, *Official Gazette of the Republic of Serbia*, no. 98/2006, Arts. 182–187.

12 UNMIK/REG/1999/1, Art. 3.

12, 1999, the then Special Representative of the UN Secretary-General, Bernard Kouchner, formally dealt a fatal blow to one of the fundamental legal principles – the principle of legal certainty, stipulating that “[t]he law applicable to Kosovo [and Metohija]” was “[t]he law in force in Kosovo on March 22, 1989”!¹³ This decision was made for reasons that are not of a legal nature.¹⁴

Acting contrary to the spirit and letter of UNSCR 1244, in substituting the role of the state in Kosovo and Metohija¹⁵ and acting independently of the state authorities of the Federal Republic of Yugoslavia (i.e. the Republic of Serbia) – and not as a temporary administration that was obliged to respect the existing legal order, legal system and institutions¹⁶ – the Special Representative passed regulations that established not only a whole series of generally binding rules of conduct, but also new quasi-legal institutions and mechanisms for resolving disputes, including those arising in connection with property rights on real estate.

Having in mind the stated facts, we can only speak conditionally about the legal framework and general legal acts of UNMIK as well as their legal character, and the mentioned normative activity of UNMIK, being caused by non-legal motives, can be considered a kind of quasi-legislative policy.

13 UNMIK/REG/1999/24, Art. 1(b).

14 “The increasingly contentious relationship between local jurists and UNMIK began with the first legal regulation signed by Kouchner, which dealt with Kosovo’s applicable law. Signed on July 25, Regulation No. 1 stated that the law ‘prior to March 24, 1999, shall continue to apply in Kosovo’, as long as it does not conflict with international human rights standards or with the UN resolution number 1244, which placed Kosovo under international administration and military protection. The UN interpreted the regulation to mean that the Serbian criminal code and Yugoslav criminal procedure code, in effect in Kosovo prior to the commencement of NATO bombing on March 24, would stay in force. Although UNMIK’s interpretation is in conformity with international law, the failure to state categorically which law was in effect opened the door for Kosovo Albanian lawyers to argue that UNMIK should recognise the old Kosovo criminal code, in effect until 1989, when Kosovo’s autonomy was revoked. And for them, the Serbian code was unconstitutionally imposed, discriminatory against Albanians, and symbolic of the past decade of repression. Some newly appointed judges threatened to resign. One judge from Prizren, A. Krasniqi, said that by forcing the Serbian laws on Kosovo, UNMIK was ‘legitimising Serbia’s occupation of Kosovo’. The issue came to a head at an August 15 meeting between Kouchner and the newly appointed judges and prosecutors. At the meeting, Kouchner bowed to demands that Serbian law not be enforced, thereby contradicting his own regulation. More importantly, legal experts conclude, he allowed the Albanian jurists to politicise the judicial process. There are only minor differences between the Kosovo and Serbian penal code and, even Albanian lawyers admit, the issue was purely symbolic – and political.” Abrahams F, 1999, *Justice Delayed in Kosovo*, IWPR No. 96, <https://iwpr.net/global-voices/justice-delayed-kosovo>, 15 September 2020.

15 More: Ombudsperson institution in Kosovo, 2000, *Special Report No. 1*, p. 12.

16 “In implementing its mandate in the territory of Kosovo, UNMIK will respect the laws of the Federal Republic of Yugoslavia and of the Republic of Serbia insofar as they do not conflict with internationally recognized human rights standards or with regulations issued by the Special Representative in the fulfilment of the mandate given to the United Nations by the Security Council. In the same vein, the UNMIK interim civil administration will respect the existing institutions to the extent that they are compatible with its mandate.” *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, S/1999/779, p. D. IV 36, http://www.un.org/en/ga/search/view_doc.asp?symbol=S/1999/779, 11 November 2020.

According to UNMIK's quasi-legislative policy, the following sources and "sources" of law in Kosovo and Metohija consist of the following law in force:

1. "regulations" published by the Special Representative of the Secretary-General, (UNMIK legislation in the narrow sense);
2. laws and general acts of the Socialist Autonomous Province of Kosovo which were in force until March 22, 1989 (provincial legislation);
3. laws and general acts of the Socialist Federal Republic of Yugoslavia which were in force until March 22, 1989 (federal legislation);
4. laws and general acts of the Socialist Republic of Serbia which were in force until March 22, 1989 and which, in accordance with the relevant provisions of the then valid Constitution of the Socialist Republic of Serbia,¹⁷ were applied on the entire territory of the Republic of Serbia (republic legislation); these laws and general acts have (or have not) been applied sporadically due to UNMIK's "ignorance of rights";
5. laws and general acts passed by the "Assembly" after 2001 as part of the "Provisional Institutions of Self-Government in Kosovo";¹⁸
6. "internationally recognized human rights standards"¹⁹ contained in international conventions and other sources of international law;
7. "laws and general acts" that the self-proclaimed authorities in Kosovo and Metohija began to adopt after the unilateral "declaration of independence of Kosovo" on February 17, 2008.²⁰

In the area of property relations, the above mentioned "quasi-legislative policy" of UNMIK resulted in the already particular, subregulated, unsystematized and uncodified law in the area of property rights on real estate in the territory of AP Kosovo and Metohija turning into "legal chaos" with mutually inconsistent and contradictory legal rules, contained in an even greater number of sources than was the case until June 10, 1999. There was "general confusion in which it is not known which Yugoslav and Serbian laws are in force and which are not",²¹ and in general, which regulation was in force.²² The

17 See Art. 300 of the Constitution of the Socialist Republic of Serbia, *Official Gazette of the SRS*, no. 8/74.

18 See Arts. 9.1.26 and 9. 1. 27, UNMIK/REG/9/2001.

19 See Art. 1.3. UNMIK/REG/1999/24.

20 Given the illegality of this act, for the purposes of this paper we can only speak conditionally about the legal order and general legal acts, as acts of the de facto authorities.

21 "Unfortunately, the 'legal chaos' described in the Third Annual Report has not visibly diminished. There is still a general confusion as to which Yugoslav laws are applicable and which are not ..." Ombudsperson institution in Kosovo, *Fourth Annual Report, 2003/2004*, Pristina, p. 8.

22 "Most of these laws overlap each other and whichever of them is determined to be valid depends on who is the deciding authority. In short, no one is clear on what the applicable law is any more." Vicovac D, 2013, Challenges in Providing Legal Aid to Displaced Persons Following Armed Conflict: Lessons Learned from Kosovo, *Journal of Human Rights Practice*, Oxford, Vol. 5, N 1, p. 198.

confusion of laws, “regulations”, “administrative instructions”, and instructions made up a complex and inextricable “legal” system, almost inapplicable for resolving disputes involving real estate ownership in Kosovo and Metohija.²³ In addition, almost until the end of the mandate of specialized bodies for resolving claims of natural persons regarding the protection of property rights on real estate intended for housing, land and other real estate (i.e. until the end of 2006), there was no procedure regarding the publication of newly adopted “regulations” in Kosovo and Metohija, and so the general public – those whose rights and obligations are covered by legislation and other general acts – is not even familiar with most of the laws that have been applied, according to UNMIK’s “legislative policy”.²⁴

2.1. “Law in application” in relation to certain institutions of property law

The mentioned “legislative policy” of UNMIK and the determination of the “valid legal framework” in the territory of the Autonomous Province of Kosovo and Metohija, was reflected in, to put it mildly, a specific “right in application” of all institutions of property law. The nature of this paper does not allow to analyze in this respect the entire “newly established” – and, in fact, the “reincarnated” system of long-lost legal rules. On this occasion, we decided to present the “rights in practice” regarding the expropriation and sale of real estate, bearing in mind that these two areas are of specific importance for real estate relations, and that those rights were particularly endangered after June 10, 1999, especially when it concerned persons of Serbian nationality expelled from Kosovo and Metohija.

2.1.1. Expropriation

The application of certain provisions of the Law on Expropriation of the Republic of Serbia arose from the text of the Law on Expropriation of the Socialist Autonomous Province of Kosovo,²⁵ adopted in 1978 and in force on March 22, 1989,²⁶ and therefore “appropriate” from UNMIK’s point of view of this notion of “rights in force”; however, from official compilations of regulations, prepared by the United Nations Interim Administration for Kosovo and Metohija,²⁷ as

23 Roccia M, 2015, Reforming Property Law in Kosovo: A Clash to Legal Orders, *European Review*, 4, p. 566.

24 Ombudsperson institution in Kosovo, *Fourth Annual Report, 2003/2004*, Pristina, p. 8–9.

25 According to Art. 1 of the Law on Expropriation of SAP Kosovo, “expropriation of immovable property is carried out according to the provisions of this Law and the Law on Expropriation of the Socialist Republic of Serbia that are uniquely applicable to the whole territory of the Republic”.

26 Law on Expropriation of SAP Kosovo, *Official Gazette of SAP Kosovo*, no. 21/78.

27 See: UNMIK, Housing and Property Directorate and Housing and Property Claims Commission, *Housing and Property Rights in Kosovo, Collection of basic texts, Second edition*, March 2000, Pristina.

well as from thematic reports of the Department for Human Rights and the Rule of Law of the Organization for Security and Co-operation in Europe,²⁸ it can be concluded that in this area, as well as in the field of real estate, UNMIK “did not know the law”, or rather did not have in mind that in the territory of the then SAP Kosovo, certain provisions of the relevant laws passed by the legislature of the Socialist Republic of Serbia did apply – that is, according to the provisions of the Constitution of the Socialist Republic of Serbia of 1974, there was possibility of uniform application of regulations throughout the territory of the Republic of Serbia. Pursuing a “revolutionary legislative policy” to break the legal continuity with the rest of the Federal Republic of Yugoslavia, i.e. the Republic of Serbia, UNMIK has completely ignored the fact that the Law on Expropriation of SAP Kosovo ceased to be in force with the adoption of the Law on Expropriation of the Republic of Serbia in 1995 – on the basis of the Constitutional Law on Amendments to the Constitutional Law for the Implementation of the Constitution of the Republic of Serbia – and that, at the time of the establishment of the United Nations Interim Administration in Kosovo, it was that law, and not the mentioned Law on Expropriation of SAP Kosovo, that was the law in force in the field of expropriation.

If, owing to the nature of this paper, we leave aside the non-legal motives of UNMIK to remain in the exercise, not only without a legal, but also without a logical answer, which is why in terms of expropriation, UNMIK “reincarnated” the Law on Expropriation of SAP Kosovo, adopted in 1978, at a time when social property was an ideological category and private property was considered a remnant of the “old capitalist system”, and was to be marginalized and reduced to “personal property”?

The Law on Expropriation of the Republic of Serbia (in addition to being the law in force) had numerous advantages in terms of expropriation compared to the Law on Expropriation of SAP Kosovo. This was also logical given that, after 1990, substantially and formally, major political changes took place in terms of abandoning socialist ideology and one-party social order, on the one hand, and the adoption of multi-party democracy based on free elections, separation of powers, and guarantees of human rights, including property rights, on the other hand.

We note that the purpose of expropriation, i.e. the public interest, was determined much more broadly according to the provincial law on expropriation in comparison with the law on the republic level, in terms that it enabled a much wider encroachment on the right to (private) property. The provincial law thus prescribed that real estate could be expropriated for the purpose of, inter alia, afforestation, construction of parks, and for numerous other purposes, which the Republic Law on Expropriation did not provide for. This opened the possibility for a much wider encroachment on private property, when it comes to expro-

28 OSCE Mission in Kosovo, Department of Human Rights and Rule of Law, *Property Rights in Kosovo 2002–2003*, Pristina, p. 39; OSCE Mission in Kosovo, Department of Human Rights and Rule of Law, *Expropriations in Kosovo*, Pristina, 2006, p. 6.

priation, on the territory of the then SAP Kosovo, in relation to the rest of the territory of the Republic.

Furthermore, the Republic Law on Expropriation stipulated that the compensation for expropriated real estate cannot be lower than its market value, while the provincial law, depending on the type of real estate, referred to the average price,²⁹ reduced average price,³⁰ percentage of the average market price,³¹ or the construction value of expropriated construction facility.³² The provincial law on expropriation vests the authority to determine the public interest in numerous public bodies: urban planners,³³ municipal assemblies, and the Executive Council of the Autonomous Province of Kosovo.³⁴

As it can be seen, the *prima facie* conclusion is that, in terms of guarantees for the protection of property from unjustified expropriation, these are two laws from two completely different epochs of social organization. Hence, there is no logical, much less legal justification for the “reincarnation” of the Law on Expropriation of SAP Kosovo and the derogation of the current Law on Expropriation of the Republic of Serbia. In view of these obvious facts, the reasons for this action by UNMIK should be sought outside the field of logic and law.

2.1.2. “Prerogative in application” regarding real estate transactions

In this area, too, it can be said, *mutatis mutandis*, that it represents a step backwards by UNMIK, into the already forgotten era of restricting the turnover of (private) property.

In the area of real estate, according to UNMIK’s “legislative policy”, the Socialist Autonomous Province of Kosovo Real Estate Law, enacted in 1981, was the law in force in this area.³⁵

This law also contained several restrictions on the free movement of real estate in (private) ownership, establishing the right of pre-emption in favor of many entities, both natural persons and public entities. Thus, the right of first refusal to purchase arable agricultural land belongs to “the organization of associated labor engaged in agricultural production and agricultural cooperatives in the municipality where the agricultural land is located, the municipality in whose territory the land is located and the farmer-owner of the neighboring land.”³⁶ Then, regarding the transactions concerning forest land, the right of pre-emption was established in favor of “the organization of associated labor that manages forests, on the territory of the municipality where the forest and forest land

29 See Art. 28(2) Law on Expropriation of SAP Kosovo.

30 See Art. 28(3) Law on Expropriation of SAP Kosovo.

31 See Art. 29(1) Law on Expropriation of SAP Kosovo.

32 See Art. 30(1) Law on Expropriation of SAP Kosovo.

33 See Art. 3(1) Law on Expropriation of SAP Kosovo.

34 See Art. 3(2) and (3) Law on Expropriation of SAP Kosovo.

35 Law on Real Estate Transactions of SAP Kosovo, *Official Gazette of SAP Kosovo*, nos. 45/81, 29/86 and 28/88.

36 See Art. 19(1) Law on Real Estate Transactions of SAP Kosovo.

are located, and [in favor of] the municipality on whose territory the forest and forest land are located.”³⁷ With regard to first refusal to purchase construction land, that right was established in favor of “the municipality on whose territory the construction land is located.”³⁸ With regard to purchase a condominium, the right of first refusal was established in favor of “the co-owner, the occupancy right holder and the municipality on whose territory the apartment or family residential building is located.”³⁹

If the seller of real estate would not, during the verification of the signature on the contract, submit to the court written proof of the offer made to the holders of the right of pre-emption, it was envisaged that the court rejects the verification of the signature on such contract.⁴⁰ The provision of Art. 4(4) of The Law on Real Estate Transactions of the Socialist Republic of Serbia,⁴¹ which applied on the entire territory of Serbia, stipulated that the court may recognize the legal effect of the contract on transfer of ownership of real estate between property holders, if the transaction is not prohibited; if it was not concluded in writing form; if the signatures of the contractor are not certified by the court – provided that the contract is fulfilled in whole or in part; that the property is acquired within the boundaries of the law; that sales tax is paid; that the right of pre-emption has not been violated; and that no other social interest has been violated. Similar provisions were contained in the later Law on Real Estate of the Republic of Serbia.

Having in mind these numerous preconditions, the validation of written contracts on real estate transactions, on which the signatures of the contractors had not been certified by the court, was practically only a declarative possibility. Moreover, court practice in the territory of the then SAP Kosovo at one point took a stricter position⁴², considering a real estate contract that had not been concluded in the legally prescribed form to be non-existent; which, according to UNMIK’s “legislative” policy, had to be legally relevant, since it was formed before March 22, 1989.

UNMIK selectively applied the “applicable law” thus established. The specialized quasi-judicial bodies of UNMIK, which had the exclusive jurisdiction to conduct proceedings for the protection of immovable property rights, acted as if the law in force, which they themselves defined as “the law in force on 22 March 1989”, was a kind of “buffet”, from which one can take (apply) what is at UNMIK’s will. Thus, all the provisions – which protected the public interest; which, by the force of preemptory norms, provided for the right of pre-emption; and which provided for a qualified written form of real estate contract under

37 See Art. 19(3) Law on Real Estate Transactions of SAP Kosovo.

38 See Art. 20 Law on Real Estate Transactions of SAP Kosovo.

39 See Art. 21 Law on Real Estate Transactions of SAP Kosovo.

40 See Art. 26 Law on Real Estate Transactions of SAP Kosovo.

41 Law on Real Estate Transactions, *Official Gazette of the SRS*, nos. 43/81 and 28/87.

42 Decision of the Supreme Court of Kosovo, *Гзз. 12/80*, Збирка судских одлука Савезног Врховног суда Југославије, Београд, књ. V, св. 4, Београд, 1980, p. 63.

the sanction of nullity – were not applied, without any explanation!⁴³ Moreover, there have been many cases in which local “courts” have accepted lawsuits concerning the validation of oral contracts on real estate transactions!⁴⁴

2.1.3. Acquiring property by adverse possession

By enacting the “Law on Property and Other Real Rights”,⁴⁵ the de facto authorities in Kosovo and Metohija have established a discontinuity between the previous and the new “legal” regime on adverse possession in such a way that the legality of the possession is no longer a condition for acquiring property, while conscientiousness is required only when it comes to acquiring property through regular adverse possession. On the unclear nomotechnical, grammatical and dogmatic level of the provisions of this “law”, not only about adverse possession, but also about everything else, speaks enough the rubrum above Art. 40 (“Acquisition by Prescription”) and above Art. 41. (“Acquisition by Prescription Following Registration”), as well as the full text of these articles. Faced with the dilemma over how to understand the content of these “legal rules”, and accepting the risk that we may be wrong, we hold the opinion that in Art. 40 the “legislator” has “regulated” the ex-tabular acquisition of property by adverse possession, and in Art. 41, an attempt has been made to standardize “tabular (register) acquisition of property by adverse possession. In the part of the “law” where possession is “standardized”, land registry (tabular, register) possession is not recognized or conceptually determined at all,⁴⁶ and among different types of the possession that are of legal importance for acquiring property by adverse possession, this “law” knows neither conscientious nor legal or good faith possession. Like from the mute provisions of Arts. 40 and 41, one can conclude that the de facto legislator in Kosovo and Metohija did not limit the scope of adverse possession in almost any way, except by the time scope for adverse possession. Therefore, the conditions for adverse possession are neither the legality nor the truthfulness of the possession, and the question remains whether conscientiousness is required only regarding the former. It is as if the “Law on Property and Other Real Rights” was passed in a legal order characterized by a high degree of legal certainty, culture and tradition, orderliness and reliability of public registers and the rule of law; while in fact, everything is – as we tried to prove – the opposite, and a severe opposite!⁴⁷ In such circumstances, a wide and almost unlimited scope of adverse

43 For more on the matter, see: Čelić D, 2017, Konvalidacija ugovora o prometu nepokretnosti u praksi specijalizovanih kvazisudskih tela koje je osnovala Misija Ujedinjenih nacija na Kosovu i Metohiji, *Nacionalno i međunarodno pravo – aktuelna pitanja i teme*, ed. Jović-Prlainović O, Pravni fakultet Univerziteta u Prištini, Kosovska Mitrovica, 2017, Tom I, p. 179–203.

44 See: OSCE Mission in Kosovo, Department of Human Rights and Communities, *Litigation Ownership of Immovable Property in Kosovo, Pristina*, 2009, p. 11–12.

45 Law on Property and Other Real Rights, http://www.gazetazyrtare.com/e-gov/index.php?option=com_content&task=view&id=387&Itemid=28&lang=bh, 30 September 2020.

46 See Arts. 103–114 Law on Property and Other Real Rights.

47 On the historically chaotic property relations concerning real estate in Kosovo and Metohija, see: Mirković Z, Čelić D, 2011, Svojinakopravni odnosi na nepokretnostima na Kosovu i Me-

possession, even for tabular (register) adverse possession, which was founded on the idea of trusting the accuracy of land registers, seems grotesque. It seems almost unbelievable that the trust in the public register can be achieved by allowing registry based on adverse possession, and that on the other hand even those refugees who successfully completed the procedure before the “Kosovo Property Agency” cannot, based on the final decision of this quasi-judicial body, enter the right of ownership in the public register, due to the impossibility of access to the competent cadastral service in the municipality on whose territory the respective real estate is located.⁴⁸

2.2. Real estate records without acquisitive function?

The Real Estate Cadaster, as a single register of real estate property rights (factual and legal) in Kosovo and Metohija was not being maintained before March 24, 1999 (the beginning of the NATO aggression on FR Yugoslavia), although the legal preconditions for it were created in 1988 by the Law on Cadaster and Registration of Rights on Real Estate, i.e. in 1992, with the adoption of the Law on State Cadaster and Registration of Rights on Real Estate. It is true that, in the first decade of the Law being applied, the establishment of a single real estate record was done almost symbolically throughout Serbia – by March 2000, out of a total of 5831 cadastral municipalities, the real estate cadaster was established for 252, or about 4% of all cadastral municipalities, or realistically for about 1% of the total territory.⁴⁹

Immediately after the end of the NATO aggression on our country, the Republic Geodetic Authority dislocated the documentation and the Real Estate Cadaster for the area of the Autonomous Province of Kosovo and Metohija, including collections of documents, outside the territory of the Province. The Special Representative established, by means of “general acts – decrees”, not just a number of generally binding rules of conduct, but also new quasi-legal institutions, among them the “Register of Immovable Property Rights”.⁵⁰

It can be concluded from the text of this “law” that UNMIK decided to establish a public register of property rights on real estate, completely independent of the rest of Serbia. This was done in a way that is inappropriate for a society of immanent conflict; it was also done badly from the nomotechnics perspective; and in terms of normative structure, the subject matter of the law is underregulated. Also, given that since the end of the NATO aggression on the FRY (Repub-

tohiji – Stogodišnji *circulus vitiosus* (prvi deo), *Pravni sistem i društvena kriza, prva sveska*, ed. Isailović Z, Pravni fakultet Kosovska Mitrovica, p. 215–233, and Mirković Z, Čelić D, 2012, *Svojinokopravni odnosi na nepokretnostima na Kosovu i Metohiji – Stogodišnji circulus vitiosus* (drugi deo), *Pravne norme u vremenu i prostoru, prva sveska*, ed. Krvavac M, Pravni fakultet Kosovska Mitrovica, p. 123–146.

48 OSCE Mission in Kosovo, *Challenges in the Resolution of Conflict-Related Property Claims in Kosovo*, Pristina, 2011, p. 11.

49 Živanović M, 2000, *Katastar zemljišta ili katastar nepokretnosti – vizija katastra zemljišta 2024. godine*, *Anali Pravnog fakulteta u Beogradu*, br. 1–6/2000, p. 284.

50 UNMIK/REG/2002/22.

lic of Serbia), there is complete discontinuity of public records of real estate and their status, including a complete cessation of continuity regarding collections of public and private documents eligible for registration of these rights / possession status, it is unclear on what basis the continuity of public records has been established and whether it has been established at all.

It is interesting that the “law” contains an incomplete and imprecise provision on the most important issue related to the legal basis for acquiring property and other related rights on real estate – the issue of documents suitable for registration of property rights on real estate. Namely, the “law” in that regard mentions “the necessary documentation that supports the rights to immovable property”,⁵¹ whatever that means. There are no provisions in the mentioned text on the types of registration and their effect. The provision specifying whether there is legal remedy against the second-instance decision on registration is also missing. In the otherwise scarce legal opinion in the Albanian language, there is an interpretation that the second-instance decisions of the “Kosovo Cadastral Agency”,⁵² which is entrusted with keeping the register, can be appealed to the “Constitutional Court”.⁵³ We consider this interpretation to be unfounded in comparative practice and logic when considered that, by all accounts, the “Kosovo Cadastral Agency” should be a kind of administrative body, and, in accordance with that assumption, it would be logical to initiate an administrative dispute against the final decisions of such a body. The mentioned “law” does not contain a provision on legal succession, i.e., against whom the registration of rights to real estate can be requested, and thus all entries are considered to be “first entries”, resulting in no continuity of the public register. It does not “regulate” one of the many long-known principles on which public records of real estate and related rights are based. For example, there are no provisions on the principle of cadastral survey or on the principle that is immanent to a single record – the duty of registration – as well as no provisions on the principle of legality (legality of registration).

There are two independent and different records that cover real estate and real estate rights in the territory of AP Kosovo and Metohija: 1) Real Estate Cadaster, which was relocated from Kosovo and Metohija and which is under the jurisdiction of the Republic Geodetic Authority; and 2) “Register of Rights on Immovable Property” established by UNMIK, which, after 17 February 2008, was handed over to the de facto authorities in Kosovo and Metohija and is now managed by those authorities. The fact that there are two different public records on real estate and real estate rights, kept by different authorities, one of which is a legal and the other a de facto authority, adds further confusion to the already complicated legal and factual situation regarding real estate in Kosovo and Metohija, while security in this extremely important area is completely neglected.

51 See Art. 3(2) Law on the Establishment of the Immovable Property Rights Register, http://www.gazetazrtare.com/e-gov/index.php?option=com_content&task=view&id=247&Itemid=28&lang=en, 30 September 2020.

52 See Art. 1(2) Law on the Establishment of the Immovable Property Rights Register.

53 Pürner S, Aliu A, 2004, *Komentar juridik i ligjit për themelimin e një regjistri për të drejtat e pronës së paluajtshme*, Pristina, 2004, p. 30.

To overcome this dualism, on September 2, 2011 the authorities of the Republic of Serbia signed the “Technical Agreement on Cadaster” with the de facto authorities in Kosovo and Metohija, under the auspices of the European Union (hereinafter: “TAC”).⁵⁴ In order to implement the “TAC”, the de facto authorities in Kosovo and Metohija have enacted the “Law on the Kosovo Property Comparison and Verification Agency” (hereinafter: “KPCVA”).⁵⁵ Even with a cursory glance at the text of the “TAC” and the text of the “Law on KPCVA”, it can be concluded that the “Law” is not in accordance with the “TAC”. The text of the law in the Serbian language is full of spelling and grammatical errors, and thus it makes certain parts difficult to understand (e.g., Article 11, paragraph 1, and Article 14, paragraph 4). The content of some provisions of the law differs when both language versions are compared (e.g., Article 14, paragraph 3). The way in which the law is structured and in which its provisions are organized does not fulfil the basic rules of nomotechnics.

In particular, under one provision, the “KPCVA” is not obliged to inform any other person who may have a legal interest in the real estate in connection to which the request for comparison (verification) of the cadaster was submitted, but is obliged to make a reasonable effort aimed at notifying, including issuing public notice to notify any other person who may have a legitimate interest in that property. This would practically mean that – in administrative, rather than judicial proceedings – it could decide, at the request of the usurper, on the right of ownership on usurped real estate owned by persons expelled from Kosovo and Metohija, without real possibilities for them, according to the rules of personal delivery, to be informed about the initiation of such a procedure, and to be given the chance to participate in it. Such “standardization” is in direct contradiction with the right to a fair trial, i.e., the right to access to court, which is guaranteed even in the de facto order in Kosovo and Metohija.⁵⁶

The “Law on KPCVA” does not meet the essential requirements of precision and predictability in application, designed to prevent arbitrary application and interpretation, which is the basic standard of legal certainty.⁵⁷

Finally, the fact that the de facto authorities in Kosovo and Metohija have adopted a “regulation”, which provides for general “comparison and verification” of the register of real estate and related rights with the cadaster of real estate and

54 Technical Agreement on Cadaster, <http://www.kord-kim.gov.rs/eng/p07.php>, 30 November 2020.

55 Law on Kosovo Property Comparison and Verification Agency, http://www.kpcva.org/pdf/LAW_NO_05_L-010_ON_KOSOVO_PROPERTY_COMPARISON_AND_VERIFICATON_AGENCY.pdf, 30 November 2020.

56 Arts. 21, 22 and 32 “Constitution of Kosovo”, https://gjk-ks.org/wp-content/uploads/2017/11/gjkk_kushtetuta_e_republikes_se_kosoves_me_amendamentet_I-XXV_srb.pdf, 11 September 2020.

57 For more on the matter, see: Marinković T, 2018, Pojam zakona u praksi Evropskog suda za ljudska prava, *Nomotehnika i pravničko rasuđivanje*, ed. Radmila Vasić, Program Ujedinjenih nacija za razvoj u Srbiji, Pravni fakultet Beograd, p. 321–342.

related rights for the territory of AP Kosovo and Metohija, which is under the jurisdiction of the authorities of the Republic of Serbia, represents a new legally relevant circumstance. It points out that the registration of real estate and related rights in the “Register of Immovable Property Rights” has no constitutive character before the “comparison and verification” procedure is finished, and is an abrogation of the principle of accuracy of registration (i.e. confidence in the accuracy of data entered in the “Register”). Therefore, the only logical conclusion is that the entry in such a “register” does not have an acquisitive function when it comes to real estate rights, but that it could possibly represent some kind of “auxiliary public” records.

III CONCLUSIONS

The United Nations Interim Administration (UNMIK) did not act within the mandate of UNSCR no. 1244. Because it did not respect the sovereignty of the Federal Republic of Yugoslavia, i.e., the Republic of Serbia as its successor state, UNMIK, among other things, did not respect the existing legal order in Kosovo and Metohija, both in general and in the field of property rights, and with quasi-legal interventions (“regulations”), it has established a legal order independent of the rest of the Federal Republic of Yugoslavia, i.e. the Republic of Serbia. By means of Regulation “[o]n the law applicable in Kosovo”, adopted on 12 December 1999 and applied on 10 June 1999, UNMIK proclaimed that in Kosovo and Metohija “the law that was in force in Kosovo on March 22, 1989” was applicable!? In the field of property relations, this quasi-legislative policy of UNMIK as a result turned the law in force, in the field of property relations regarding real estate in the Autonomous Province of Kosovo and Metohija, into “legal chaos” of mutually inconsistent and contradictory legal norms, contained in an even greater number of sources than was the case until June 10, 1999.

After February 17, 2008, the *de facto* authorities in Kosovo and Metohija continued the practice of quasi-legislative encroachment on the legal system in Kosovo and Metohija. Thus, in 2009, a codification of sorts in the field of property law was carried out with the adoption of the “Law on Property and Other Real Rights”, although from the point of view of the current legal order of Serbia the abovementioned authorities did not have jurisdiction for such activity. Such an attempt was even contrary to basic social conditions for codification, such as the stability of social and, above all, property relations. According to this “law”, some institutions of property law are regulated in a significantly different way compared to the rest of Serbia. The Law on Property and Other Real Rights, adopted by the Kosovo Assembly in 2009, changed the rules on acquisition by prescription by altering the requirements of *bona fide* and lawful possession existing under the previously applicable law. A new type of maintenance has also been introduced – registry maintenance, despite discontinuities in keeping real estate registers and despite the traditionally incomplete real estate register on the territory of Kosovo and Metohija, not only in recent history.

Another issue with The Law on Property and Other Real Rights, also occurring in other “laws”, is that there are differences between the Albanian text and the Serbian text (although both languages are official and in equal public use in Kosovo and Metohija), which creates additional problems in terms of application of this law and in terms of legal security. Good practice examples of unification of legal texts in some other multiethnic societies in which several languages are in public use, as is the case e.g. with Canada, Switzerland, or the former Yugoslavia, could be applicable in the territory of Kosovo and Metohija.

The quasi-legal regulation of property rights has completely ignored the fact that Kosovo and Metohija is a post-conflict society in which elements of ethnic conflict between the majority Albanians and Serbs have not yet been removed. Moreover, the fact that the most vulnerable social group in terms of exercising rights, including property rights – a group that constitutes over 220,000 people, mostly Serbs, who were expelled from Kosovo and Metohija due to Albanian violence after June 10, 1999 and are unable to return to their properties – is still being completely ignored. The results of the analysis show that the quasi-legal provisions and practice of the de facto authorities in Kosovo and Metohija could lead to systemic violations of Article 1 of Protocol 1 to the European Convention on Human Rights, in particular in cases involving the property rights of internally displaced people (IDPs).

Leaving aside, for this occasion, issues related to the status of Kosovo and Metohija, in order to, at least temporarily remedy this situation, we believe that there is an urgent need for an impartial professional revision of all systemic “laws” regulating property and other real estate rights: The Law on Property and Other Real Rights as well as all other “regulations”, e.g. Law on Kosovo Property Comparison and Verification Agency, Law on the Establishment of the Immovable Property Rights Register, and other regulations that regulate property rights in a systematic way. Such a revision would have to harmonize legal solutions in order to eliminate their systemic inconsistency with the social reality, and to avoid permanent harmful consequences for the rights of persons expelled from Kosovo and Metohija. It could include the abolition of land registry maintenance due to the lack of basic conditions for its existence, given that the records of real estate in Kosovo and Metohija, kept by the de facto authorities, cannot be considered reliable. It would also include re-examining the acquiring of property by adverse possession on immovable property, which has been considered in Kosovo and Metohija to be a “traditional” way of acquiring property rights on immovable property for decades, even by some Albanian legal scholars in Kosovo and Metohija.⁵⁸ In a situation where a large part of the cadastral parcels were usurped (out of a total of 2,575,448 cadastral parcels, more than 1,000,000 were usurped, which is 38.83% of all cadastral parcels in Kosovo and Metohija)⁵⁹, and having in mind the state of the real estate register, that would

58 Statovci E, 1977, *Vlasničko-pravni odnosi na nekretninama u Socijalističkoj autonomnoj pokrajini Kosovo*, Zavod za izdavanje udžbenika SAP Kosovo, Priština, p. 230.

59 Republika Srbija, Ministarstvo za Kosovo i Metohiju, *Strategija održivog opstanka i povratka na Kosovo i Metohiju – radni tekst*, Republika Srbija, Ministarstvo za Kosovo i Metohiju, Beograd, 2009, p. 10, <http://www.kim.gov.rs/cms/view.php?id=102&start=50#archive>, 10 June 2020.

be both logical and justified. Acquiring property by adverse possession is a way of “calming down” real (property) relations where there are open issues, in order to achieve the general interest of stability and certainty in legal relations. In the case of the post-conflict reality in Kosovo and Metohija, the achievement of this “public interest” has been attempted by disproportionately encroaching on the property interests of most of the “old” owners – persons expelled from Kosovo and Metohija.⁶⁰ Until the rule of law is established on the territory of Kosovo and Metohija, which would imply full respect for human and therefore property rights of all citizens, and until the establishment of public records of real estate and related rights, which would be accompanied by legal actions that are immanent to it, the existence of the institution of acquiring property by adverse possession remains legally unjustified.

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(NON) AGREEMENT ON SUCCESSION ISSUES OF THE FORMER SFRY

Abstract: *The Agreement on Succession Issues between former republics of the SFRY was signed in Vienna on 29 June 2001 by five sovereign and equal former republics as legal successors. Although the Agreement was ratified by all respective signatory countries, its application has raised many misunderstandings in its interpretation. This eventually led to the conclusion that succession is a complicated legal, as well as a political issue. The legal consequences of a country's disappearance from the international arena and the emergence of new ones in its place, are the subject of different interpretations, which frequently neglect civilisation's fundamental legacy, formulated in the following principles: the pacta sunt servanda rule, and the inviolability of private property. The latter principle is directly related to the individual as a holder of rights and it is considered a fundamental human right enjoyed by individuals regardless of their local, national, or any other affiliation. Although succession requires a different legal and technical approach concerning the enforcement of this right, the very essence of inviolability of the right to private property should therefore never be questioned.*

It is of importance to this paper to examine Annex G to the said Agreement, which guarantees the acquired rights of natural and legal persons to private property. The successor states have committed to recognise and protect the right to property, as well as to restore that right where necessary. Since the beginning of this year, the Republic of Serbia has been called upon more vocally to reconsider the enforcement of the Law on Ratification of the Agreement on Succession Issues from 2002, taking into account the recent interpretation of the Agreement by the European Court of Human Rights, which held that its provisions could not be applied directly, but only through bilateral agreements the successor states would need to conclude to resolve their property-related issues.

Keywords: private property, succession, Agreement on Succession Issues from 2001, European Court of Human Rights

1. INTRODUCTION

The last decade of the 20th century was marked by tectonic shifts in the socio-political arena on the European continent. The crucial event was the fall of the Berlin Wall on 9 November 1989. The following years witnessed “the unravelling reel” of accumulated problems that had risen in the period of the Cold War, which

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only postponed those events. The latent strivings for secession and disintegration movements were materialised in the Soviet Union,¹ Czechoslovakia² and Yugoslavia. The legal consequences of disintegration, in terms of property in particular, have been dealt with in various ways. For instance, the property of Czechoslovakia was divided by special committees within two years, and was done so according to the territorial principle, which means that the particular property in question was acquired by the state on whose territory it was situated. In cases where this was not possible, it was divided proportionally to the number of inhabitants, 2:1 to the benefit of the Czech Republic.³ On the other hand, the USSR dissolution resulted in the status of Russia as the only successor state.

Unfortunately, “the case of Yugoslavia” will be remembered in history as the least preferable scenario of succession of states. Establishing the legal and technical framework to resolve the succession issues lasted almost a decade. However, the legal and technical framework, so arduously agreed upon, has still not been fully implemented in practice. Efforts to resolve the succession issues in line with the international law principles were hindered by the fact that the FR Yugoslavia had invoked the continuity, considering itself to be the exclusive successor of the SFRY. Admission of the FR Yugoslavia to the United Nations on 1 November 2000 was a turning point in eliminating the hindrance to further negotiations concerning the succession issue. Once the status of newly created successor states had been resolved, further steps could be taken in terms of clarification. All states had equal and equitable position and status in further negotiations.

In the period since 1991, when Slovenia and Croatia declared independence, up to the conclusion of the Agreement on the SFRY Succession Issues on 29 June 2001 in Vienna (hereinafter: the Agreement), many issues occurring in the Agreement on Succession had already been resolved in practice. The issues that were resolved in the meantime include the following: citizenship (due to the fact that, in the meantime, all of the successor states had passed their own laws on citizenship), succession in international organisations (as all states, except the FRY, had resolved that issue on their own), and the issue of succession of international treaties (as the states themselves had found appropriate solutions to that issue).⁴ Other issues, in particular those related to property of individuals, have been “resolved” in this vacuum according to clearly political principles, without adhering to international and civilised standards in their protection.⁵ Delays in

1 After the USSR dissolution, fifteen independent new states emerged on the international scene: Azerbaijan, Belarus, Georgia, Estonia, Armenia, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Moldova, Russia, Turkmenistan, Tajikistan, Uzbekistan and Ukraine.

2 On 1 January 1993 Czechoslovakia split into the Czech Republic and Slovakia. This event was named *sametová revoluce* (“Velvet Revolution”), because the states separated peacefully and of their own free will.

3 Twenty years since the “separation” of the Czech Republic and Slovakia, *Vijesti online*, (<https://www.vijesti.me/svijet/evropa/292725/dvadeset-godina-od-razvoda-ceske-i-slovacke>, 1 December 2020).

4 Kovačević, Ž., 2004, *International negotiations*, Diplomatic Academy and MFA SME, p. 352.

5 Although numerous requests for protection of private property were unresolved, soon after the entry into force of the Agreement, Slovenia was admitted to the European Union in 2004.

and prolongation of the negotiations were directly proportional to a series of violations of property rights of expelled persons and refugees. The issue of private property protection and respect for acquired rights depends on the rules established in the sphere of succession, as well as on the relations between the newly created states. It requires, first of all, a definition of relations between the successor state and the predecessor state, and those between the successor states as well.⁶ Unfortunately, the issues of membership in international organisations were resolved on an ad hoc basis, resulting in the abovementioned persons being deprived of international protection.

Globally, the issues of succession, secession and dissolution of countries were giving rise to a number of problems, which initiated the UN action resulting in the adoption of the Security Council Resolution number 1022 from 1995 on resolving outstanding issues based on consensus.

2. AGREEMENT ON SUCCESSION OF THE SFRY

As previously stated, the final version of the Agreement failed to include some of the most typical issues⁷ usually negotiated in cases of succession of states, because they had already been resolved unilaterally or bilaterally by the successor states in question. Although formal succession negotiations started early,⁸ it took a long time before the delegations of five states managed to agree on the “successors” and contents of the so-called assets of state.

The Agreement was negotiated based on consensus of successor states, with the mediation of the international community representative. After several rounds of negotiations, the Agreement was concluded on 29 June 2001. The time interval from the conclusion of the Agreement to its entry into force was not short either, as the latter took almost three years.⁹

Croatia was the second state of the former Yugoslavia to join the EU in July 2013. Before admission to the EU, Croatia closed Chapters 23 and 24, concerning Judiciary and Fundamental Rights, and Justice, Freedom and Security.

6 Čolović, V., 2015, Agreement on Succession Issues – Protection of Private Property, *Yearbook of the Faculty of Legal Sciences, Banja Luka*, Vol. 5, No. 5, p. 41.

7 Škrk, M., et al., 2015, The Agreement on Succession Issues and Some Dilemmas Regarding its Implementation, *Zbornik znanstvenih razprav*, Vol. 75, p. 251, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2806803, 13 December 2020.

8 The negotiations started towards the end of 1991 as part of Lord Carrington’s Conference on Yugoslavia. The negotiations on the SFRY succession were held in the presence of a special international mediator, the British diplomat Sir Arthur Watts. The high representative in the negotiations was appointed at the Peace Implementation Conference of the European Community, held in London on 8–9 December 1995.

9 The Agreement entered into force on 3 March 2004, after it was ratified by the Republic of Croatia. The Federal Republic of Yugoslavia ratified the Agreement in 2002 by adopting the Law on Ratification of Agreement on Succession Issues, *Official Journal of the FRY-International Treaties*, No. 6/2002. The first country to ratify the Agreement was Bosnia and Herzegovina, followed by the Republic of Macedonia and the Republic of Slovenia.

The text of the Agreement contains a general part and Annexes. In addition to the Preamble, the general part comprises thirteen Articles. Annexes are concerned with specific succession issues, as follows: Movable and immovable property (A); Diplomatic and consular properties (B); Financial assets and liabilities (C); Archives (D); Pensions (E); Other rights, interests and liabilities (F); and Private property and acquired rights (G).¹⁰

2.1. PRINCIPLES FOR RESOLVING THE SUCCESSION

General principles and general legal rules were the pillars of the succession negotiations. The general principle is that changes in the territorial sovereignty may only be made within the limits established by international law. Issues concerning the succession of states are only partially regulated by public international law. Two conventions were passed in this sphere: the Vienna Convention on Succession of States in Respect of Treaties¹¹ and the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts.¹² However, the rules are not found only in the written sources of international law, but also in good practice that has become part of the international legal system. The international practice that was created in relation to succession is wealthy – and came to be mainly as a consequence of decolonisation and world wars.¹³ Views suggested by the legal doctrine are also significant.¹⁴

In Article 9 of the Agreement, the following is stated: “*This Agreement shall be implemented by the successor states in good faith in conformity with the Charter of the United Nations and in accordance with international law*”. As one of the fundamental principles of international law, the *pacta sunt servanda* rule orders the respect and enforcement of the assumed international obligations. The Agreement has supreme legal force, and it takes precedence over internal laws.

As the delegations understood that the crucial issue of the Agreement on Succession was the division of property, it was necessary to establish the criteria

10 In Article 6 of the Agreement, it is confirmed that the Annexes A to G are an integral part of the Agreement.

11 The Convention was signed on 23 August 1978 in Vienna. It entered into force on 6 December 1996, after the Republic of Macedonia became the 15th contracting party. The SFRY ratified the Convention by adopting the Law on Ratification of the Vienna Convention on Succession of States in Respect of Treaties, *Official Journal of the FRY-International Treaties*, No. 1/80.

12 Vienna Convention on Succession of States in respect of State Property, Archives and Debts, done at Vienna on 8 April 1983, not yet in force, (https://legal.un.org/ilc/texts/instruments/english/conventions/3_3_1983.pdf, 1 December 2020).

13 Dumberry, P., 2015, State Succession to Bilateral Treaties: A Few Observations on the Incoherent and Unjustifiable Solution Adopted for Secession and Dissolution of States under the 1978 Vienna Convention, *Journal of International Law and Practice*, p. 13–14 (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3126523, 13 December 2020).

14 Dumberry, P., 2015, State Succession to Bilateral Treaties: A Few Observations on the Incoherent and Unjustifiable Solution Adopted for Secession and Dissolution of States under the 1978 Vienna Convention, *Journal of International Law and Practice*, p. 13–14. (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3126523 13 December 2020).

and principles of that division. The physical criterion was selected as the initial criterion for establishing the rules and principles applicable to succession of state property. In other words, it was the material character of state property, referring to the connection of property to the state territory.¹⁵ The territorial principle was adhered to in the division of property, with certain exceptions to the rule. In Annex G, Article 2(1), the following is stated: “*The immovable state property of the SFRY which was located within the territory of the SFRY shall pass to the successor State on whose territory that property is situated.*” Annex A to the Agreement on Succession Issues specifically regulates the division of state property, or property owned by the SFRY. In this respect, Annex A stipulates that the immovable property of the SFRY shall pass to the successor state on whose territory that property is situated, whereas in terms of the division of movable property of the SFRY, it is stipulated that tangible movable State property of the SFRY which was located within the territory of the SFRY shall pass to the successor state on whose territory that property was situated on the date on which it proclaimed independence.¹⁶

The property of diplomatic and consular offices was partly divided according to the territorial principle, however, the main principle of division was to establish the apportionment key by which this type of property was to be divided.¹⁷ The territorial principle of division was not applied to movable material state property of great importance for cultural heritage of successor states,¹⁸ nor to movable military property of the SFRY, which was to be divided by a separate agreement between the successor states concerned.¹⁹

When it comes to finding a solution to division or establishing the aliquot parts in the SFRY financial assets and liabilities, the division principle was based on “equitable proportion”. This principle is contained in the text of the Vienna Convention on Succession of States in Respect of State Property, Archives and Debts from 1983.²⁰ Article 41 of the Convention stipulates the following:

- 15 Dimitrijević, D., 2013, Agreement on Succession Issues of the SFRY and international law, *Legal and economic aspects of regulating the outstanding issues concerning the SFRY succession*, Institute of International Politics and Economics, p. 33.
- 16 Antić, O., 2012, Some remarks on the Agreement on Succession Issues, *Yearbook of the Faculty of Law in Istočno Sarajevo*, Vol. III, No. 1, p. 8.
- 17 Diplomatic-consular property was listed and estimated, and that document is an integral part of the Agreement. In Article 1 of Annex B, a partial division of diplomatic-consular property was carried out, in which each successor state received one piece of immovable property. For the remaining property, Article 3 provided the following apportionment key: Bosnia and Herzegovina 15%, Croatia 23.5%, Macedonia 8%, Slovenia 14% and the FRY 39.5%.
- 18 Annex A, Article 3(2) of the Agreement.
- 19 Annex A, Article 4 of the Agreement.
- 20 The Convention, however, does not define the content of this standard. That was defined in the Vancouver Resolution of the Institute of International Law from 2001, which obliges successor states to take several factors into account in establishing an equitable division. The first one is the relation between the property and debts compared to activities of the predecessor state in the territory under succession of states. The second is the relation between property, rights, and interests on the one hand, and debts on the other hand. The third factor marks the share in gross national product of the state at the time of succession or at the time of passing a decision by an international body or reaching an agreement on division. Finally,

“When a state dissolves and ceases to exist and the parts of the territory of the predecessor state form two or more successor states, and unless the successor states otherwise agree, the state debt of the predecessor state shall pass to the successor states in equitable proportions, taking into account, in particular, the property, rights and interests which pass to the successor states in relation to that state debt.” The Agreement also established the proportions in the division of financial assets.

The issue of division of the archives was successfully resolved. Each state obtained the part of the documents concerning that respective state, whereas other documents pertaining to the former federal state are kept in Belgrade.²¹ The principle of “functional relevance” or functional relation was applied in division of the archives.

Another important principle in resolving the succession issues is the principle of reciprocity, established in Article 8 of the Agreement, which stipulates the following: “Each successor state, on the basis of reciprocity, shall take the necessary measures in accordance with its internal law to ensure that the provisions of this Agreement are recognised and effective in its courts, administrative tribunals and agencies, and that the other successor states and their nationals have access to those courts, tribunals and agencies to secure the implementation of this Agreement.” Emergence of new states on the international scene logically implies the use of the principle of reciprocity, defined by legal scholars as an expression of aspiration to secure equal cooperation between sovereignties.²² This provision imposed an obligation on successor states to harmonise their internal legislation. The principle of reciprocity in case of the SFRY succession has another dimension, one concerning the issue of recognition and execution of international (post-Yugoslav) decisions by successor states, in particular, those decisions concerning invalidity of the acts of passing carried out after 31 December 1990. However, reciprocity was perceived as a legal, rather than political issue. It is implied that the state is politically more superior if it waits for another state to make the first move, in order to initiate reciprocity.²³ The actual time when the decision has become final is crucial to qualify the decision as national or international. In the opinion of the Badinter Commission number 11, Slovenia and Croatia consider 8 October 1991 as the date of succession, while in Macedonia it is 17 December, in Bosnia and Herzegovina 6 March, and in the FRY 27 April of 1992. All decisions that became final in successor states after these dates are to be considered international decisions that may be used as the title of execution only after conducting the recognition procedure.

also an important factor is the formulation adopted by the International Monetary Fund regarding the division of quotas or, if that is not satisfactory, the division according to the agreed apportionment key, which could be the proportion in export revenues, funding and benefit earned by exploiting certain projects. Dimitrijević, D., 2013, p. 40.

21 Kovačević, Ž., 2004, p. 357.

22 Varadi, T., et al., 2012, *International private law*, Belgrade, Faculty of Law, University of Belgrade, p. 205.

23 Rakić-Vodinelić, V., et al., 1995, *The end of the SFRY – legal consequences*, Belgrade, Faculty of Law, University of Belgrade, p. 178.

For the purpose of ensuring the efficient enforcement of the Agreement, the Standing Joint Committee was established with the mandate in eliminating differences in interpretation and enforcement of the Agreement, comprising high representatives of each successor state, who may be assisted by professionals in their work.²⁴

3. ANNEX G – PRIVATE PROPERTY AND ACQUIRED RIGHTS

The issue of private property and protection of acquired rights holds perhaps the most significant place in the Agreement. A separate Annex is concerned with private and acquired rights of natural and legal persons,²⁵ representing the most vulnerable category of property affected by the succession. However, this issue has still not been resolved, despite many international and internal guarantees of protection of property rights and of the right to peaceful enjoyment of property. The Universal Declaration of Human Rights from 1948, in a declarative provision in Article 17, stipulates the following: “*Everyone has the right to own property alone, as well as in association with others. No one shall be arbitrarily deprived of his property.*” Territorial changes directly encroach upon the property rights of individuals. Therefore, the protection of these rights involves a significant corpus of issues in defining the relation between the predecessor state and successor state(s). The successor state enters into legal relations of the predecessor state and its guarantees will be crucial for the protection of rights of natural and legal persons. The normative guarantee of respect for these rights may only be granted by the successor state. Declarative statements about the respect of these rights are “on paper only”²⁶ if the successor states fail to undertake concrete mechanisms to protect these rights.

Under the Agreement, the rights to movable and immovable property located in a successor state and to which citizens or other legal persons of the SFRY were entitled on 31 December 1990 shall be recognised, and protected and restored by that state in accordance with established standards and norms of international law and irrespective of the nationality, citizenship, residence or domicile of those persons. This shall include persons who, after 31 December 1990, acquired the citizenship of or established domicile or residence in a state other than a successor state. Persons unable to realise such rights shall be entitled to compensation in accordance with civil and international legal norms. A very important provision of Annex G states that any purported transfer of rights to movable or immovable property shall be null and void if it was made after the date specified above and concluded under duress.

24 Article 4 of the Agreement.

25 Annex G serves to protect the rights of natural and legal persons to movable and immovable property, intellectual property rights, including patents, trademarks, the right of copyright and other related rights, dwelling rights the SFRY citizens used to have.

26 <http://www.parlament.gov.rs/.38627.43.html>

The problem encountered in practice when enforcing the provision contained in Article 1 of Annex G was whether it should be applied directly or not. The formulation “*to ensure the effective application*”, instead of “*to implement the Agreement*” may be construed as the obligation of means, rather than the obligation of result. Pursuant to provisions of Article 8 of the Agreement, each successor state “*on the basis of reciprocity, shall take the necessary measures in accordance with its internal law to ensure that the provisions of this Agreement are recognised and effective in its courts, administrative tribunals and agencies, and that the other successor States and their nationals have access to those courts, tribunals and agencies to secure the implementation of this Agreement*”.²⁷ Each interpretation that does not support direct application of the Agreement is detrimental to natural persons and legal entities as the successors of rights. Insisting on conclusion of bilateral agreements would mean allowing Annex G to remain unenforced for many years or even for good, or allowing the signatory states to hinder its application without any sanctions.²⁸ Furthermore, this interpretation is contrary to the generally accepted rule of *pacta sunt servanda*. Immediately after entering into force of the Agreement, the courts in Serbia started with direct application of the provisions of Annex G,²⁹ although that approach was later changed due to the absence of reciprocity on the part of the Republic of Croatia.³⁰ Additional leverage was shifted towards the necessity to conclude bilateral agreements in regard to application of Annex G after the European Court

27 Vukadinović, R., 2013, On direct application of the Agreement on Succession, *Legal and economic aspects of regulation of outstanding issues concerning the SFRY succession*, Institute of International Politics and Economics, p. 61.

28 ECtHR, *Mladost Turist A.D. v. Croatia*, No. 73035/14, Judgement of 22 February 2018, para. 46.

29 In the judgment passed immediately after entering into force of the Agreement, the High Commercial Court confirmed the judgment of the Commercial Court, by which the property on business premises was returned to the legal entity from Bosnia and Herzegovina, recalling Article 2 of Annex G to the Agreement on Succession Issues. Also important is the legal position of the High Commercial Court established at the session of the Economic Offences Department, expressed in their response to the issue of commercial courts. The position was assumed then that the issue of title to movable and immovable property registered as the property of business units pursuant to the Regulation on Protection of Property of Enterprises Based in the Territory of the Former Republics, shall be resolved in the Law on Ratification of the Agreement on Succession Issues, in fact, in Annex G – Private Property and Acquired Rights. Colović, V., 2015, p. 50–51.

30 The Instruction of the State’s Attorney Office of the Republic of Croatia number M-DO-523/04 from 6 December 2004 JJ/SM, Deputy State’s Attorney of the Republic of Croatia, Jadranko Jug, MSc, states the following: “The County Court in Pula accepted the legal position of the State’s Attorney Office of the Republic of Croatia, that Annex G of the Agreement on Succession Issues, concluded in Vienna on 29 June 2001 between the successor states of the former SFRY, would only in principle regulate the issue concerning the recognition of ownership rights between the successor states, so that Agreement could not be applied directly. Instead, the issue of return of property should be resolved in bilateral agreements which would resolve the overall legal issues concerning property between the Republic of Croatia, and the Republic of Serbia and the Republic of Montenegro, respecting reciprocity.” Tabaković, S., Božić, V., 2020, The Platform for “ending the war period” in the territory of the former SFRY along with implementation of the ratified Agreement on Succession Issues with Annexes A-G, with a special consideration of Annex G – Private Property and Acquired Rights, as convalidation of the passed laws and their legal consequences, (<https://novaconsulting>).

of Human Rights (hereinafter: the ECtHR) passed the judgment in the case of *Mladost Turist A.D. versus Croatia*.³¹ The ECtHR referred in its decision to the recommendations made by the Standing Joint Committee within its term, at sessions held in 2009 and 2015, pertaining to Annex G of the Agreement. The Committee noted that the application of the provisions of Annex G had not been sufficiently efficient and thus recommended that the interested successor states conclude bilateral agreements to ensure the efficient application of those provisions. It also advised them to refrain from passing any laws or taking any measures contrary to the provisions of Annex G and, if they consider it necessary, to pass measures whose aim would be to ensure the efficient application of the standards contained in Annex G.³²

However, the problems related to protection of property rights and acquired rights in the territory of the successor states had emerged much before the conclusion the Agreement. The purpose of Annex G was to eliminate these problems, not to create new ones. In fact, in the period from 1992 to entering into force of the Agreement, the successor states passed a number of legal acts and by-laws that regulated property-related legal consequences of the succession.³³ These regulations grossly violated the institutional guarantee to the right of property, which, in literature, implies a dual request to the legislator: positively, that the legislator be obliged to pass provisions which are to allow the existence, survival and functioning of property rights; negatively, that neither the legislator nor any other provision issuing authority be permitted to regulate the property in their normative solutions, so as to bring it, as an institute, into question.³⁴ Legislative activities of the successor states certainly did not meet the second requirement, but it may be concluded that the practice had led the way in this respect. In particular, this refers to acting in which that right was refused to holders of dwelling rights as part of the socially-owned property, in discriminatory

rs/nova-vebinari/medjunarodna-konferencija-o-postovanju-preuzetih-medjunarodnih-obaveza-iz-aneksa-g-beckog-sporazuma-o-pitanjima-sukcesije/ 2 December 2020), p. 6.

31 ECtHR, *Mladost Turist A.D. v. Croatia*, No. 73035/14, Judgement of 22 February 2018.

32 *Mladost Turist A.D. v. Croatia*, No. 73035/14, Judgement of 22 February 2018, para. 29.

33 The following regulations were passed in the Republic of Serbia: Regulation on Temporary Prohibition of Disposal of Particular Immovables, Movables and Rights, *Official Gazette of the RS*, Nos. 49/91, 50/91, 55/91, 29/92, 46/92 and 50/95; Regulation on Organising the Parts of Enterprises Based in the Territory of the Republic of Bosnia and Herzegovina, Republic of Croatia and Republic of Slovenia, *Official Gazette of the RS*, Nos. 6/92, 75/93, 68/94, 53/95 and 18/98, which, after the passing of the decision by the Federal Constitutional Court in 2001, was replaced by the Regulation on Protection of Property of Enterprises Based in the Territory of the Former SFRY Republics, *Official Gazette of the RS*, Nos. 31/2001, 61/2008, 109/2008, 14/2009, 40/2009, 79/2009, 111/2009, 67/2010 and 73/2011. The following regulations were passed in the Republic of Croatia: Regulation on the Prohibition of Disposal of Immovables in the Territory of the Republic of Croatia, *Official Gazette*, No. 36/91, which was later replaced by the Law on Prohibition of Disposal and Takeover of Assets of Particular Legal Entities in the Territory of the Republic of Croatia, *Official Gazette*, No. 29/94; Regulation on Prohibition of Disposal and Takeover of Assets of Legal Entities in the Territory of the Republic of Croatia, *Official Gazette*, No. 40/92; Law on Sales of Flats Under Dwelling Right, *Official Gazette*, No. 44/94; Law on Sales of Flats Under Dwelling Right, *Official Gazette*, No. 11/96.

34 Rakić-Vodinelić, V., et al., 1995, p. 84.

circumstances. However, although the dwelling right is a *sui generis* right, arising from the Yugoslav concept of social ownership, it is related to a person, so the principle of inviolability should apply to that right as well, as is case with other private rights. These actions were contrary to Article 6 of Annex G, which reads as follows: “*Domestic legislation of each successor State concerning dwelling rights shall be applied equally to persons who were citizens of the SFRY and who had such rights, without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*”

Due to inability to protect their private rights before the responsible authorities of successor states, certain persons chose to seek legal protection before the ECtHR.

4. PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS

Protection of the right to property guaranteed in Article 1 of the 1st Additional Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms from 1950 (hereinafter: the EC) is a step forward in terms of international legal protection. For the first time, an international mechanism was established to ensure the protection of property rights, which had previously been only declarative. From the historical aspect, this mechanism for protection of human rights provided individuals, for the first time, with the status of subjects of international law, with a possibility to enjoy and exercise their rights, as well as to appeal to the Court about the acting of the state if their rights have been violated and request protection through a legal instrument due to violation of rights.³⁵ In fact, until that time in the EU, constitutional frameworks of states were the ultimate level of protection and guarantee of the property rights. Due to some countries opposing, the protection of the right to property was not included in the text of the EC. The right to property was subsequently guaranteed in Protocol No. 1 to the Convention, which was opened for signature in 1952 and entered into force in 1954. The Protocol is an integral part of the EC. Article 1 of Protocol No. 1 reads: “*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. The preceding provisions shall not, however, in any way impair the right of the state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure payment of taxes or other contributions or penalties.*”³⁶

In interpreting and applying this Article, the ECtHR defined the content and significant features of the right protected in the provisions of this Article.

35 Popović, D., 2012, *European Human Rights Law*, Belgrade, p. 27.

36 <https://www.paragraf.rs/propisi/zakon-ratifikaciji-evropske-konvencije-ljudska-prava-osnovne-slobode.html>, 3 December 2020.

The concept of property should be interpreted autonomously, as it is not restricted to possession of material goods: other particular rights and interests that account for property, may also be considered “property rights” and therefore “property”, within the meaning of the EC.³⁷ The ECtHR, therefore, agreed to act on applications submitted by citizens, mainly of Serbian nationality, in regard to deprivation of dwelling rights on socially owned flats.³⁸

In its practice, the ECtHR³⁹ assumed the position that Article 1 of Protocol No. 1 to the Convention, contained three separate rules: 1) the first referring to the principle of peaceful enjoyment of possessions; 2) the second referring to deprivation of property and subjecting it to certain requirements; and 3) the third, recognising the right of states to control the use of property in accordance with the general interest.

In terms of changes of state territory, protection of the rights of individuals to property is a sensitive category. In fact, even if natural persons and legal entities are protected against the state’s arbitrary intervention in their property, the ECtHR practice has still allowed a substantial discretion to public authorities with regard to encroaching upon that right. In this sense, it is permitted that a person be deprived of property when it is in the public interest, and the state is also permitted to enforce laws it may deem necessary to ensure the collection of taxes, different duties, and penalties. This standpoint was confirmed by the ECtHR in its judgments and the greatest reaction in the public was caused by the ECtHR decision in the case of *Blečić v. Croatia*. In the opinion of the Court, deprivation of the applicant’s dwelling right had been conducted in conformity with the law and the state’s intervention in her property rights had been within the permitted range of action. The first-instance court decision raised the question whether passing the laws according to which a group of ethnically unsuitable citizens shall be deprived of property, only to transfer that property to a group of ethnically suitable citizens, was indeed justified in a democratic society and whether it was a legitimate social policy goal in a member state of the Council of Europe at the end of the 20th century.⁴⁰

4.1. A DIFFERENT VIEW

When it comes to interpreting the third rule concerning the right to peaceful enjoyment of property, the opinion of six judges was interesting, as stated in the judgment of the Grand Chamber in 2005 in the case of *Jahn et al. v. Germany*.⁴¹

37 ECtHR, *Gasus Dosier und Fördertechnik GmbH v. Netherlands*, No. 15375/89, Judgement of 23 February 1995, para. 53.

38 ECtHR, *Blečić v. Croatia*, No. 59532/00, Judgments of 29 July 2004 and 8 March 2006; ECtHR, *Gačeša v. Croatia*, No. 43389/02, Final Decision on Admissibility of 1 April 2008.

39 ECtHR, *Orlović and others v. Bosnia and Herzegovina*, No. 16332/18, Judgement of 1 October 2019; *Radanović v. Croatia*, No. 9056/02, Judgement of 21 December 2006.

40 Komnenić, D., 2017, *Right to peaceful enjoyment of property in judgments and decisions of the ECHR passed in proceedings with former Yugoslav republics as responsible states*, Union University Faculty of Law, p. 302.

41 ECtHR, *Jahn and others v. Germany*, Nos. 46720/99, 72203/01 and 72552/01, Judgement of 30 June 2005 (GC).

The application was concerned with peaceful enjoyment of property which was denied to the applicants, five citizens of Germany, following the unification of Germany. According to the statements made by the applicants, the obligation of transfer of property without compensation was in accordance with the second Property Rights Amendment Act, adopted by the German Parliament on 14 July 1992, but it was violating the right to peaceful enjoyment of property under Article 1 of Protocol No. 1 to the EC. The applicants also claimed they had been victims of discrimination, contrary to Article 14 of the Convention taken in conjunction with Article 1 of Protocol No.1.

In the judgment, the Court assumed the position that deprivation of property without compensation may be considered justifiable pursuant to Article 1 of Protocol No. 1 *in exceptional circumstances* only. This judgment is significant because the context of *exceptional circumstances* in this case referred to territorial changes, in fact, the reunification of Germany. The ECtHR also concluded that there had not been any violation of Article 14 of the EC, as claimed by the applicants. The decision was passed by the Grand Chamber with eleven votes in favour and six votes against. According to the partially dissenting opinion of judge Pavlovschi, Article 1 of Protocol No.1 to the Convention was violated in this case. He took into account the fact that the applicants had been legally recognised as the owners of land for the period of 11 to 12 years, as well as the fact that as many as 50,000 other German citizens were in the same situation.⁴² Judge Ress was also of the opinion that Article 1 of Protocol No. 1 to the Convention had been violated. That was because, inter alia, German unification was by no means different from the dissolution of the USSR and Yugoslavia or from changes in political regimes of a number of countries after the fall of the Berlin Wall. He stated that using the concept of *exceptional circumstances* by the Court was a risky step in developing the interpretation of the Convention.⁴³ Judges Costa, Borrego Borrego, Ress and Botoucharova emphasised that the concept of the *unique context* used by the majority to describe the German reunification, should not be misused, as Europe has experienced a great number of *unique contexts*⁴⁴ throughout its turbulent history.

5. CONCLUSION

It has been almost two decades since the signing of the Agreement on Succession Issues of the SFRY, and it somehow seems that the agreement has been easily achieved when it comes to the division of rights of successor states, as well as the division of liabilities to external creditors. However, the Agreement indicated a lack of balance in terms of division of obligations of successor states, particularly in issues like private property and acquired

⁴² *Janh and others v. Germany*, p. 36.

⁴³ *Janh and others v. Germany*, p. 40.

⁴⁴ *Selected cases of the ECHR practice*, 2019, Podgorica, <https://rm.coe.int/handbook-on-caselaw-of-the-ecthr-in-relation-to-right-to-property-arti/16809e27f7> 05.12.2020, p. 50.

rights of natural persons and legal entities. The Standing Joint Committee did not use its mandate delegated by the Agreement, nor the possibility to refer this issue to be resolved by a third party expert to ensure swift and efficient elimination of differences in the interpretation and enforcement of Annex G to the Agreement.

The legal insecurity, encountered for quite a long period of time by natural persons and legal entities, as “victims” of succession, has not been congruous with the century in which we live. Unfortunately, the contemporary society has been in a crisis, globally. Great expectations from European protection mechanisms have proved unjustifiable. In the course of the negotiation processes for EU accession of certain successor states, the issue of protection of private property and acquired rights had not been given due significance, not even in the form of obligation to conclude bilateral agreements, which would ensure the efficient implementation of the Agreement. Even the provisions of the Agreement stipulate that actions of successor states – aimed at the efficient application of principles in the protection of private property and acquired rights – could be required by general principles or *be otherwise appropriate*.

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**LEGAL FRAMEWORKS FOR PRIVATIZATION
OF SOCIALLY-OWNED AND PUBLICLY-OWNED
ENTERPRISES IN THE REPUBLIC OF SERBIA
IN THE TERRITORY OF THE AUTONOMOUS PROVINCE
OF KOSOVO AND METOHIJA FROM 1999 TO 2008**

Abstract: *With the adoption of Resolution 1244, the United Nations Mission in Kosovo (UNMIK) gained the status of guardian of state and social property of the Republic of Serbia (Serbia) in the territory of the Autonomous Province (AP) of Kosovo and Metohija. However, by adopting regulations having the force of law, UNMIK, or the Special Representative of the Secretary-General (SRSG), unilaterally and retroactively abrogated the existing legal system, creating conditions for the establishment of a quasi-legal system independent of the legal system of Serbia. UNMIK Regulation 1999/24 resulted in the re-incarnation of SFRY-era legal acts. Regulation no. 1999/24 represents a guideline in further legal normalization and a design of a legal system in the territory of AP Kosovo and Metohija. The UNMIK regulations recognize several internationally recognized human rights and anti-discrimination standards. The adoption of UNMIK Regulation 2002/12, on the establishment of the Kosovo Trust Agency (KTA), created conditions for changing the ownership regime of socially-owned and publicly-owned enterprises of the Republic of Serbia in the territory of AP Kosovo and Metohija. The law authorized the KTA to manage socially-owned and publicly-owned enterprises and their assets in the territory of AP Kosovo and Metohija. In addition to governance, the KTA sponsored the spin-off method of accessing and privatizing socially-owned and publicly-owned enterprises. The authors pay special attention to the Regulations on the Kosovo Trust Agency (KTA) and this spin-off method.*

Keywords: Republic of Serbia, UNMIK Administration, Special Representative of the Secretary-General (SRSG), Regulation 1999/1, Regulation 1999/24, Regulation 2002/12, socially-owned, publicly-owned, spin-off, Kosovo Trust Agency (KTA).

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INTRODUCTION

Since 10 June 1999, the territory of the Autonomous Province (AP) of Kosovo and Metohija has been temporarily administered by the United Nations Mission in Kosovo (UNMIK) in accordance with United Nations Security Council Resolution 1244.¹ Resolution 1244 tasks UNMIK with facilitating a political process designed to determine Kosovo's future status envisioning that at some point of the institution-building sequence, the UN's subsidiary organ will be called upon to participate in finding solutions to the permanent status of the territory it administers.²

Resolution 1244 guarantees the sovereignty and territorial integrity of the Federal Republic of Yugoslavia (FRY), i.e., the Republic of Serbia as its legal successor, in accordance with Annex 2³ and the Helsinki Final Act.⁴ Nevertheless, although the sovereignty and territorial integrity of the FRY are guaranteed, now that a certain time interval has passed, we can freely point out the constant and flagrant abuse of the provisions of Resolution 1244 and the accompanying documents. The flagrant abuse of the provisions of the Resolution began immediately after its adoption, both by representatives of the Military Peacekeeping Mission (KFOR) and by representatives of the International Civilian Mission, in particular by the Special Representative of the UN Secretary-General (hereinafter SRSG). With the establishment of international administration, the entire state power was in fact, taken over by the international community, thus reducing the guaranteed sovereignty to a naked right (*nudum ius*).⁵

Though there are certain views that the UNMIK Administration was under pressure by major international protagonists and that there was a conflict between the progressive and legalist forces within itself,⁶ 22 years later we find it justified to consider that through its action in the field, which was contrary to the provisions of the Resolution, the UNMIK Administration consciously participated in: a) the establishment of a quasi-independent legal system;⁷ and b) the

1 UN Security Council Resolution 1244 (1999) on the situation relating to Kosovo, (<https://peacemaker.un.org/kosovo-resolution1244>, 10 November 2020).

2 Knoll, B., 2005, From Benchmarking to Final Status? Kosovo and The Problem of an International Administration's Open-Ended Mandate, *The European Journal of International Law*, Vol. 16, No. 4, p. 657.

3 Resolution 1244 Annex 2. p. 5 and p. 8

4 Helsinki Final Act (<https://www.osce.org/files/f/documents/5/c/39501.pdf>, 10 November 2020).

5 Knoll, B., 2002, UN Imperium: Horizontal and Vertical transfer off Effective Control and Concept of Residual Sovereignty in Internationalised Territories, *Austrian Review of International and European Law*, Vol. 7, p. 3.

6 Davidović, S., 2018, *Privatizacija društvenih preduzeća na Kosovu i Metohiji pod okriljem UNMIK administracije*, Beograd, p. 45.

7 The main political goal of the UNMIK administration was to contribute to the establishment of substantial autonomy and self-government in Kosovo, instead of working to create a legal system (quasi-legal system) independent of the legal system of the Republic of Serbia, which is contrary to the provisions of UN Resolution 1244. – Freidrich, J., 2005, UNMIK in Kosovo: Struggling with Uncertainty, *Max Planck Yearbook of United Nations Law*, Vol. 9, p. 237.

creation of necessary preconditions for a unilateral declaration of independence by the Provisional Institutions of Self-Government (hereinafter PISG), which is unprecedented in the UN practice of seven decades. The UNMIK Administration has laid the foundations for building a quasi-independent legal system by abolishing legal regulations of the Republic of Serbia. The establishment of a quasi-legal system contrary to the provisions of the Resolution is especially evident in the denial of ownership interests over socially-owned, state-owned and public enterprises in the establishment and financing of which the Republic of Serbia participated.⁸ Therefore, our further consideration of this issue should start from the statement made by Prof. Milojević, M. in 2007, which is still valid today: “Nothing is wrong in Kosovo and Metohija. Today’s situation is created by a gross violation of the basic principles of international law”.⁹

I THE ROLE OF THE UNMIK ADMINISTRATION IN SHAPING AND ESTABLISHING A QUASI-LEGAL SYSTEM

The legal basis for adoption of regulations by the Special Representative of the UN Secretary-General is contained in Resolution 1244. The Special Representative of the UN Secretary-General has enabled the adoption of regulations that are important for the fate of socially-owned¹⁰ and state-owned property of the Republic of Serbia in the territory of AP Kosovo and Metohija.

I.1. UNMIK/REG/1999/1 ON THE AUTHORITY OF THE INTERIM ADMINISTRATION IN KOSOVO*¹¹

The first regulation issued by the SRSG is Regulation no. 1999/1 dated 25 July 1999 on the Authority of the Interim Administration in Kosovo.¹² The Regulation stipulates that all legislative powers, the executive power, including the administration of the judiciary, are entrusted to UNMIK and exercised by the SRSG. The SRSG acquires all elements of the state on the basis of the stated authorities referred to in Article 1 of the Regulation.¹³

8 On the investments of the Republic of Serbia in Kosovo and Metohija through the Development Fund in the period from 1945 to 1999, see: Davidović, S., 2018, pp. 27–37.

9 Milojević, M., 2005, *Srbi na Kosovu i Metohiji i načela međunarodnog prava*, (Kosovska Mitrovica 27–29. maj 2005), Srpska akademija nauka i umetnosti, Beograd, p. 245.

10 See more about the notion of social property in the self-governing system of the SFRY: Gams, A. Petrović, M., 1980, *Osnovi stvarnog prava*, Beograd, pp. 88–100.

11 Kosovo* – “This designation is without prejudice to positions on status, and is in line with UNSC Resolution 1244 and the ICJ Opinion on the Kosovo declaration of independence.” – Government of Republic of Serbia, Agreement on regional representation and cooperation (<https://www.srbija.gov.rs/kosovo-metohija/168200>, 15 December 2020).

12 UNMIK/REG/1999/1 on the Authority of the Interim Administration in Kosovo, 25 July 1999 (https://unmik.unmissions.org/sites/default/files/regulations/02english/E1999regs/RE1999_01.htm, 15 November 2020).

13 Čelić, D., 2015, *Pravni sistem i zaštita od diskriminacije*, *Diskriminacijom protiv „Diskriminacije” – Diskriminativne odluke UNMIK-a („Komisije za stambena i imovinska*

It is precisely for that reason that regulations adopted and signed by the SRSG as the supreme international authority cannot be disputed before the competent bodies of the PISG of Kosovo and Metohija. The importance of the regulations for the creation of the legal system is also indicated by the fact that in the event of a conflict between the provisions of the Regulation and the provisions of the law passed by the PISG of Kosovo and Metohija, the Regulation shall prevail.¹⁴

With regard to the appointment or removal of persons performing functions in the civil administration or the judiciary, the SRSG has broad powers, with the proviso that the appointment and removal of such persons and the performance of functions by them can only be done on the basis of and in accordance with existing laws.¹⁵ Only those laws that were in force before 24 March 1999 are considered existing laws.¹⁶ However, the application of existing laws or laws passed by the Republic of Serbia is not unconditional, i.e. their application is possible only if they are not in conflict with internationally recognized human rights standards,¹⁷ the fulfilment of UNMIK mandate under Resolution 1244 and any other regulation passed by UNMIK. Although the Regulation stipulates the conditional application of laws passed before 24 March 1999, we can point out that it acknowledges and respects the legal sovereignty of the Republic of Serbia in AP Kosovo and Metohija.

In addition to legislative, executive and judicial powers, the Regulation provides for another significant authority of the SRSG, which is the power to administer state property. The UNMIK Administration administers movable and immovable property, including financial assets, bank accounts and other property registered in the name of the Federal Republic of Yugoslavia, the Republic of Serbia or any of their bodies located in the territory of Kosovo*.¹⁸ Based on the stated authority, the UNMIK Administration appears in the role of guardian and custodian of state property of the Republic of Serbia. Recognizing its importance and economic value, the SRSG passed Regulation no. 2000/54,¹⁹ whereby the competence of the UNMIK Administration with regard to the right to administer all socially-owned property in the territory of AP Kosovo and Metohija was extended. When determining what falls (is) under state-owned or socially-owned property, Regulation no. 2000/54 establishes the principle of “objective and reasonable grounds to believe” that it is: (a) property belonging to or registered in the Federal Republic of Yugoslavia, the Republic of Serbia or belonging to or registered in any of their bodies; or (b) socially-owned

pitanja”), *Zbornik radova*, Prva sveska, Pravni fakultet, Univerzitet u Prištini – Kosovska Mitrovica, p. 241.

14 Art. 5 para. 5.2 UNMIK/REG/1999/1.

15 Art. 1 para. 1.2 UNMIK/REG/1999/1.

16 Art. 3 UNMIK/REG/1999/1.

17 Art. 2 UNMIK/REG/1999/1.

18 Art. 6 UNMIK/REG/1999/1.

19 UNMIK/REG/2000/54 Amending UNMIK Regulation no. 1999/1, as amended, on the Authority of the Interim Administration in Kosovo (https://unmik.unmissions.org/sites/default/files/regulations/04serbian/SC2000regs/RSC2000_54.pdf, 11 November 2020).

property.²⁰ It should be pointed out, and it is important that the UNMIK Administration has the sole and exclusive right to administer state-owned and socially-owned property in the territory of AP Kosovo and Metohija. The exclusive right to administer²¹ state-owned or public property by the UNMIK Administration shall be without prejudice to the right of any person or entity to assert ownership or other rights over property before a competent court in Kosovo*, or before a judicial mechanism to be established by regulation.²²

I.2. UNMIK/REG/1999/24 ON THE LAW APPLICABLE IN KOSOVO*

The situation proclaimed by Regulation no. 1999/1 regarding the application of existing laws which confirm the legal sovereignty of the Republic of Serbia was short-lived, that is, it only lasted less than five months. The alleged legal discrimination of the Albanian population provided by the laws passed after 22 March 1989²³ (whereby the Socialist Autonomous Province (SAP) of Kosovo was returned under the auspices of the legal sovereignty of the Republic of Serbia) is an excuse to boycott the application of Article 3 of Regulation no. 1999/1. We can advocate an attitude that the actual reasons for the boycott of the application of existing laws in accordance with Article 3 of Regulation no. 1999/1 were not in the allegedly discriminatory laws of the Republic of Serbia, but rather in the strong resistance of the “local lawyers” to application of laws that contain the prefix of the Republic of Serbia. The “local lawyers” threatened to stop all cooperation with UNMIK over the issue of applicable laws.²⁴ The resistance regarding further application of the laws passed after 23 March 1989 existed at all levels of government, and especially within the “local judiciary”.²⁵ The reasons for such wide resistance can be found in the status that SAP Kosovo had pursuant to the SFRY Constitution of 1974, whereby it had an independent and autonomous legislative, executive and judicial power (there was also a Constitutional Court) in relation to the Republic of Serbia, the integral part of which it used to be.²⁶ Respecting the demands of the

20 Art. 6 para. 6.1 UNMIK/REG/2000/54.

21 As it has expanded over time the jurisdiction over which property it has the right to administer, the UN SRSG has gone a step further in terms of an extensive interpretation of what the right to administer property includes. The right to administer property was initially interpreted by the UN SRSG in its original form in accordance with Resolution 1244, while later the right to administer property has been extensively interpreted in such a way that it includes the right to dispose of property. Extensive interpretation of administration rights has far-reaching consequences for exercising property and ownership interests of the Republic of Serbia.

22 Art. 6 para. 6.2 UNMIK/REG/2000/54.

23 22 March 1989 is linked to the alleged “abolition” of the autonomy enjoyed by SAP Kosovo – Gajić, V. A., 2018, *Međunarodno pravni status KiM i pridruživanje Srbije Evropskoj Uniji*, Beograd, p. 172.

24 Smith, C. A., 2012, *The Management Handbook for UN Field Missions*, International Peace Institute, New York, p. 131.

25 *Ibid.*, p. 132.

26 The legal independence guaranteed by the 1974 Constitution created the feeling that only if legal documents passed before 23 March 1989 were brought back to legal life, the legislative,

“local judiciary”;²⁷ the SRSG, contrary to the mandate entrusted to him pursuant to Resolution 1244, adopted and signed Regulation no. 1999/24 on the Law Applicable in Kosovo.²⁸

Regulation no. 1999/24 as a *lex specialis* is a precedent because it completely abrogated the legal-normative system of the Republic of Serbia, which had been built and established before 24 March 1999, on the one hand, while on the other hand it reincarnated the legal and normative system from the time of the SFRY. The essence of the Regulation is Article 1 para. 1.1 which provides for the application of two types of laws in the territory of AP Kosovo and Metohija, specifically: a) regulations issued by the SRSG together with additional legal instruments²⁹ and (b) the laws in force in Kosovo as on 22 March 1989.³⁰ Pursuant to Article 1 para. 1.1 which stipulates which laws are in force, and in order to avoid a conflict between laws passed before 22 March 1989 and laws passed after 22 March 1989, the SRSG adopted Regulation no. 1999/25³¹ with retroactive effect, whereby Article 3 of Regulation no. 1999/1 of 25 July 1999 on the application of “existing laws” was annulled.³²

However, in certain cases, the Regulation confirms the legal and normative sovereignty of the Republic of Serbia. Application of provisions of the laws passed by the Republic of Serbia is exceptionally possible if the competent court or body or legal entity determines in the decision-making procedure that the legal basis is not regulated by the laws provided for in Article 1 para. 1.1 of the Regulation, but is regulated by some other law in force in Kosovo* after 22 March 1989. Only then is the court, body or legal entity obliged to apply the provisions of the law and other legal documents that entered into force after 22 March 1989.³³

executive and judicial independence in relation to the legal sovereignty of Republic of Serbia could be restored, on the one hand, and that the idea of secessionism would be realized that way, on the other hand.

27 Smith C. A., 2012, p. 132.

28 UNMIK/REG/1999/24 on the Law Applicable in Kosovo, 12 December 1999, (https://unmik.unmissions.org/sites/default/files/regulations/02english/E1999regs/RE1999_24.htm, 15 November 2020).

29 Additional legal instruments that are implied pursuant to Article 1 para. 1.3 of the Regulation are the following: the Universal Declaration on Human Rights of 10 December 1948; the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and the Protocols thereto; the International Covenant on Civil and Political Rights of 16 December 1966 and the Protocols thereto; the International Covenant on Economic, Social and Cultural Rights of 16 December 1966; the Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965; the Convention on Elimination of All Forms of Discrimination Against Women of 17 December 1979; the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment of 17 December 1984; and the International Convention on the Rights of the Child of 20 December 1989.

30 Art. 1 para. 1.1 UNMIK/REG/1999/24.

31 UNMIK/REG/1999/25 amending UNMIK Regulation no. 1999/1 on the Authority of the Interim Administration in Kosovo (https://unmik.unmissions.org/sites/default/files/regulations/02english/E1999regs/RE1999_25.htm, 15 November 2020).

32 Gajić, V. A., 2018, p. 174.

33 Art. 1 para. 1.2 UNMIK/REG/1999/24.

Although the legal and normative system of the Republic of Serbia is exceptionally stipulated and acknowledged pursuant to Article 1 para. 1.2, Article 4 of the Regulation perfidiously excludes it.³⁴

With the adoption of the Regulation, conditions were created for a permanent change of property relations concerning business entities. By applying the reincarnated laws of SAP Kosovo from the time of the SFRY, and pursuant to Article 1 para. 1.1(b) of the Regulation, all forms of transformations of business entities carried out in the period between 22 March 1989 and 10 June 1999 shall be exempted.³⁵ Transformations of business entities in the form of status changes, changes in legal form, re-registration of names, reorganization, bankruptcy and liquidation, are not legally valid and are invalid, and therefore are annulled, because they are allegedly carried out under the auspices of legal discrimination against the Albanian population.³⁶ Legal relations over property that were established until 23 March 1999 were experiencing a return to the previous state, that is, there was a return to social and legal relations from the time of the SFRY.

Finally, we can point out that the reincarnation of long-extinct laws and legal documents from the time of the SFRY and the establishment of the inviolable principle of discrimination in favor of the Albanian population³⁷ constitute the basic characteristics and principles of Regulation no. 1999/24. Favoring the above two principles in practice, Regulation no. 1999/24 was a guideline for the SRSG to participate in the creation and establishment of a quasi-legal system in the territory of AP Kosovo and Metohija, contrary to the provisions of Resolution 1244.

34 All legal acts, including judicial decisions, and the legal effects of events which occurred, during the period from 10 June 1999 up to the date of the present regulation, pursuant to the laws in force during that period under section 3 of UNMIK Regulation No. 1999/1 of 25 July 1999, shall remain valid, insofar as they do not conflict with the standards referred to in section 1 of the present regulation or any UNMIK regulation in force at the time of such acts. – Art. 4 UNMIK/REG/1999/24.

35 The highest percentage of ownership transformation was carried out after 1991, namely 304 socially-owned enterprises, i.e. 61.21% of all socially-owned enterprises operating in Kosovo and Metohija went through ownership transformation in accordance with the following laws: Law on Conditions and Procedure for Transforming Socially-Owned Property into Other Forms of Ownership (*Official Gazette of the RS* nos. 48/91, 75/91, 48/94 and 51/94); Law on the Basis of Change of Ownership of Social Capital (*Official Gazette of the RS* nos. 29/96, 29/97, 59/98 and 74/99); and the Law on Property Transformation (*Official Gazette of the RS* nos. 32/97). – Data of the Government of the Republic of Serbia, Office for Kosovo and Metohija (unpublished document).

36 The characteristic of the Regulations issued by the SRSG, and especially those concerning the exercise of property rights and the rights arising from them, is that they are based on the “sacred axiom of discrimination against the Albanian population in the period from 22 March 1989 to 24 March 1999” by the Republic of Serbia. The regulations have a double effect: a) they eliminate the negative effects of allegedly repressive discrimination against the Albanian population by bringing back legal documents from the SFRY period; and b) in reality the regulations have the effect of discriminating against the non-Albanian population in terms of exercising basic human rights.

37 Interestingly, the Regulation refers to internationally recognized standards on human rights and non-discrimination in law enforcement, which was not the case in practice.

II REASONS FOR ADOPTING REGULATION NO. 2002/12 AND REGULATION NO. 2002/13 WHICH ESTABLISHED THE LEGAL FRAMEWORK FOR THE PROCESS OF LEGAL USURPATION OF SOCIALLY-OWNED AND PUBLICLY-OWNED ENTERPRISES

Pursuant to the powers entrusted to him on the basis of Regulation no. 1999/1 and Regulation no. 2001/9,³⁸ and after consultations with the Economic Fiscal Council and the PISG in AP Kosovo and Metohija, the SRSG simultaneously adopted: 1) Regulation no. 2002/12 on the Establishment of the Kosovo Trust Agency (KTA)³⁹ and 2) Regulation no. 2002/13 on the Establishment of the Special Chamber of the Supreme Court of Kosovo.⁴⁰ The adoption of the above-mentioned Regulations created the necessary conditions for implementing mass privatization of socially-owned enterprises in AP Kosovo and Metohija. What the reasons are for the UNMIK Administration to pass these Regulations and thus become the authority under which privatization was carried out – remains a question to be answered? Constant pressure from the United States of America to begin with privatization as soon as possible, without determining the property rights of the Republic of Serbia in socially-owned enterprises, raised fears within the UN that participation in the privatization process could result in UNMIK's liability for violations of rights in possible disputes initiated by owners and creditors.⁴¹ In order for UNMIK to prove to be in compliance with Resolution 1244, and thus a mission whose members and bodies do not participate in the privatization process, on the one hand, and the body that is the only one to be authorized to issue regulations with legal force, on the other hand, an alleged compromise was reached between the UN and the leading countries, in the form of adoption of Regulations no. 2002/12 and 2002/13. The specificity of Regulation no. 2002/12 is in the proclamation of the alleged position that the role and influence of the UNMIK Administration and the SRSG in the work of the Agency is reduced as much as possible. Regulation no. 2002/13 contains a proclamation of a mechanism for legal protection of interests of owners and creditors by the establishing Special Chamber of the Supreme Court of Kosovo* (composed of international judges as impartial ones) the jurisdiction of which covers only disputes arising from the privatization process.⁴² Although the adoption of the

38 UNMIK/REG/2001/19 on the Executive Branch of the Provisional Institutions of Self-Government in Kosovo, 13 September 2001, (https://unmik.unmissions.org/sites/default/files/regulations/02english/E2001regs/RE2001_19.pdf, 18 November 2020).

39 UNMIK/REG/2002/12 on the Establishment of the Kosovo Trust Agency, 13 June 2002, (https://unmik.unmissions.org/sites/default/files/regulations/02english/E2002regs/RE2002_12.pdf, 20 November 2020).

40 UNMIK/REG/2002/13 on the Establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters, 13 June 2002, (https://unmik.unmissions.org/sites/default/files/regulations/02english/E2002regs/RE2002_13.pdf, 20 November 2020).

41 Davidović, S., 2018, p. 56.

42 *Ibid.*, p. 57.

above-mentioned Regulations allegedly represents a denial of UNMIK's responsibility in terms of the privatization carried out, we can justifiably point out that if not the UN, then the UNMIK Administration, by denying the ownership interests of the Republic of Serbia in the privatization process over socially-owned enterprises provided biased support to the PISG in AP Kosovo and Metohija.

II.1. ON THE ESTABLISHMENT OF THE KOSOVO TRUST AGENCY (KTA)

INTRODUCTION

With the adoption and entry into force of Regulation no. 2002/12, which was subsequently supplemented by Regulation 2005/18,⁴³ the Kosovo Trust Agency (KTA) was founded. Regulation no. 2002/12 is based on the denial of the equity capital of the Republic of Serbia in socially-owned, public-owned and state-owned enterprises. While the Regulation denied the equity capital of the Republic of Serbia, it went a step further in terms of denying the private capital of legal entities and individuals from the territory of the Republic of Serbia in the companies/enterprises in the territory of AP Kosovo and Metohija.⁴⁴ The significance of the adoption of the aforementioned regulations, and thus the establishment of the KTA, is reflected in the fact that legal usurpation and the *de facto* nationalization of socially-owned and state-owned property are carried out in favor of a third party – self-proclaimed Kosovo*, as well as in the discrimination of the workers of Serbian nationality.⁴⁵

II.1.1. Purpose and objective of KTA

The purpose of establishment of the KTA is to administer socially-owned⁴⁶ and publicly-owned enterprises. In order to remove doubts, and without inten-

43 UNMIK/REG/2005/18 amending UNMIK Regulation no. 2002/12 on the Establishment of the Kosovo Trust Agency, 22 April 2005, (https://unmik.unmissions.org/sites/default/files/regulations/02english/E2005regs/RE2005_18.pdf, 20 November 2020).

44 Since UNMIK Regulation no. 2005/18 allows the Trust Agency to sell assets without prior determination of the ownership of those assets, and also protects parties who have bought property from the Trust Agency, privatization could result in expropriation i.e., the sale of assets owned by third parties. However, risking a violation of Article 1 of Protocol 1 to the European Convention, UNMIK Regulation no. 2005/18, Section 5.3 does not include the necessary procedural safeguards. The Trust Agency could, under the applicable law, sell property which is potentially private. – Organization for Security and Co-operation in Europe (OSCE), 2008, *Privatization in Kosovo: Judicial Review of Kosovo Trust Agency Matters by the Special Chamber of the Supreme Court of Kosovo*, p. 26 (<https://www.osce.org/files/f/documents/9/5/32012.pdf>, 5 April 2021).

45 Benedek, W., 2015, "Kosovo – UNMIK accountability: Human Rights Advisory Panel Finds Discrimination in Privatization Cases", *Austrian Law Journal Vol. 2, Issue 2*, pp. 281–282.

46 Using the methodology provided for in Regulation 2002/12, the KTA determines that at the time of establishing the international administration in AP Kosovo and Metohija, there were 450 socially-owned enterprises and 180 with undefined status (they were later declared socially-owned enterprises).

tion and need to consider and understand the ownership structure, Regulation no. 2002/12 contains general definitions of a socially-owned or publicly-owned enterprise. An enterprise is considered socially-owned only if it was established as a socially-owned enterprise pursuant to the Law on Enterprises, the Law on Associated Labor of the Federal Republic of Yugoslavia, or any other applicable law.⁴⁷ Pursuant to the provisions of the Regulation, publicly-owned enterprise means an enterprise that was created as publicly-owned by the territory of Kosovo, a municipality or other public-political organization within the territory of Kosovo, the Republic of Serbia, or the Federal Republic of Yugoslavia or any public-political organization of either the Republic of Serbia, or the Federal Republic of Yugoslavia.⁴⁸

A question arises what will happen to the status of a socially-owned enterprise for which the process of transformation (privatization) has been completed or has begun and has not been completed until the entry into force of Regulation 2002/12. The Regulation does not leave the possibility of legal interpretation, rather it is explicit and states that any transformation of a socially-owned enterprise into various forms of business organizations that affects its status (status changes) as a socially-owned enterprise is valid only if it was implemented before 22 March 1989.⁴⁹ However, a transformation of a socially-owned enterprise carried out after 22 March 1989 is valid only if it is carried out: a) in accordance with the applicable law⁵⁰ and b) in a non-discriminatory manner.⁵¹

The KTA has the sole and exclusive right of administration, whereby it can only administer enterprises registered or operating in the territory of AP Kosovo and Metohija.⁵² The KTA is also obliged to administer the assets⁵³ of socially and publicly-owned enterprises. By providing for the authority to administer enterprises and their assets, the Regulation favors the territorial principle by disabling the right of the KTA to administer branch offices, subsidiaries and assets located outside the territory of AP Kosovo and Metohija.

As an administrative body founded in line with Regulation no. 2002/12 within the Kosovo legal system, the KTA has the status of an independent and autonomous legal entity with legal and business capacity.⁵⁴ Having the status of a legal

47 Art. 3 UNMIK/REG/2002/12.

48 Art. 3 UNMIK/REG/2002/12.

49 Art. 5 para. 5. 4 UNMIK/REG/2002/12.

50 The applicable law is the law in force in AP Kosovo and Metohija pursuant to UNMIK Regulation 1999/24 of 2 December 1999 with amendments to the applicable law.

51 By providing for the institute of discrimination against the non-Serb population in the period from 22 March 1989 to 22 June 1999, the achievement of the desired goal was enabled, which is to exclude the ownership interests of the Republic of Serbia and companies from its territory.

52 An enterprise or branch thereof shall be deemed to be operating in the territory of Kosovo if its actual management control is in Kosovo. – Art. 5 para. 5. 2(a). UNMIK / REG /2002/12.

53 Assets of an enterprise shall be deemed to be located in the territory of Kosovo if such assets are located in Kosovo and have since 10 June 1999 been administered or managed independently of its assets outside of Kosovo, or if such assets are otherwise subject to the authority of UNMIK – Art. 5 para. 5. 2(b) UNMIK/REG /2002/12.

54 Art. 17 UNMIK/REG/2002/12.

entity, the KTA is authorized to enter into agreements, acquire, use, and dispose of property of the enterprise, and also appears as a procedural legal entity. In terms of administering an enterprise, the KTA appears as a trustee of the owner of the capital.⁵⁵ As a trustee of the owner of the capital who has the obligation to administer the enterprise, the KTA undertakes all necessary actions/any actions in order to preserve or increase the value (capital) and sustainability of the enterprise.⁵⁶ The generalization in defining the term “necessary action/any action” leads us to the conclusion that no precise limits can be set in asset administration and that it cannot be defined what exactly the powers of the Agency are, and whether (and which) actions can be considered to be outside the scope.⁵⁷

The foundation and subsequent sale of a new joint stock company (*New Cos*) through the process of transformation of a socially-owned enterprise represents the essence of the establishment of the KTA. The KTA may found one or more joint stock companies on behalf of a socially-owned enterprise, and as a trustee of the owner of the capital. The KTA, in accordance with its powers, may decide to transfer to the newly founded joint stock company all rights and interests in relation to all or part of the assets of the respective socially-owned enterprise. The newly founded joint stock company is entered in the register kept by the KTA under a new name and form. Only the assets of the parent company in social ownership are registered to the newly founded joint stock company by the method of transfer. As for the liabilities of the socially-owned enterprise, they are not transferred (not registered) to the newly founded joint stock company, but remain with the old socially-owned enterprise. The KTA decides on a case-by-case basis whether and to what extent the newly founded joint stock company would take over the liabilities of the parent socially-owned enterprise, primarily recognizing receivables arising in the period after 22 June 2002. With the foundation of a new joint stock company out of a socially-owned enterprise, a company that has no commitments and contingencies is formed. Instead, it has extremely attractive assets. The moment of registration of assets and the value of assets are the benchmarks for determining the value of the share(s) of the newly founded joint stock company. The shares of the newly founded company, which are owned by the socially-owned enterprise, are exclusively and solely administered by the KTA.⁵⁸

II.1.2. Structure and responsibility of Board of Directors

The KTA performs its duties in terms of exercising authority⁵⁹ regarding enterprise administration through the Board of Directors, the General Manager and two Deputy General Managers. The members of the Board of Directors,

55 To avoid confusion, the term “capital owner” means the PISG of AP Kosovo and Metohija and the Kosovo society, and not the Republic of Serbia.

56 Art. 2 UNMIK/REG/2002/12.

57 Davidović, S., 2018, p. 58.

58 Art. 8 para. 8.1 UNMIK/REG/2002/12.

59 For more on the specific authorities of the Agency to take any action it deems necessary to preserve or increase the value and sustainability of the undertaking concerned or to manage it, see Article 6 UNMIK/REG/2002/12.

the General Manager and the Deputy General Managers are elected among representatives of the international community and local representatives from the territory of AP Kosovo and Metohija. The Board of Directors consists of eight directors, four international and four local.

The SRSG has the exclusive right to appoint the directors of the Board of Directors.⁶⁰ The directors who come from among the representatives of the international community and who are directly appointed by the SRSG are: a) Deputy SRSG for Economic Reconstruction, who is *ex officio* the Chairman of the Board; b) Deputy of the Deputy SRSG for Economic Reconstruction, who, in the absence of the Chairman of the Board, acts as the Chairman of the Board; c) Deputy SRSG for Civil Administration; and d) General Manager of the Agency. In terms of the composition of directors elected from the territory of AP Kosovo and Metohija, three are elected among the PISG ministers, including a minister from the Kosovo and Metohija Serb community, while the fourth director is the President of the Federation of Independent Trade Unions. Although the appointment of one director from among the Serbs from Kosovo and Metohija is envisaged, it can be pointed out that he/she has no special influence on decision-making, because decisions are made by a simple majority of votes.⁶¹

The appointment of the Board of Directors, the authorities regarding the Board decisions,⁶² the individual responsibility of the Board members and the collective responsibility of the Board⁶³ leave no doubt that the SRSG, as the authority with the broadest powers and under the auspices of the UNMIK mission, played a significant role in the controlled process of legal usurpation of assets of the Republic of Serbia in favor of the PISG in Kosovo and Metohija.

II.1.3. Privatization methodology

As we have previously stated, declaratively and under the auspices of the SRSG, the only purpose of establishing the KTA was to manage socially-owned and public-owned enterprises to increase their value until the moment of final resolution of property relations. However, the real goal of establishing the KTA was not management or increase of the value of the enterprise, but the privatization of socially-owned and public-owned enterprises.⁶⁴ We must point out that the privatization of socially-owned enterprises through bankruptcy was not

60 Art. 12 para. 12.1 UNMIK/REG/2002/12.

61 The Serbian director did not have the opportunity to veto decisions as member of the Board, as an instrument for protecting the interests of the Republic of Serbia and legal entities from the territory of the Republic of Serbia, by stopping the privatization process until the ownership structure in business entities is determined.

62 The SRSG may at any time: a) revoke or amend any decision of the Board or Management if he/she finds that such decision is not in accordance with Article 24.2; and b) order any action of the Agency for which he/she determines to be necessary in accordance with Article 24.2 – Art. 24 para. 24.3 UNMIK/REG/2002/12.

63 On its work, and in accordance with the provisions of the Regulation on the basis of Article 24 para. 24.2, the KTA reports immediately and directly to the SRGS.

64 On the effects and implemented privatizations of KTA, see: <https://www.pak-ks.org/page.aspx?id=3,1&id=3,1> (27 November 2020).

considered,⁶⁵ because in the case of bankruptcy it must be determined who the creditors are and who the debtor is (the owner of the company, in these cases, is the Republic of Serbia). When choosing the privatization procedure,⁶⁶ the position was taken that it must be carried out only through: a) *spin-off* methods or b) *liquidation*.⁶⁷ By choosing the *spin-off* method of privatization, according to which property can be transferred without a permit, and by freezing the proceeds from its sale and waiting for the political situation to stabilize, a new and unknown right has been created.⁶⁸

II.1.3.1. *Spin-off* method of privatization

Unlike the accepted business practices in the field of *spin-off* company establishment, in the territory of AP Kosovo and Metohija, as carried out first by the UNMIK administration and later by the PISG of AP Kosovo and Metohija, the establishment of a new *spin-off* cannot be discussed as a *spin-off* company, but only as using the *spin-off* privatization method in its barest form known as the turn-around method. The *spin-off* turn-around method creates a Newly Established Joint Stock Company (*New Cos*), a company free of all debts, which is later sold. The proceeds from the sale of *New Cos* are placed in a trust fund, managed by the KTA. Funds from the trust fund should be distributed as follows: a) 20% to employees of the socially-owned enterprise⁶⁹ and b) 80% for administrative costs, to creditors and owners.⁷⁰ However, what causes great controversy is that there is no envisaged method of determining the starting price of a company that is put up for tender. Very often in practice, an oral agreement has been reached in advance between the potential buyer and the KTA on the price at which the new company will be purchased, provided that the price agreed on must be minimally acceptable for the KTA.

65 Petrović, P., 2006, Obim i kontraverze aktuelne i najavljene privatizacije na Kosmetu, *Zbornik radova „Pitanje Kosmeta“*, Institut za međunarodnu politiku i privredu, Beograd, p. 243.

66 See more about the conducted privatization rounds and the number of privatized companies at: <http://kta-kosovo.org/html/> (26 November 2020).

67 Regulation no. 2005/48 on reorganisation and liquidation of companies and their property under the Kosovo Trust Agency's administrative jurisdiction, (<http://www.pak-ks.org/desk/inc/media/7D66CEF0-FACC-42D6-88B3-827D82B5E5E7.pdf>, 20 December 2020). Administrative Direction no. 2007/1 for the Implementation of UNMIK Regulation no. 2005/48 on the Reorganization and Liquidation of Enterprises and Their Assets Under the Administrative Jurisdiction of the Kosovo Trust Agency (<https://www.pak-ks.org/desk/inc/media/1CAC9357-B4CF-4F3D-98A1-02582CD573F2.pdf>, 27 November 2020).

68 Todini, M., 2003, *Privatization System in Kosovo-Rising Towards Uncertain Future*, Pristina, p. 30.

69 Art. 10 para. 10.1 UNMIK/REG/2003/13 on the Transformation of the Right of use Socially-owned Immovable Property, 9 May 2003 (https://unmik.unmissions.org/sites/default/files/regulations/04serbian/SC2003regs/RSC2003_13.pdf, 10 April 2021).

70 Art. 36 UNMIK/REG/2005/48 on the Reorganisation and Liquidation of Enterprises and their Assets under the Administrative Authority of the Kosovo Trust Agency, 21 November 2005 (https://unmik.unmissions.org/sites/default/files/regulations/02english/E2005regs/RE2005_48.pdf, 10 April 2021).

II.1.3.1.2. Types of *spin-off* methods

Regarding the application of the *spin-off* method of turning, when founding a new company, the following can be applied: a) ordinary *spin-off* and b) special *spin-off*.

II.1.3.1.2.1. Ordinary *spin-off*

Out of the two previously mentioned types of *spin-off* methods, the KTA applied ordinary *spin-off* in privatizing socially-owned enterprises when issuing tender rules for the *spin-off*.⁷¹ The *ordinary spin-off* method of privatization is carried out in two steps: a) creating a new company without debt and b) selling the new company without debt.

Step 1: The Kosovo Trust Agency (KTA) may create a new company in the form of a joint stock company (*New Cos*) or a limited liability company. Part or all of the assets of former socially-owned enterprises are transferred to the new company. Shares in the *New Cos* will be temporarily owned by the old company which will later be converted into a holding company, fully managed by the KTA. The KTA also keeps shares in trust for old businesses, and creditors of old businesses can appeal to the International Chamber of the Supreme Court of Kosovo*.

When starting a *New Cos*, only assets are transferred, while liabilities are not transferred but remain with the old company. Creditors remain unprotected in the process of registering assets and setting up a new company. This way, the obligations towards creditors of a socially-owned or publicly-owned enterprise are flagrantly avoided, leaving obligations to the founder (Republic of Serbia). When a new company is established, creditors can only settle their claims against the founders and owners of the old company's capital.

Step 2: The KTA sells new company shares held in private investors' trust, both domestic and foreign. The proceeds are entrusted to the KTA, disregarding ownership and creditors of the old company.

II.1.3.1.2.2. Special *spin-off*

A special *spin-off* is used in all those cases when it is estimated that these are companies of strategic importance, which have a large number of employees. A strategic company is a company that has at least 150 employees and a potential capital turnover of 10 million euros. It should be noted that the application of a special *spin-off* achieves the same result as the application of an ordinary *spin-off* i.e., it is carried out in two steps like the ordinary *spin-off*. Two bidding rounds are held, and three standards apply: (i) the bid price (50% of the total bid price), (ii) employment guarantees (25% of the total bid) and (iii) investment guarantees (25% of the total supply).⁷² In applying a special *spin-off*, higher standards

71 Rules of Tender for the Spin-Off Privatisation (<http://www.kta-kosovo.org/ktareg/tender-ruleseng.pdf>, 5 December 2020).

72 Organization for Security and Co-operation in Europe (OSCE), 2008, *Privatization in Kosovo: Judicial Review of Kosovo Trust Agency Matters by the Special Chamber of the Supreme*

are set for the potential buyer when buying a company. The buyer is obliged to have a business plan, and he is also obliged to keep a certain number of employees in the privatized company.

II.2. SPECIAL CHAMBER OF THE SUPREME COURT

The adoption of the Regulation on the Special Chamber of the Supreme Court provided for establishment of a legal mechanism to protect the interests of potential owners and creditors in the privatization process. The legislative framework for the functioning of the Special Chamber is Regulation no. 2002/13 and UNMIK Administrative Direction no. 2003/13 for implementation of UNMIK Regulation No. 2002/13,⁷³ later replaced by Administrative Direction no. 2006/17.⁷⁴ In terms of composition, the Special Chamber consists of five judges, three of whom are international and two are local. The SRSG has the sole and exclusive right to appoint all judges of the Special Chamber, following consultations with the President of the Supreme Court of Kosovo*. The consultations that the SRSG has with the President of the Supreme Court are primarily declarative (informative) and are non-binding for the SRSG.⁷⁵ The opinion of the President of the Supreme Court is somewhat important when it comes to the appointment of local judges (judges from the territory of AP Kosovo and Metohija). In addition to the appointment of judges, the SRSG is also responsible for the appointment of the presiding judge of the Special Chamber. Only an international judge may be appointed presiding judge of the Special Chamber. The appointment and removal of judges and the appointment of the presiding judge inevitably indicate that the SRSG was thoroughly acquainted with all proceedings before the Special Chamber, leading us to justifiably fear/doubt that he/she directly and with his/her authority influenced the final outcome of the court proceedings.

The subject matter jurisdiction of the Special Chamber is exclusive, in respect of litigation initiated or conducted against the KTA. The indemnified party in the privatization process – the plaintiff can initiate civil proceedings against the KTA only before the Special Chamber of the Supreme Court, while local courts are obliged to declare themselves without jurisdiction over the subject matter. In addition to exclusive jurisdiction, the Special Chamber has additional competencies related to: 1) challenging decisions and other actions of the KTA; 2) receivables from the KTA for financial losses that are the result of decisions of

Court of Kosovo, p. 9. (footnote 29), (<https://www.osce.org/files/f/documents/9/5/32012.pdf>, 5 April 2021).

73 UNMIK/DIR/2003/13 implementing UNMIK Regulation no. 2002/13 on the Establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency related matters, 11 June 2003 (https://unmik.unmissions.org/sites/default/files/regulations/02english/E2003ads/ADE2003_13.pdf, 24 November 2020).

74 Amending and Replacing UNMIK Administrative Direction 2003/13 Implementing UNMIK Regulation no. 2002/13 on the Establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency related matters (https://unmik.unmissions.org/sites/default/files/regulations/02english/E2006ads/ADE2006_17.pdf, 25 November 2020).

75 Read more about the legal nature of the court in: Davidović, S., 2018. pp. 60–61.

the Trust Agency which is the administrator of the socially-owned enterprise; 3) receivables from the socially-owned enterprise that is under the KTA administration if such receivables arose during or before administration by the KTA; and 4) all other receivables provided for in Article 4.1 of Regulation no. 2002/13.⁷⁶

In the four categories of cases, the Special Chamber has the authority to pass: 1) decisions to send or revoke requests to the regular courts that are in the primary jurisdiction of the Special Chamber; 2) decisions relating to appeals concerning the list of eligible workers; 3) judgments, decisions and orders in reorganization and liquidation proceedings; and 4) judgments on appeal against judgments of regular courts on issues within the competence of the Special Chamber.

The proceedings initiated before the Special Chamber are characterized by being urgent and single-instance. The judgment of the Special Chamber on the issue arising from its exclusive jurisdiction is final and binding, i.e., there is no possibility of filing ordinary legal remedies (appeals). However, in addition to the rule on single-instance decision-making, there is a possibility of two-instance proceedings in the following cases: 1) an appeal is filed against the decision and judgment of the regular court to which the Special Chamber assigned the case or 2) when the regular court renders a decision on the request which is in the exclusive jurisdiction of the Special Chamber. The two-instance decision-making, i.e., deciding on appeals, suggests that the intention was to limit the arbitrary behavior of local courts in the privatization process. Finally, we can point out that the effects of the Special Chamber of the Supreme Court of Kosovo* were limited in scope, with the established case-law being a useful source of interpretation of legal institutes in the privatization process.⁷⁷

III CONTINUED PRIVATIZATION OF SOCIALLY-OWNED ENTERPRISES IN THE PERIOD AFTER THE UNILATERAL DECLARATION OF INDEPENDENCE

In the period after the unilateral declaration of independence and the reduction of the UN Mission's authority, the delegation of the UN Mission's competence to local authorities and agencies occurs. The Kosovo Trust Agency – KTA continues its work in the form of the Kosovo Privatization Agency⁷⁸ (hereinafter referred to as KPA). UNMIK Regulation no. 2002/12 on the Establishment of the KTA, as amended, and all KTA assets and liabilities, which will later become the Agency's property and liability, constitute the legal basis

76 Art. 4 para. 4.1 UNMIK/REG/2002/13.

77 Davidović, S., 2018. p. 62.

78 Law no. 03/L-067 on the Privatization Agency of Kosovo (<https://www.pak-ks.org/desk/inc/media/298578cb-9202-44cf-8d28-ce24cc53afa2.pdf>, 6 December 2020), later amended by Law no. 04/L-034 on the Privatization Agency of Kosovo (<https://www.pak-ks.org/desk/inc/media/EC4F2A29-9497-44C1-A5FA-A39BCC812359.pdf>, 6 December 2020).

for KPA to become legal successor of the KTA. The KPA has the authority to manage the business and assets, including the authority to sell, transfer and/or liquidate.⁷⁹

The main goal of the KPA remains the privatisation of socially-owned enterprises through already practically justified methods: a) *spin-off* and b) *liquidations*. The KPA shall have the authority to administer socially-owned enterprises, regardless of whether they underwent a transformation; any assets located in the territory of Kosovo*, whether organized into an entity or not, which comprised socially-owned property on or after 22 March 1989, and all shares in Corporations and subsidiary Corporations established pursuant to the present Law; and all state-owned interests in an enterprise or other legal entity, regardless as to whether the enterprise or legal entity underwent a transformation.⁸⁰ The KPA takes all actions and enforces the rights set out in the applicable law concerning the property of the enterprise which is located outside the territory of Kosovo*, if the property of the enterprise is easily accessible, taking into account the limitations of the Agency's administrative resources.⁸¹

It is precisely the competence of the KPA to undertake all actions and exercise rights regarding ownership of an enterprise which is located outside the territory of AP Kosovo and Metohija, if the ownership of the enterprise is easily accessible, that represents one of the crucial differences between Regulation no. 2002/12 and Law no. 04/L-034. While Regulation no. 2002/12 restricts the Agency's competence to ownership of enterprises located in the territory of AP Kosovo and Metohija, Law no. 04/L-034 extends the Agency's competence to ownership of enterprises located outside the territory of AP Kosovo and Metohija.

Law no. 03/L-067 and later Law no. 04/L-034A opened the Pandora's Box in this respect: while on the one hand it disputes and denies the property rights of the Republic of Serbia over socially-owned and publicly-owned enterprises, on the other hand, the Kosovo* strive to pursue and realize their quasi-legal interests in the territories of those countries that have recognized their unilateral independence.⁸²

79 Liquidation is the final stage and is designed to bring an end to the distribution of assets to creditors and owners: by eventually deleting the socially-owned company and name from the Kosovo Trade Companies and Trade Names Register (the Business Register). The liquidation framework is designed to facilitate the regular implementation of funds, the identification of creditors and the allocation of assets in accordance with the principle of priority set out in Article 40 in addition to the KPA Law. The Agency may liquidate the socially-owned enterprise or any part of it if it considers that such action is in the creditor's interest and/or in the interest of their owners. – See more in: Liquidation and Final Closure of Socially-Owned Enterprises (“SOEs”) PAK's Guide to Liquidation, (<http://www.pak-ks.org/desk/inc/media/19ECF2D6-1228-472F-BA67-1B625D7E7A93.pdf>, 6 December 2020).

80 Art. 5 para. 1 Law no. 04/L-034.

81 Art. 5 para. 3 Law No.04/L-034.

82 <https://kolektiv.me/118983/cija-je-popularna-plaza-kosovari-traze-dio-crnogorske-obale>, 20 December 2020.

IV DECISION NO. 06/134

Last but not least, a decision that has far-reaching implications for the legal status of socially-owned and publicly-owned of the Republic of Serbia in the territory of AP Kosovo and Metohija is Decision no. 06/134.⁸³ Referring to the rules of international law on state succession, and to the Vienna Convention on the Succession of State in Respect of State Property, Archives and Debts,⁸⁴ and unilaterally declaring themselves as a legal successor of the Republic of Serbia, the Kosovo* passed Decision no. 06/134. The quasi-legal effect of the Decision is that all real estate registered in the name of the Socialist Federal Republic of Yugoslavia or the Federal Republic of Yugoslavia, the Socialist Republic of Serbia, that is, the Republic of Serbia and the Socialist AP Kosovo and Metohija, including but not limited to their national, administrative, military bodies and former social-political organizations, shall be registered with the Kosovo* as the owner of real estate.⁸⁵ It is anticipated that all necessary actions shall be taken to register the said property in the cadastre.⁸⁶ The Decision's is important because it has negative applications for the interests of the Republic of Serbia, in the way that socially property and publicly property to which the Republic of Serbia is entitled are registered as property in favour of self-proclaimed Kosovo*.

CONCLUSION

Resolution 1244, which is still in force, guarantees the sovereignty and territorial integrity of the Federal Republic of Yugoslavia (FRY), i.e., the Republic of Serbia as its legal successor. However, the historical distance of 22 years and the behaviour by UNMIK administration and the SRSG entitle us to conclude that the UNMIK administration, implementing SRSG decisions, by its action on the ground and contrary to the provisions of the Resolution, knowingly participated in building a quasi-independent legal system and a basis for a unilateral declaration of independence by the PSIG AP Kosovo and Metohija.

Regulation passed by SRSG are based on the negation of legal regulations and ownership interests of the Republic of Serbia. Disregard for ownership interests is especially evident in the denial of ownership interests over socially-owned, state-owned and public enterprises in the establishment and financing of which the Republic of Serbia participated. Adopting Regulation no. 1999/24 opened the Pandora's Box in such a way that, contrary to the provisions of Resolution 1244, it reincarnated the legal-normative system from the time of the SFRY, which is

83 Decision no. 06/134 (www.kryeministri-ks.net/repository/docs/134_odluke_134.docx, 25 December 2020).

84 Vienna Convention on the Succession of States in Respect of State Property, Archives and Debts (1983), United Nations Document A/CONF. 117/14, (http://legal.un.org/ilc/texts/instruments/english/conventions/3_3_1983.pdf, 25 December 2020).

85 Art. 1 Decision no. 06/134.

86 Art. 2 Decision no. 06/134.

based on self-governing-social management. The self-governing-social management system, which does not recognize the owner of things, served as an excuse for UNMIK Administration that all enterprises located in the territory of AP Kosovo and Metohija belong to the “Kosovo society” and that the society is the sole owner of these enterprises. The adoption of Regulation no. 2002/12 on the establishment of the KTA created the conditions for mass legal usurpation of socially-owned enterprises. The establishment and subsequent sale of a new joint stock company (*New Cos*) through the transformation of a socially-owned enterprise represents the essence of the establishment of the KTA. Enterprise privatization was performed by the *spin-off* method as an original and unique privatization method which excluded ownership interests of the Republic of Serbia. It should be emphasized that the KTA, in principle, only claimed that it would conduct the privatization process transparently and competitively, to ensure a fair price for the privatized companies, and to satisfy the potential creditors of the old enterprise.

The privatization of socially-owned and public-owned enterprises through the *spin-off* method endorsed by the UNMIK Administration with the establishment of the Kosovo Trust Agency (KTA) has been continuously conducted to this day. We should emphasize that the process of privatization of socially-owned and publicly-owned enterprises in the territory of AP Kosovo and Metohija was neither transparent nor respectful of the ownership interests of the Republic of Serbia and the companies/enterprises in the territory of the Republic of Serbia, that is, the entire privatization process can be marked as usurpation of property by and in favour of self-proclaimed Kosovo*. Finally, on the basis of what is presented in the paper, we can once again confirm the statement of Prof. M. Milojević from 2007, which is still valid today: “Nothing is wrong in Kosovo and Metohija. Today’s situation is created by a gross violation of the basic principles of international law.”

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V PANEL:
EXPROPRIATION
.....

Jelena Jerinić*

WHO IS THE JUDGE OF THE COMMON GOOD?

Possibilities for judicial review of public interest establishment in expropriation cases – the example of Serbia

Abstract: *Expropriation, as a permissible limitation of personal property rights for a public purpose exists, in all probability, in most legal systems in the world. It is recognized as such in the case-law of the European Court of Human Rights. The procedure in which public purpose is established differs across legislatures. Serbian expropriation law envisages that public interest for expropriation can be established by law, as an act of Parliament, or in a number of areas, by an act of the Government. Legislative establishment is, apparently, under no limitation, other than the general constitutional provision allowing the restriction of property rights in the public interest. The article explores possibilities to utilize legal, primarily judicial remedies, in situations where the very establishment of public interest is called into question. The author claims that the possibilities are rather limited – particularly in relation to standing of owners whose property rights are to be affected by the expropriation, as well as the standing of representatives of wider interests of the public. She also explores issues relating to the effectiveness of these legal remedies.*

Keywords: expropriation, public interest, public purpose, legitimate aim, judicial review, Administrative Court, constitutionality review.

I INTRODUCTION AND RESEARCH QUESTIONS

When viewed as a legal issue, expropriation can be located somewhere in between public law (constitutional and administrative law) and civil law, namely property law. Written by an administrative law enthusiast, this contribution primarily addresses the public law aspects of expropriation. As a permissible interference with property in the public interest (or for a public purpose) expropriation is in all probability, universally allowed.¹ It is also recognized as such in the

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1 See e.g. Dorsen, N., Rosenfeld, M., Sajó, A. and Baer, S., 2010, *Comparative Constitutionalism: Cases and Materials*, sec. ed., St. Paul, MN, West, pp. 1283–1325; Plimmer, F. and McCluskey, W. (eds.), 2019, *Routledge Handbook of Contemporary Issues in Expropriation*, London, Routledge; United Nations Conference on Trade and Development (UNCTAD), 2012, *Expropriation – A Sequel*, New York and Geneva, United Nations; Reinisch, A., 2008, *Expropriation*, in: Muchlinski, P. et al. (eds.), *The Oxford Handbook of International Investment Law*, Oxford, Oxford University Press, pp. 410–458; Waincymer, J.M., 2009, Balancing property rights and

case-law of the European Court of Human Rights (ECtHR),² as well as in other regional human rights treaties³ and international soft-law instruments.⁴ Another, mostly undisputed issue is that expropriation should be subject to just compensation, unless there are exceptional circumstances. The procedure in which public interest for expropriation is determined differs across legislatures and, understandably, situations might arise in which the very establishment of public interest is called into question or, in the legal sense, reviewed as a consequence of adequate remedies. The FAO Voluntary Guidelines call upon states to “clearly define the concept of public purpose in law, in order *to allow for judicial review* [emphasis added].”

In the comparative law perspective, public interest for expropriation is determined either by an act of the legislature or this is delegated by law to the executive (the Government or the administration) or to the judiciary,⁵ according to a procedure usually set out in a general act on expropriation. This, in general terms, is the case in Serbia.

The Serbian expropriation law (passed in 1995 and amended several times, last time in 2016)⁶ envisages that public interest for expropriation can be established by law, as an act of Parliament (legislative expropriation), or by an act of the Government (as a form of administrative expropriation). The legal nature of the latter act will be discussed in more detail in Part II. The law limits areas

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- human rights in expropriation, in: Dupuy, PM et al. (eds.), *Human Rights in International Investment Law and Arbitration*, Oxford, Oxford University Press, pp. 275–309; Sluysmans, J. A. M. A., & Waring, E. J. L., 2016, Core Principles of European Expropriation Law, *European Property Law Journal*, 3, pp. 142–169; Sluysmans, J., 2016, Rethinking expropriation law, *European Property Law Journal*, 3, pp. 139–141; Groen, L., 2016, The development of the right of self-realisation in the Netherlands, *European Property Law Journal*, 3, pp. 275–300.
- 2 Popović, D., 2009, *Protecting property in European human rights law*, The Hague, Eleven, pp. 29–41, 52–64; Ploeger, H. and Groetelaers, D., 2007, The Importance of the Fundamental Right to Property for the Practice of Planning: An Introduction to the Case Law of the European Court of Human Rights on Article 1, Protocol 1, *European Planning Studies*, 10, pp. 1423–1438; Deutsch, U., 2005, Expropriation without Compensation – the European Court of Human Rights sanctions German Legislation expropriating the Heirs of “New Farmers”, *German Law Journal*, 10, pp. 1367–1380; Bruno, G. C., 2003, Right of Property “Occupation-expropriation” rule Article I of the First Protocol to the European Convention on Human Rights and Fundamental Freedoms – Role of the case-law of the European Court of Human Rights. *The Italian Yearbook of International Law Online*, 1, pp. 241–252.
 - 3 See e.g. Sprankling, J. G., 2013, The Global Right to Property, *Columbia Journal of Transnational Law*, p. 52.
 - 4 The most prominent being the 2012 Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security of the Food and Agriculture Organization of the United Nations (FAO), <http://www.fao.org/3/i2801e/i2801e.pdf> (accessed 8 February 2021). Guideline 16 deals with expropriation and compensation. For an analysis of Guideline 16, see e.g. Hoops, B., 2016, Expropriation Procedures in Germany and the Netherlands: Ready for the Voluntary Guidelines on the Responsible Governance of Tenure?, *European Property Law Journal*, 3, pp. 236–274.
 - 5 In this respect, authors distinguish between statutory (legislative), administrative and judicial expropriation. See Hoops, B., 2016, p. 243.
 - 6 Law on Expropriation (Zakon o eksproprijaciji, *Službeni glasnik RS*, nos. 53/95, 23/01, 20/09, 55/13 and 106/16 – available in Serbian only).

in which Government can establish public interest, while its establishment by law is apparently under no such limitation, other than the general constitutional provision allowing the revoking or restriction of one's property rights in the public interest "established by the law and with compensation which cannot be less than market value" (Article 58 para. 2 of the Serbian Constitution).

The Law does not regulate the conditions or the procedure for establishment of public interest by Parliament, so the regular legislative procedure applies. On the other hand, it does to an extent regulate the procedure before the Government, but does not determine its legal nature. However, it can be considered a *sui generis* procedure, resembling administrative procedure (as argued in Part II), with a remedy provided in administrative dispute before the Administrative Court.

Areas in which the Government can establish public interest for expropriation are defined fairly widely (e.g., education or social welfare, or social housing or exploitation of mineral resources, on the other side). Most of these fall into the scope of public or communal services which are generally in the remit of central or local authorities, and we can easily recognize public interest within them. Since 2009, the Government has passed more than 2,000 such decisions, concerning expropriations of smaller scale in different parts of the country.⁷ These concerned, for instance, expropriations for building streets or local roads, a copper mine in the eastern town of Bor, electricity transmission stations, but also state and regional highways.

In the same period, five laws concerning large-scale projects were passed establishing public interest for expropriation in case of two gas pipelines (in 2009 and 2013), an electricity transmission system (2014), a highway (2019), as well as a commercial and residential complex in the center of Belgrade (in 2015).⁸

Besides expropriation, some of these laws brought about derogations from general planning and construction legislation, as well as public procurement

7 The data has been retrieved from the official database of *Službeni glasnik (Official Gazette of the Republic of Serbia)* in which these Government decisions are published. <https://www.pravno-informacioni-sistem.rs/arrhslgl-sgarh> (available in Serbian only).

In 2009, the Government passed 171 decisions on the establishment of general interest for expropriation and from 2010 to 2020, another 1,868 decisions establishing public interest for expropriation, while 29 were passed in the first two months of 2021.

8 Zakon o utvrđivanju javnog interesa za eksproprijaciju nepokretnosti radi izgradnje magistralnog gasovoda MG-11 (*Službeni glasnik RS*, no. 104/09 – available in Serbian only); Zakon o utvrđivanju javnog interesa i posebnim postupcima eksproprijacije i pribavljanja dokumentacije radi realizacije izgradnje magistralnog gasovoda granica Bugarske – granica Mađarske (*Službeni glasnik RS*, no. 17/13, 95/18 – available in Serbian only); Zakon o utvrđivanju javnog interesa i posebnim postupcima eksproprijacije i pribavljanja dokumentacije radi realizacije izgradnje sistema za prenos električne energije 400 kV naponskog nivoa „Transbalkanski koridor – prva faza“ (*Službeni glasnik RS*, no. 115/14 – available in Serbian only); Zakon o utvrđivanju javnog interesa i posebnim postupcima eksproprijacije i izdavanja građevinske dozvole radi realizacije projekta „Beograd na vodi“ (*Službeni glasnik RS*, nos. 34/15, 103/15 and 153/20 – available in Serbian only); Zakon o utvrđivanju javnog interesa i posebnim postupcima radi realizacije projekta izgradnje infrastrukturnog koridora auto-puta E-761, deonica Pojate–Preljina (*Službeni glasnik RS*, no. 49/19 – available in Serbian only).

rules, facing public criticism as a result (on details see Part II).⁹ One of these laws ended up being challenged before the Constitutional Court.¹⁰ In addition to that, in 2020 the Parliament passed a law governing “special procedures for the implementation of the project of construction and reconstruction of line traffic infrastructure of particular importance to the Republic of Serbia”¹¹ allowing for some derogations from the same laws for these projects for which public interest is determined by Government.

After public interest is established, individual expropriation is carried out in a procedure before local government. Individual decisions on expropriation can be reviewed on appeal before the Ministry of Finance (Art. 26 para. 6 Law on Expropriation). However, as recognized by the Serbian Constitutional Court, the very establishment of the public interest cannot be challenged in these subsequent expropriation proceedings, by individual owners, as the establishment is at that moment considered “an undisputable fact”.¹²

Bearing the said in mind, the author poses two research questions. The first is: can Parliament determine public interest in the fields listed within Government’s competence (e.g. when the expropriation law puts traffic infrastructure under Government’s remit, does this allow the Parliament to pass a law determining public interest for expropriation in case of a regional highway)? In other words, in what way is Parliament tied by the general law on expropriation when passing these laws and for what other purposes, not explicitly mentioned in the Law within Government’s competence, can the Parliament do so – e.g., for attracting foreign investment or, simply, for economic development?

The second, and central research question focuses on possibilities to legally challenge these decisions of the Parliament and the Government. In other words, if I were a concerned citizen or a civil society organization representing a collective or a wider interest, what legal remedies would be at my disposal to challenge the very establishment of public interest by the Serbian Parliament or

9 This was particularly the case with the law determining public interest in the case of the Belgrade Waterfront (BW) project (*Beograd na vodi*), also known in the wider and expert public as *lex specialis*, for the special regime it introduced for this project (referenced in f. n. 8). See e.g. Transparency Serbia, “*Lex specialis*” – for exceptional cases only (<https://transparentnost.org.rs/index.php/en/110-english/naslovna/7473-lex-specialis-for-exceptional-cases-only>, accessed 15 February 2021) or Transparency Serbia, 2018, *Elements of State Capture in Serbia: Case studies in two sectors*.

On the *lex specialis* and its criticism in the context of urban planning, see e.g. Perić, A., 2019, Public engagement under authoritarian entrepreneurialism: the Belgrade Waterfront project, *Urban Research & Practice*, 2, pp. 213–227; Koelemaj, J. 2020, Dubaification in practice: an inter-scalar analysis of Belgrade Waterfront, *Urban Geography*, pp. 1–19; Zeković, S. and Maričić, T., 2020, Contemporary governance of urban mega-projects: a case study of the Belgrade waterfront, *Territory, Politics, Governance*, 1, pp. 1–22.

10 In 2019, the Constitutional Court dismissed several initiatives for the constitutionality review of *lex specialis* on the BW project (Ruling of the Constitutional Court [CC], no. IUz-115/2015 of 25 April 2019). See further in Part III.

11 Zakon o posebnim postupcima radi realizacije projekata izgradnje i rekonstrukcije linijskih infrastrukturnih objekata od posebnog značaja za Republiku Srbiju (*Official Gazette of the RS*, No. 9/20 – available in Serbian only).

12 Decision of the CC, no. IUz-17/2011 of 23 May 2013.

Government? Who has the final say when it comes to establishing what is in the interest of us all, the public good? This question concerns both accessibility and effectiveness of available legal remedies. In relation to the establishment of public interest by Government, there is a preliminary question of the legal nature of this procedure and of the act passed as a result of it.

The first question is dealt with in Part II and Part III deals with the second question.

The author uses the method of legal analysis, i.e. analysis of legislation and acts of Government, in part against the backdrop of ECtHR case-law and standards from comparative law. Putting aside the legitimate arguments that these acts of Government and Parliament are actually political in nature and an implementation of “policies promised by their manifestos to the electorate”,¹³ the author maintains her legalistic approach.

The author hypothesizes that the Serbian legal system lacks effective legal remedies for interested parties to question the very establishment of public interest for expropriation. This, in part, stems from a general lack of legal remedies available to individuals to legally question acts of Parliament, but also from the failure of current legislation to expressly determine the legal nature of acts passed in this sphere and the procedural rules which would also entail a regular remedial path.

II PUBLIC INTEREST FOR EXPROPRIATION

Current Serbian legislation uses the phrase: establishment of “public interest” (*javni interes*), while before 2009, expropriation laws used the term: establishment of “general interest” (*opšti interes*), as basis and prerequisite for individual expropriation proceedings.¹⁴

In other legislatures we find the same (e.g. *general interest* in the constitutions of Italy or the Netherlands; *public interest* in constitutional texts of Hungary, Montenegro, North Macedonia, Romania, or Slovenia, as well as Art. 1 of Protocol 1 to the ECHR)¹⁵ or similar formulations, bearing the more or less same meaning – e.g. public good (see Art. 14 of the German Basic Law – *die*

13 Popović, D., 2009, pp. 55–57.

14 Prior to the present law, originally passed in 1995 (see f. n. 6), the expropriation regime was governed by laws passed in 1973 (*Zakon o eksproprijaciji, Službeni glasnik SRS*, nos. 22/73, 6/77, 47/77, 6/78 and 27/78 – available in Serbian only) and in 1984 (*Zakon o eksproprijaciji, Službeni glasnik SRS*, nos. 40/84, 53/87, 22/89 and 15/90 and *Službeni glasnik RS*, no. 6/90 – available in Serbian only).

The 2009 amendments were meant to harmonize the Law’s terminology with the new Constitution passed in 2006. Minutes from the parliamentary debate, held on 6 December 2008, available in Serbian at <http://otvorenavlada.rs/pz-o-eksproprijaciji0038-lat-doc/> (accessed 24 February 2021).

15 E.g. Art. 42 of the Italian Constitution (*per motivi d’interesse generale*); Art. 14 of the Dutch Constitution (*algemeen belang*); Art. XIII para. 2 of the Hungarian Constitution (*közérdekből*); Art. 58 of the Montenegrin Constitution (*javni interes*); Art. 30 of the Constitution of North Macedonia (*јавен интѐрес*); Art. 44 of the Romanian Constitution (*de utilitate publică*); Art.

Wohle der Allgemeinheit), public necessity (Art. 17 of the French Declaration of Human and Civil Rights – *la nécessité publique*), public use (takings clause of the Fifth Amendment to the US Constitution).¹⁶

The substance of public interest is rarely defined in constitutional texts, but is to be sought in legislation and/or in case-law. As a rare example, the Bulgarian Constitution (Art. 17), allows for expropriation provided that the public needs which necessitate it “could not have been otherwise met”. This implies a balancing of interests or a proportionality test of a kind, where expropriation should be sought as a measure of last resort.

Public interest is first evaluated and established in urban and development plans, preceding expropriation. For instance, in Germany procedures leading to expropriation consist of a planning phase and an expropriation phase. In the latter phase, authorities can also evaluate the lawfulness of the plan.¹⁷ On the other hand, in Serbia, establishment of public interest by the plan is “taken for granted” and expropriation is treated as a (practical) consequence of the plan.

Under the ECHR, a legitimate public interest is a *sine qua non* for expropriation, even though states enjoy a wide margin of appreciation, which basically excludes only those cases where the state’s judgement was “manifestly without reasonable foundation”.¹⁸ The ECtHR has formed a long and unexhaustive list of possible justified purposes for interference with property rights. Additionally, the state must strike a “fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights”.¹⁹ The legitimacy of public interest and the proportionality of measures are assessed in individual cases, thus making the reasoning of these decisions of the state paramount.

On occasions, even transfer of property to private parties can be considered to be in the public interest, usually for furthering economic development. This was the case in *Kelo v. City of New London*,²⁰ in which the US Supreme Court held that property can be taken by eminent domain from one private owner and transferred to another private owner to promote economic development and

69 of the Slovenian Constitution (*javna korist*). English translations of the constitutions retrieved from the website www.constituteproject.org (accessed 15 February 2021).

An interesting formulation is found in Art. 50 of the Croatian Constitution which allows deprivation or limitation to property rights “in the interest of the Republic of Croatia”, i.e. in the interest of the state. This is similar to the Bulgarian Constitution which envisages “state and municipal needs” (Art. 17).

16 E.g. Harvill, N., 2010, Use the Purpose by Which All May Benefit: The Semiotics of ‘Public Use’, *International Journal for the Semiotics of Law*, 1, pp. 49–60.

17 Hoops, 2016, pp. 245–246.

18 Sermet, L., 1998, *The European Convention on Human Rights and property rights (Human Rights Files, Vol. 11)*, Strasbourg, Council of Europe, p. 33.

19 European Court of Human Rights, 2020, *Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights – Protection of Property*, Strasbourg, Council of Europe, pp. 29–33.

20 545 U.S. 469 (2005).

increase tax revenues.²¹ The case triggered extensive political debate, with several bills initiated to prohibit takings funded by federal funds for the sole purpose of economic development, even though none of them were ultimately passed.²² In comparison, when reviewing the constitutionality of the mentioned *lex specialis* on the Belgrade Waterfront project [the BW case], a joint venture of the state and a foreign private investor, involving real estate for resale, the Serbian Constitutional Court did not delve into such considerations. No evaluation of public interest establishment by the *lex specialis* was conducted, since the project was already declared of special interest for the Republic of Serbia in a spatial plan passed according to planning legislation – *ergo*, the Parliament had a legitimate interest to enable expropriation.²³

Similarly, the same Court found in an earlier case that the type of “co-ownership in a company and establishment of public interest for expropriation cannot be brought into legal connection”, thus finding no relation between provisions listing possible beneficiaries of expropriation and those on establishment of public interest for expropriation.²⁴ Also, Serbian Law on Mining and Geological Research explicitly allows expropriation for the benefit of the holder of research or exploitation rights (either in private or public ownership).²⁵

The notion of public interest, although frequently used in Serbian legislation, does not have a statutory definition. Attempts at defining it in Serbian legal theory have also been rare and do not provide enough applicable guidelines for concrete cases.²⁶ Moreover, neither does the available case-law.

21 See e.g. Huffman, J., 2013, *Private Property and the Constitution*, New York, Palgrave Macmillan, p. 4 or Posner, R., 2005, *The Kelo Case, Public Use, and Eminent Domain—Posner Comment*, The Becker-Posner Blog (<https://www.becker-posner-blog.com/2005/06/the-kelo-case-public-use-and-eminent-domain--posner-comment.html>, accessed 17 March 2021).

On earlier case-law of the US Supreme Court, see also Dorsen, N. et al., 2020, pp. 1319–1320, including the *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), leading case in its takings jurisprudence. On the relationship between *Kelo* and *Pennsylvania Coal*, see also Delogu, O. E., 2006, *Kelo v. City of New London – Wrongly decided and a missed opportunity for principled line drawing with respect to eminent domain takings*, *Maine Law Review*, 1, pp. 18–48.

22 See Rosen, J., 2012, *Privacy, property, and free speech: Law and the constitution in the 21st century*, Chantilly, Teaching Company, pp. 147–149.

23 Ruling of the CC, no. IUz-115/2015 of 25 April 2019.

24 Ruling of the CC, no. IUz-81/2009 of 22 December 2009, where the Court rejected initiatives to review the constitutionality of, inter alia, Article 8 of the Law on Expropriation, determining possible beneficiaries of expropriation. The initiators claimed that Art. 8 can lead to factual deprivation of individual's property rights in favor of another private person, in contravention of Art. 58 of the Serbian Constitution guaranteeing right to property.

25 Article 4 of the Law on Mining and Geological Research (Zakon o rudarstvu i geološkim istraživanjima, *Službeni glasnik RS*, nos. 101/15 and 95/18 – available in Serbian only).

26 See Tomić, Z., 2019, Javni poredak: pojam i struktura, *Anali Pravnog fakulteta u Beogradu*, 2, pp. 34–48. Tomić identifies three constituent elements of public interest as “full realization and protection of human rights and freedoms”, “regular course of social life in all its components, with necessary corrections and improvements” and “orderly work of state and public bodies”. Attempts have been made in other disciplines, such as urban planning, but with not much more success – see e.g. Stojkov, B., 1996, Javni interes i planiranje, *Arhitektura i urbanizam*, 3, pp. 5–9.

In the few cases²⁷ in which the Constitutional Court reviewed aspects of expropriation-related legislation, it did not offer guidelines as to the criteria for establishment of public interest, nor did it deal with evaluating the legitimacy of the establishment of public interest by the individual laws on expropriation. Instead, it deferred to the legislator's assessment, i.e. its balancing of interests.

On the other hand, the Law on Expropriation expressly allows the Government to establish the public interest when there is a planning act or a ratified joint venture agreement concluded by the state (both in the form of general legal acts). Under earlier laws, general interest for expropriation was, as a rule, established by urban plans (1977) or by exception by the executive or local government assemblies (decentralized in 1984).

Practice shows that this is done automatically, without prior evaluation of lawfulness of the plans or agreements, or the proportionality of such establishment of public interest. This points towards the conclusion that the rationale behind the establishment of public interest should actually be sought in rationales of plans or concluded state agreements, with questionable possibility of posing legal challenges. This is because the Constitutional Court, in reviewing the constitutionality of spatial plans strictly limits itself to issues of procedure, thus rarely providing interested parties with an effective opportunity to effect the annulment of plans.²⁸ A similar approach, based on broad interpretation of existing legislation, has also been employed by the Constitutional Court in cases of reviewing the constitutionality of ratified bilateral agreements.²⁹

Besides, such practice of the Government has been legitimized by the Constitutional Court. In the mentioned BW case, the Court found that the legislator had a legitimate interest to determine the project's particular importance for the state and the local government, basing its arguments on the sole fact that this

27 There were actually five such cases before the Constitutional Court – four of them challenging the constitutionality of the Law on Expropriation and one challenging a law determining the public interest in an individual case. In one case, decided in 2011, the Constitutional Court found that the Law was in breach of the Serbian Constitution.

See: Ruling of the Federal Constitutional Court [of the Federal Republic of Yugoslavia], IU nos. 9/96, 10/96, 15/96, 83/96, 153/96, 231/96, 135/97 and 160/99 of March 13, 2001; Ruling of the CC, no. IUz-81/2009 of 22 December 2009; Ruling of the CC, no. IUz-229/2009 of July 15, 2010; Ruling of the CC, no. IUz-115/2015 of 25 April 2019; Decision of the CC, no. IUz-17/2011 of 23 May 2011.

28 For a comment on this case-law of the Constitutional Court, see e.g. Ne davimo Beograd, *Podneta inicijativa Ustavnom sudu zbog plana za gondolu*, 21 March 2019, https://nedavimobeograd.rs/wp-content/uploads/2019/03/NdmBgd_inicijativa_za_ocenu_ustavnosti_PDR_Gondola.pdf (accessed 23 March 2021). In the initiative for review of constitutionality of a detailed regulation plan allowing for a cable car to be built across the Sava river. The case is still pending before the Constitutional Court. Also, see ruling of the CC no. IU-112/2007 of October 16, 2008.

29 See e.g. Ruling of the CC no. 478/2014 of 13 July 2017, dismissing initiatives to review the constitutionality of bilateral agreements between the Serbian Government and the Government of the United Arab Emirates on mutual encouragement and protection of investments, as well as agreements of the Serbian Government and an international investment company based in the UAE.

was previously established by the special purpose spatial plan,³⁰ passed in accordance with the Law on Planning and Construction.³¹ In a sense, the Constitutional Court found here that the Parliament is neither fallible, nor limited in establishing public interest. It can do that when it sees fit, as long as there is another (prior) document establishing public interest – in this case, a spatial plan. This generally answers our first research question.

It implies that any prior establishment of public interest cannot be challenged when reviewing the constitutionality of establishment of public interest in cases of legislative expropriation. It also indicates that in this way, the Constitutional Court practically limited its own competence in reviewing the constitutionality of legislation in its substance, since other possibilities to establish unconstitutionality of such legislation would fall exclusively in the domain of procedural omissions.

III AVAILABILITY AND EFFECTIVENESS OF LEGAL REMEDIES

Issues surrounding availability and, consequently, effectiveness of legal remedies to challenge the legitimacy of establishment of public interest depend on answers to the preliminary question regarding the nature of these procedures.

III.1 REMEDIES IN CASE OF PUBLIC INTEREST ESTABLISHED BY PARLIAMENT

When public interest is established by law, this is done by regular legislative procedure and the laws passed have the same legal force as any other law passed by Parliament, since the Serbian legal system does not recognize laws of different legal force. In theory, laws could be challenged prior to their adoption, in some form of public consultation³² (e.g., public hearing, which does not have the nature or force of a legal remedy) or subsequent to that – via an initiative to challenge their constitutionality.

Comparatively speaking, challenges of the establishment of public interest (whether legislative or administrative) are often in the remit of constitutional courts or other courts entrusted with judicial review of legislation (e.g., this is the case in Germany or the United States).³³ However, the nature of procedure

30 Government Regulation determining the Spatial Plan of special purpose for the landscaping of the river banks of the city of Belgrade – the area of the Sava river bank for the project “Belgrade Waterfront” (Uredba o utvrđivanju Prostornog plana područja posebne namene uređenja dela priobalja grada Beograda – područje priobalja reke Save za projekat „Beograd na vodi”, *Službeni glasnik RS*, no. 7/2015 – available in Serbian only).

31 Ruling of the CC no. IUz 115/2015 of 25 April 2019, para. V.

32 This is governed by Art. 77 of the Law on State Administration (Zakon o državnoj upravi, *Službeni glasnik RS*, nos. 79/05, 101/07, 95/10, 99/14, 30/18 and 47/18 – available in Serbian only).

33 Dorsen, N. et al., 2010, pp. 1319–1323.

before these courts has a decisive influence on their effectiveness in expropriation cases. US courts perform a concrete review of constitutionality, similar to the German Constitutional Court when reviewing the constitutionality of legislation in procedures on constitutional complaints.³⁴

In contrast, laws passed by the Serbian Parliament (and any other regulatory act) can only be challenged before the Constitutional Court, for abstract review of constitutionality, while the constitutional appeal is reserved for cases of human rights breaches by individual acts of state bodies. Abstract review can either be proposed by designated state bodies³⁵ or initiated by any other person, but in the latter case the Constitutional Court first decides on the initiative's acceptability, i.e., if reasons set forth actually support the claim that there are grounds for commencing procedure for assessing constitutionality and legality.³⁶ Since it is not obligatory for the Constitutional Court to start the procedure and consider the merits, and the initiative can be dismissed, such abstract review of constitutionality cannot be considered an effective remedy.³⁷

As already mentioned, the referenced case-law of the Serbian Constitutional Court shows that in order to challenge the legitimacy of public interest for expropriation, one should challenge a previously adopted spatial plan or bilateral agreement, thus making the review of legislative establishment of public interest for expropriation void of effectiveness.

As said, the legal framework does provide for obligatory public consultation in the process of drafting laws, but these are in practice easily overridden or only formally implemented.³⁸ In neither of the listed laws do we find a clear justification of public interest. As mentioned, civil society organizations did protest

34 E.g. see a judgement of the German Constitutional Court, BVerfG, Judgment Spruchkoerper of 17 December 2013 – 1 BvR 3139/08, paras. 1–333, http://www.bverfg.de/e/rs20131217_1bvr313908en.html (accessed 20 March 2021).

35 According to Article 168 of the Serbian Constitution, the proposal can come from state bodies, provincial or local government bodies or local self-government or 25 members of Parliament, as well as *ex officio* by the Constitutional Court. English translation of the Constitution available at <http://www.ustavni.sud.rs/page/view/en-GB/235-100028/constitution> (accessed 25 February 2021).

36 Article 53 of the Law on the Constitutional Court (Zakon o Ustavnom sudu, *Službeni glasnik RS*, nos. 109/07, 99/11, 18/13, 40/15 and 103/15). English translation available at <http://www.ustavni.sud.rs/page/view/en-GB/237-100030/law-on-the-constitutional-court> (accessed 25 February 2021).

37 On the applicability of the ECHR to procedures before constitutional courts see e.g. ECtHR, *Ruiz-Mateos v. Spain*, no. 12952/87, Judgement of 23 June 1993, or a more recent case of *Batinović and Point Trade d.o.o. v. Croatia* (dec.), no. 30426/03, 10 July 2007.

In *Ruiz-Mateos*, which in fact related to a case of legislative expropriation, the Spanish Constitutional Court claimed in 1986 that it was “always open for land owners to contest the measure in administrative courts and ask them to refer a question to Constitutional Court on the constitutional conformity of such action.” As the landowners lacked standing in the procedure before the Constitutional Court, there were in fact prevented from influencing it in any substantial way – a position very similar to the one initiators of abstract review have before the Serbian Constitutional Court.

38 E.g. Vuković, D., 2017, The Hollowing Out of Institutions: Law-and Policymaking in Contemporary Serbia, in: Busch, J. et al. (eds.), *Central and Eastern European Socio-Political and*

against proposals of these laws,³⁹ but they were nevertheless swiftly and smoothly passed through Parliament. Only one of these laws was challenged before the Constitutional Court and that initiative was dismissed.

This leaves the land owners, or other interested citizens, with abstract review of constitutionality – an ineffective legal remedy. If the subject of this challenge would be the very establishment of public interest, the Constitutional Court would actually have to go into the merits, i.e., decide if this in fact is in the public interest. As seen in Part II, the Constitutional Court has thus far chosen to defer to the Parliament's assessment.

The basis for the challenge could be sought either in constitutional provisions on the right to property (which generally allow for limitations to property rights in the public interest) or in the more general provisions of the Law on Expropriation itself. As mentioned, in comparable cases where planning acts have been challenged, the Constitutional Court limits itself to issues of procedure.

On the other hand, on numerous occasions the Constitutional Court has pointed towards the principle of the unity of the legal order – basic principles envisaged by so-called systemic laws should be honored in special laws, even if systemic laws explicitly allow for derogations from their own provisions. This was recognized in the mentioned 2013 decision on unconstitutionality of Art. 20 of the Law on Expropriation, in respect of LGAP laying down rules of administrative procedure. It is doubtful, though, that the Constitutional Court would take the same position in respect of the Law on Expropriation as a systemic law, when the Parliament deviates from it by way of *lex specialis* establishment of the public interest.

III.2 REMEDIES IN CASE OF PUBLIC INTEREST ESTABLISHED BY GOVERNMENT

The law is silent on the exact nature of the procedure for establishment of public interest by Government, but some of its provisions, as well as available case-law of the Constitutional Court and the Administrative Court, point towards it being a modality of the administrative procedure. Surprisingly enough, the law does not even proclaim the nature of individual expropriation proceedings, and this has been the case with all expropriation laws since 1984.⁴⁰ However, the regulation of that procedure (in terms of competent bodies, duty of hearing, possibility of appeal) highly resembles administrative procedure. Laws

Legal Transition Revisited, pp. 155–173. Vuković claims that the Government see public consultation as a “box-ticking” exercise.

39 See f. n. 9.

40 Article 32 of the 1977 Law on Expropriation determined that the ruling on individual expropriation by local government administration was made according to the law on general administrative procedure and, interestingly, it also expressly obliged the administration to hear the owner of the expropriated property before reaching a ruling (*Zakon o eksproprijaciji, Službeni glasnik SRS*, no. 47/77 – available in Serbian only). This is not the case in the 1984, 1995 and later laws.

before 1984 did not mention remedies in case of establishment of general interest, when the possibility of administrative dispute before the court was introduced. The same is envisaged by the current law in case of establishment of public interest by Government – administrative dispute before the Administrative Court.⁴¹

Nevertheless, even in the absence of an explicit legal provision, courts consider it and administrative procedure, applying relevant provisions of the Law on General Administrative Procedure (LGAP) to it.⁴²

Another aspect that makes the analysis of these procedures more aggravating is the fact that Government rulings do not have a rationale (unlike regular administrative acts, in accordance with the LGAP). This makes it hard to trace specific procedural steps.

As the expropriation law does not provide for any derogations from general rules of the Law on Administrative Disputes,⁴³ this Law fully applies to expropriation cases. Standing in administrative disputes is granted to a person alleging an administrative act violates his/her right or a legal interest. This would, naturally, involve both the proposer of expropriation (expropriation beneficiary), as well as any other person affected by future expropriation – namely, property owners. There would also be place for application of the LGAP and its provisions allowing standing to the so-called representatives of collective interests and wider interest of the public. Administrative authorities are still reluctant to apply these provisions, but the Administrative Court recently delivered its first judgment recognizing standing of a Belgrade-based environmental NGO.⁴⁴

However, the latter two groups of potential parties are habitually not participants to the procedure before the Government, nor are they notified that such a procedure is initiated and ongoing. Decisions of the Government are published in the *Official Gazette*, which means that their possible contestants need to be very well informed in order to know that these have been passed. This was duly noted by the Constitutional Court in its 2013 decision on several challenges of the expropriation law. It led to the annulment of its provision which envisaged

41 The Supreme Court of Serbia decided in administrative disputes prior to the establishment of the Administrative Court in 2010.

42 See e.g. Judgement of the Supreme Court of Serbia U. no. 4736/79 of 18 September 1980; Decision of the CC no. UŽ-2283/2010 of 20 September 2012 (in which the CC ruled upon a constitutional complaint on the length of proceedings before the Administrative Court), or the above cited ruling of the CC no. IUz-17/2011, in which the Constitutional Court does not question the applicability of LGAP in these cases. Law on General Administrative Procedure (Zakon o opštem upravnom postupku, *Službeni glasnik RS*, nos. 18/16 and 95/18 – available in Serbian only).

43 Law on Administrative Disputes (Zakon o upravnim sporovima, *Službeni glasnik RS*, no. 111/09 – available in Serbian only).

44 Judgement of the Administrative Court no. 7 U 6063/19 of February 12, 2021. The case involved the annulment of a building permit, endangering a cultural heritage site.

On application of Art. 44 LGAP in administrative procedures, see also Jerinić, J., 2020, U ime javnosti: legitimacija zastupnika kolektivnih interesa i širih interesa javnosti u upravnim stvarima, *Pravni zapisi*, 2, pp. 504–531.

that the Government's decision on the establishment of public interest is considered to be delivered on the date of publication in the Official Gazette.⁴⁵

In this decision, finding this part of Article 20 unconstitutional, the Constitutional Court actually referred to the position of other interested parties (e.g. owners) in these procedures. The Parliament, as the respondent held that, since Government's decisions on establishment of public interest are based on previously adopted planning acts, the owners must have been informed on the envisaged purpose of their property and the subsequently initiated procedure for establishment of the public interest, even though they do not participate in those very proceedings. The respondent also justified the peculiar aspect of these decisions of the Government – absence of a rationale – by the fact that they are actually part of realization of a planning act. Further on, it was argued that the Government's decision does not encroach on individual property rights, but is only a legal prerequisite for the second phase of expropriation, in which the owners have a chance to participate.

However, the Constitutional Court found that the Government act “indirectly decides on the legal interest of real estate owners” and “creates a precondition for deprivation or restriction of property rights directly guaranteed by the Constitution”. Therefore, at this stage of the proceedings, property owners must be provided with an opportunity “to effectively and efficiently protect their interests”.⁴⁶

Considering all the specificities of the procedure before the Government (and the allowed derogations from general administrative procedure), the Constitutional Court still maintained that even though there is no legal obligation to inform the property owner about the procedure and it is possible to exclude the principle of obligatory hearing of parties, the manner of delivery of the decision to property owners is extremely important for protection of their legal interest. The Constitutional Court found that delivery is crucial for them to be able to undertake the steps necessary to realize and to protect their rights and legal interests. Namely, it is a general rule that the administrative act does not produce legal effects until delivered to the party or parties in the procedure. Therefore, according to the Constitutional Court's assessment, the delivery of Government's decisions on establishment of public interest is of particular importance, bearing in mind that the possibility to initiate an administrative dispute is envisaged as a protective legal remedy against these acts, and the deadline for initiating it runs from the delivery date. At the same time, the Constitutional Court pointed out that the protection of legal interests of real estate owners in this phase of expropriation depends on the availability and effectiveness of the envisaged legal remedy. Namely, although the *prima facie* prescribed legal remedy is made available at a given moment (30 days from the day of publishing the act on determining the public interest in the *Official Gazette of the Republic of Serbia*), the Constitutional Court took the view that the principle of availability of a remedy cannot exist only on a theoretical level, but that it is much more important that

45 Decision of the CC no. IUz-17/2011 of 23 May 2013.

46 *Ibid.*

the legally prescribed legal remedy is actually available in practice at a given time, i.e., in this case, to be accessible to real estate owners, in order for them to protect their legal interest at this stage of the expropriation procedure. The availability of a legal remedy also determines its effectiveness, which means that its legal nature is such that it can provide satisfaction to a party, with a reasonable prospect of success.⁴⁷ This specifically means that the mere formal existence of remedies in a legal system is not enough, but that it is necessary to consider all the specific circumstances on which their availability and effectiveness may depend.⁴⁸ Therefore, the Constitutional Court, starting from all the above features of the procedure in which the existence of public interest for expropriation is established, assessed that the envisaged legal remedy against the Government's decision – initiating an administrative dispute, is essentially an “illusory legal remedy”, especially having in mind the prescribed manner of the delivery of the decision, as well as its content, i.e. the form in which it is published.

The Constitutional Court assessed that the envisaged rules of procedure do not provide equal treatment of the parties, guaranteed by Art. 36 para. 1 of the Serbian Constitution, i.e., that proportionality in the protection of the interests of the parties in the proceedings is violated to the detriment of one party in the proceedings. Moreover, the Constitutional Court pointed out the fact that, having in mind that property owners, mostly individuals who do not read the *Official Gazette* on a regular basis, practically do not find out that the public interest for the expropriation of their real estate has been established, until the competent local authority decides on the expropriation of the property.

Nevertheless, this decision of the Constitutional Court did not actually provide land owners with an effective legal remedy since Government decisions are only delivered to parties which participated in the procedure, namely, the proposers (beneficiaries) of expropriation. To receive the decision, the land owners would first have to request access to the procedure, i.e., to acquire the status of a party (according to Art. 44 LGAP), since the Law on Expropriation does not envisage specific provisions on delivery of Government decisions. Nor was the Law amended following the decision of the Constitutional Court, which simply struck out a part of its article envisaging that the decision is considered delivered when published in the *Official Gazette*.

In addition, the Constitutional Court affirmed that the “establishment of the public interest” could not be challenged in any subsequent expropriation proceedings involving individual owners and their properties.

The peculiar position of land owners vis-à-vis Government rulings on the establishment of public interest was illustrated in a recent judgement of the ECtHR, concerning expropriation, inter alia. The case of *Mastelica and others*

47 *Ibid.*

48 The Constitutional Court called upon the established case-law of the ECtHR in relation to Art. 13, in particular: *Vernillo v. France*, no. 11889/85, Judgement of 20 February 1991; *Dalia v. France*, no. 26102/95, Judgement of 19 February 1998; *Sejdović v. Italy*, no. 56581/00, Judgement of 1 March 2006; *Lepojić v. Serbia*, no. 13909/05, Judgement of 6 November 2007.

*v. Serbia*⁴⁹ concerned a group of people protesting the construction of a power line near their homes in the suburbs of Belgrade, which they did not know about until individual expropriation proceedings concerning their respective properties commenced in 2011.⁵⁰ Before applying to the ECtHR, their appeal was dismissed by the Constitutional Court for non-exhaustion of domestic remedies, i.e. failure to bring judicial review proceedings against, among other acts, the Government's decisions on the establishment of public interest for expropriation – of which they were not informed in any other way but by publication in the *Official Gazette*.

The Administrative Court's case-law on expropriation is very limited and the available databases do not contain its decisions on challenges to Government's establishment of public interest.⁵¹ Thus, nothing was found in support of actual effectiveness of such a claim. Also, as recognized in the cited *Mastelica* case, the Government's establishment cannot be challenged in later procedures for expropriation of individual assets, while claims connected to compensation are to be dealt with by courts of general jurisdiction.⁵²

IV CONCLUSIONS

Returning to the research questions posed in the introduction of this text, the following can be discerned. In relation to the first question, the Law on Expropriation does not sufficiently regulate the procedure before Parliament when it establishes public interest for expropriation. It thus leaves the Parliament fully sovereign in establishment of public interest, even in the areas envisaged as Government's competence. The indicated deference of the Constitutional Court to Parliament's assessment confirms this position.

In relation to the second research question, analysis shows that possibilities are limited and their potential effectiveness in relation to rights of property owners even more limited. In case of legislative expropriation, they are left with the ineffective abstract review of constitutionality before the Constitutional Court. In the case of Government's establishment, there is a somewhat more effective remedy – administrative dispute before the Administrative Court. The

49 ECtHR, *Mastelica and others v. Serbia*, no. 14901/15, Decision of 17 November 2020. Unfortunately, in this case the ECtHR did not get to examine the issues regarding the exhaustion of domestic remedies, declaring the application inadmissible in respect of Art. 8 ECHR since it found that “it has not been proved that the values of the electromagnetic fields generated by the high-voltage line in question have had a harmful effect on the applicants or their families.”

50 This was noted by the Ombudsman, which investigated the case in 2014 (see para. 20 of the *Mastelica* decision of the ECtHR). The Ombudsman's recommendation available in Serbian at <https://www.ombudsman.rs/index.php/2012-02-07-14-03-33/3553-2014-11-14-13-22-09> (accessed 23 March 2021).

51 The author searched the Court's database available on its website and the case-law database of the *Official Gazette of RS*.

52 *Mastelica and others v. Serbia*, para. 32. See also Judgement of the Administrative Court no. 5 U 530/10 (2007) of 18 March 2010.

latter, in turn, requires prior action on the part of the interested parties, in order to acquire access to the procedure before the Government according to general rules of administrative procedure, so its effectiveness remains in the sphere of theory.

Overall, remedies and their effectiveness are limited even in the case of Government's decisions and extremely limited in the case of laws passed by Parliament. This gives the ruling political majority the chance to push through expropriation initiatives in case of large, but questionable infrastructure projects without proper legal oversight.

Moreover, the analysis indicates that when the state wishes to deviate from legislation in other areas (e.g. construction permits, public procurement etc.) it tends to push such initiatives through Parliament, together with the establishment of public interest for expropriation, which otherwise could not be done by Government. Also, as we have seen, this may be a way to disguise derogations from other important legislation under the cape of public interest. Because, once public interest is determined, there is practically no avenue to stop expropriation, instead the owners deprived of their property can only challenge the subsequent procedure concerning their piece of land and the amount of compensation. Tying this procedure to the legislative process before the Parliament absolves it of possible criticism and reconsideration before judicial bodies.

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**VI PANEL:
ENVIRONMENTAL
AND SOCIAL CHALLENGES**
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*Maša Marochini Zrinski**

PRINCIPLES IN THE SERVICE OF CONCEPTION AND PROTECTION OF THE RIGHT TO LIVE IN A HEALTHY ENVIRONMENT – (IN)CONSISTENCY OF THE EUROPEAN COURT’S CASE-LAW

Abstract: *During the last two decades, the European Court of Human Rights has increasingly examined complaints where individuals have argued that a breach of their Convention rights has resulted from adverse environmental factors. Since healthy environment per se is not protected under the Convention, the Court decided environmental cases on a case-by-case basis, mainly under Article 8 concerning the right to private and family life, home and correspondence. Therefore, the Convention practice in the protection of these rights that would in traditional proprietary law be sought as protection from emissions or from the disturbance of property, has thus been given a new, Convention dimension. However, in those cases the Court did not set out clear standards or guidelines, thus contributing to states’ uncertainty regarding their obligations under the Convention, as well as to the Court’s own inconsistency that is ultimately threatening its legitimacy. This paper will look at the Court’s environmental cases through the lenses of interpretative methods and principles, and analyse certain aspects of its (in)consistency when delivering judgments concerning the right to live in a healthy environment.*

Keywords: right to live in a healthy environment; interpretative methods and principles; inconsistency of the European Court’s case-law.

1. INTRODUCTION

In the paper *Coexistence of actio negatoria and the right to live in a healthy environment*¹, the authors brought domestic regulation of the protection of property rights from harassment in the perspective of the protection that the European Court of Human Rights (hereinafter: the Court, European Court) provides for the right to live in a healthy environment, primarily through the protection of the right to respect for private life and home. Based on presumptions

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1 Mihelčić, G., Marochini Zrinski, M., 2018, Suživot negatorijske zaštite od imisija i prava na život u zdravoj životnoj sredini, *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, 39(1), pp. 241–266.

pointed out in the conclusion of that paper, the author would like to start this paper as a sequence of the mentioned paper. Here, not much attention will be given to environmental cases discussed in the *Coexistence of actio negatoria...* paper, instead environmental cases will be discussed from a somewhat different perspective, through the lenses of interpretative principles and methods and by discussing the problems arising out of the Court's inconsistency when deciding those cases. Since a healthy environment *per se* is not protected under the Convention, the Court decided environmental cases on a case-by-case basis, mainly under Article 8 of the Convention.² One of the problems in those cases arises from the fact that the Court did not set out clear standards or guidelines. Even though having consistent and strict guidelines in cases concerning the right to live in a healthy environment is not an easy task, it is on the Court to strive for that goal.

This paper will be divided as follows: the introduction will be followed by an overview of basic features of the Croatian national system regarding the protection from emissions. Second, a short analysis will be given of the Court's interpretative methods and principles relevant for the right to live in a healthy environment. The interpretative methods and principles relevant for the topic will be presented since the Court had to use them in order to guarantee a right not originally guaranteed under the Convention. Third, main features of environmental protection under Article 8 will be briefly presented. The central part of the paper will focus on the inconsistency of the Court's decision making when deciding environmental cases, together with problems arising out of use of external legal sources within the comparative method of interpretation.

1.1. BASIC FEATURES OF THE CROATIAN LEGAL SYSTEM AND ITS CONNECTION WITH THE RIGHT TO LIVE IN A HEALTHY ENVIRONMENT AS GUARANTEED UNDER THE CONVENTION

The Croatian legal framework does not give a definition of emissions, but Article 110, paragraph 1 of the Act on Ownership and Other Real Rights³ stipulates that no one may exploit or use a piece of property in a way that results in smoke, unpleasant odours, soot, sewage waters, earthquakes, noise etc. reaching the property of another, either by accident or by forces of nature, if they are excessive in view of the purpose appropriate for the property in question considering the place and time, or if they cause more substantial damages or if they are

2 Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5. The Court has also examined environmental complaints in the context of Article 2 and the right to life, Article 6 and the right to a fair trial, Article 10 and the freedom of expression and Article 1 of Protocol No. 1 and the right to property. Despite a relatively large number of complaints concerning these rights, most of the complaints concerned the right to private and family life, so these cases will be of biggest interest for this paper.

3 Act on Ownership and Other Real Rights, Official Gazette (hereinafter: OG), nos. 91/96, 68/98, 137/99, 22/00, 73/00, 129/00, 114/01, 79/06, 141/06, 146/08, 38/09, 153/09, 143/12, 152/14, 81/15 – consolidated version and 94/17 (hereinafter: AO).

impermissible based on the provisions of a particular piece of legislation (excessive indirect emissions). Leaving aside foreign regulations governing the definition of the concept in the regulations governing environmental protection, e.g., Article 4, paragraph 1, point 7 of Environmental Protection Act,⁴ the author will briefly review the traditional civil law concept that has grown on the concept created by the Civil Obligations Act.⁵

The basic authority of the owner who is harassed (even by emissions) is to require for it to stop (Article 167, paragraph 1 in conjunction with paragraph 4 of the AO). The peculiarity of protection against emissions in comparison with ordinary protection of property from harassment appears in relation to the circle of authorised persons who may seek protection. In the case of protection from emissions, this circle is wider for both the active and passive parties (see Article 100, paragraph 2 of the AO and Article 100, paragraph 4 of the AO).⁶

Emission protection also differs from ordinary protection against harassment in its content. The owner of the real estate is primarily not obliged to suffer direct emissions, so he is authorised to require an end to such harassment and the payment of compensation of any damages that he suffered as the result (see Article 110, paragraph 4 of the AO). The rule contained in Article 110, paragraph 1 of the AO prohibits use of someone else's property in a way that results in smoke, unpleasant odours, soot, sewage waters, earthquakes, noise etc. reaching the property of another, either by accident or by forces of nature, if they are excessive (excessive indirect emissions).

The owner of real estate exposed to such emissions is authorised to request the owner of the property from which such emissions originate to eliminate the causes of the emissions and to compensate the resulting damage, as well as to refrain in the future from actions on his property that were the cause of the excessive emissions until he takes all measures required to eliminate the possibility of excessive emissions. With regard to Article 110, paragraph 3 of the AO, where excessive emissions are the product of activities for which there is a permission by the competent authority, the owners of the exposed property do not have the right to request the owner to refrain from the activity for as long as the permission is in force; however, they are authorised to request compensation for damage caused by the emissions, as well as the taking of appropriate measures to prevent excessive emissions in the future, that is, the occurrence of damage, or to minimise it.

Regarding the protection provided under the Civil Obligations Act, it is stipulated in Article 1047 and it includes a request to eliminate a major source of danger, as well as to refrain from activities causing disturbance or a risk of damage. In relation to this, Article 167 Paragraph 3 of the AO also needs to be emphasized since it stipulates, if damages are incurred as the result of harassment,

4 Environmental Protection Act, OG, International Agreements (hereinafter: IA), nos. 18/97, 6/99 – consolidated version, 8/99, 14/02, 13/03, 9/05, 1/06 and 2/10 (hereinafter: EPA).

5 Civil Obligations Act, OG, nos. 35/05, 41/08, 125/11 and 78/15 (hereinafter: COA).

6 For more details on the Croatian legal framework concerning emissions, see Mihelčić, G., Marochini Zrinski, M., 2018, pp. 241–246.

the manner in which the owner is entitled to claim compensation according to the general rules governing compensation of damage.

The case-law of the Court shows that the Court views the types of interferences and influences in a different, broader context than the national system does. In the language of our national rules, in determining the type of interference and influence, the Court goes beyond the framework set out in Article 110 of the AO, and approaches the concept offered in Article 4 para. 1 point 7 of EEA.

Namely, when providing protection of the right to live in a healthy environment, the Court does so by conceiving this concept in the spirit of the principle of autonomous concept, as well as relying on the principle of evolutive interpretation, the principle of effectiveness but also on the principle of subsidiarity (the margin of appreciation doctrine). Since the Convention originally does not guarantee the right to live in a healthy environment, the Court also had to resort to comparative and teleological methods of interpretation of Article 8 when protecting this right. Such a conception does not correspond to our notion of real estate, neither generally, nor to one by which the owner is granted emission protection. Consequently, the protection of the right to respect for one's home and its peaceful and comfortable enjoyment in the spirit of the right to live in a healthy environment is provided to a wider circle of places.⁷

The relationship between the protection of the right to live in a healthy environment and *actio negatoria* can be observed through the prism of several characteristics, and in this sense, certain features of *actio negatoria* can be highlighted: negative definition of the concept of emissions, manageability of protection in protection of property from harassment, the requirement that there are direct or indirect excessive emissions and in relation to this, narrowing the protection when it comes to allowed excessive indirect emissions, and the aspect of protection concerning the liability for damage.⁸

2. THE INTERPRETATIVE METHODS AND PRINCIPLES USED IN DEFINING AND GUARANTEEING THE RIGHT TO (LIVE IN) A HEALTHY ENVIRONMENT UNDER ARTICLE 8 OF THE CONVENTION

The Convention does not explicitly guarantee the right to (live in) a healthy environment, but this right was derived from the broad concept of the right to respect for private life and home through the Court's interpretation of the Convention.⁹ Without going into details, some introductory remarks need to be given,

7 Mihelčić, G., Marochini Zrinski, M., 2018, p. 253.

8 *Ibid.*, pp. 261–263.

9 When writing on the right to live in a healthy environment, authors agree that the protection of the right to live in a healthy environment under the existing human rights conventions is rather limited due to its 'individualistic' perspective. See: Francioni, F., 2010, International Human Rights in an Environmental Horizon, *European Journal of International Law*, Volume 21, Issue 1, pp. 41–55; Boyle, A., 2008, Human Rights and the Environment: A Reassessment, 18 *Fordham Environmental Law Review*, pp. 471–511.

since the Convention itself gives no guidelines¹⁰ on how the Court should interpret the Convention¹¹ and particularly because the right to live in a healthy environment is not guaranteed under the Convention, but created through the Court's use of various methods and principles of interpretation. The author finds this issue particularly relevant.

Generally, interpretative¹² methods¹³ used by the Court can be presented as the method of comparative interpretation, the teleological method, the textual method of interpretation, the subjective (historical) method and the systemic method. On the other hand, the principles¹⁴ of interpretation are the evolutive principle (the living instrument doctrine), the autonomous concept¹⁵, the prin-

10 However, from the perspective of public international law, since the Convention is a multilateral international treaty, its interpretation should be governed by the Vienna Convention on the Law of Treaties (United Nations Treaty Series, vol. 1155, p. 331), as it is part of customary international law.

11 Once Protocol 15 comes into force, the margin of appreciation as a specific doctrine will become an integral part of the Convention since, at the end of the preamble to the Convention, a new recital shall be added, which shall read as follows: "Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention". However, even this recital, that will be added to the Preamble once Protocol 15 comes into force, is debatable since it clearly connects the margin of appreciation with the principle of subsidiarity while, as will be discussed here, the Court does not use the margin of appreciation exclusively in relation to the principle of subsidiarity, i.e. to allow the states a wide margin of appreciation.

12 General international rules of interpretation have been codified in the VCLT. The relevant provisions for treaty interpretation are Articles 31, 32 and 33, and methods of interpretation that can be deduced from these provisions are textual interpretation, teleological interpretation and contextual (systemic) interpretation. The ECtHR rarely invokes the VCLT and its provisions, although we might say that numerous interpretative principles used by the Court can be derived from the teleological method of interpretation as stipulated in Article 31 of the VCLT. So, the teleological interpretation serves as a basis for autonomous and evolutive interpretation, as well as for the principle of effective interpretation.

13 According to Hanneke Senden: "A method of interpretation provides a technique which leads to an objectified argument for a reasoning in a certain direction. A principle of interpretation on the other hand serves as an objective or aim that can be considered when interpreting a provision with the help of an interpretation method. A principle of interpretation does not provide an element that will help to determine the meaning of a provision." Senden, H. C. K., 2011, *Interpretation of fundamental rights in a multilevel legal system: an analysis of the European Court of Human Rights and the Court of Justice of the European Union*, Doctoral Thesis, Leiden University, p. 45. This paper will use the division as presented by Senden, H.

14 This is a division on methods and principles accepted by the author, but there is no uniform agreement on the methods and principles of interpretation in general, let alone in the Convention system. For a somewhat different division between methods and principles, see: Wisniewski, A., 2016, *The European Court of Human Rights, Between judicial activism and passivism*, Gdansk University Press, Gdansk; Greer, S., 2006, *The European Convention on Human Rights. Achievements, Problems and Prospects*, CUP, Cambridge.

15 The use of the principle of autonomous concept can be justified by reference to Article 31(4) of the Vienna Convention providing that terms may be given a special meaning. It represents a specific principle of interpretation of the Convention in accordance with its purpose and aim, giving the convention terms an autonomous meaning, regardless of the national meaning. The main task of this principle is to ensure a uniform application of Convention terms

principle of effective interpretation and finally, as interpretative tools that do not fit into either of these categories, there are the margin of appreciation doctrine¹⁶ and the doctrine of fourth instance.¹⁷ For the purpose of this paper and with regard to their relevance for guaranteeing the right to live in a healthy environment, the evolutive principle (the living instrument doctrine), the principle of effectiveness and the margin of appreciation doctrine will be briefly presented¹⁸ together with the comparative and teleological methods of interpretation.

2.1. THE LIVING INSTRUMENT DOCTRINE – PRINCIPLE OF EVOLUTIVE INTERPRETATION

The living instrument doctrine (the evolutive principle) is generally one of the most important principles of interpretation.¹⁹ It requires the interpretation of the Convention “in the light of current day conditions”, whereas the Convention should be developed through the Court’s interpretation of its provisions. However, this does not mean that judges have the authority to read in new rights into the Convention, since this would mean going beyond their judicial powers and creating the law, thereby entering the legislative sphere. The living instrument doctrine has been subject to debate from the very beginning of the Court’s work, even by the judges themselves, and regarded as impermissible judicial activism. However, since the Convention is a human rights document, it has a role to make the protection of the rights guaranteed by the Convention flexible. Many authors consider the application of the evolutive principle justified, and the reasons why the Court states that it uses this principle – legitimate.²⁰

within national systems of member states. For more on autonomous concept see Senden, H., 2011, pp. 173–191; Letsas, G., 2004, *The Truth in Autonomous Concepts: How to Interpret the ECHR*, *EJIL* 15, pp. 279–305; Letsas, G., 2009, *A Theory of Interpretation of the European Convention on Human Rights*, Oxford University Press, Oxford, pp. 37–58.

- 16 On the other hand, the margin of appreciation doctrine is, in the author’s opinion, closely connected with the use of the comparative method of interpretation, since when there is consensus among member states, the margin of appreciation allowed will be narrow, and vice versa, when there is no consensus, the states will be allowed wide margin of appreciation. At least, that is (and should be) in most cases.
- 17 Mahoney, P., 1990, *Judicial activism and judicial self-restraint in the European Court of Human Rights: two sides of the same coin*, 11 *Hum.Rts.L.J.* 57, pp. 57–89, p. 60; Marochini, M., 2014, *The interpretation of the European Convention on Human Rights*, *Zbornik radova Pravnog fakulteta u Splitu*, vol. 51, no. 1, pp. 63–84. This division is partially taken from the papers mentioned here, but also upgraded with the division taken from Senden, H., 2011.
- 18 For a very detailed analysis of all the methods and principles of interpretation used by the ECtHR, see: Senden, H., *ibid.*
- 19 We might say that the VCLT also provides, albeit limited, basis for evolutive interpretation, namely its provisions on interpretation in accordance with the ‘subsequent agreement’ (this will be really rare since it requires active agreement from the states on the topic) and the ‘subsequent practice’ of the states. Senden, H., 2011, p. 151.
- 20 Dzehtsiarou, K., 2015, *European consensus and the legitimacy of the European Court of Human Rights*, Cambridge University Press, Cambridge, pp. 1730–1746; Letsas, G., *The ECHR as a living instrument: Its meaning and legitimacy*, in Føllesdal, A., Peters, B. and Ulfstein, G. (eds.), 2013, *Constituting Europe: The European Court of Human Rights in a National, European and Global Context*, Studies on Human Rights Conventions, Cambridge University Press,

Unlike proponents, critics see the main problem with using the living instrument doctrine in the Court's legitimacy to do so.²¹ However, it might be said that the principle of evolutionary interpretation is a generally accepted principle, but this does not mean that it is still not the subject of debate.

The evolutionary interpretation plays a special role in relation to the right to live in a healthy environment, although the Court never directly invoked the living instrument doctrine/evolutive interpretation when deciding environmental cases. It might be said that, since the environment is not mentioned in any of the Convention provisions, all the cases regarding the right to live in a healthy environment are products of evolutive interpretation of the Convention.²²

2.2. THE PRINCIPLE OF EFFECTIVENESS

By introducing and using the principle of effectiveness, the Court is giving provisions of the Convention the "fullest weight and effect consistent with the language used and with the rest of the text and in such a way that every part of it can be given meaning."²³ The essence of this principle is that states cannot be in compliance with the Convention simply by prohibiting conduct that contravenes the Convention, but they might have to take positive action to protect Convention rights.²⁴ Therefore, the general idea under this approach is to impose positive obligations on the contracting states.

Regarding the right to live in a healthy environment, what can be singled out is the state's obligation to take measures against harmful effects on the environment and environment affecting the enjoyment of the individual's private life and home. From the Court's case-law concerning the right to live in a healthy environment, one can see that the Court has not always found it necessary to distinguish between the negative obligation of the state to refrain from certain doings and the positive obligation of the state to take certain measures.²⁵ The

Cambridge, pp. 106–141; Theil, S., 2017, Is the 'Living Instrument' Approach of the European Court of Human Rights Compatible with the ECHR and International Law?, *European Public Law*, 23 (3), pp. 587–614.

21 Dzehtsirou, K., 2011, p. 1735.

22 The only time when the Court directly invoked the living instrument doctrine in a case concerning the right to live in a healthy environment was in the Dissenting opinion of judges Costa, Rees, Turner, Zupančič and Steiner in the *Hatton and others v. the United Kingdom* judgment, no. 36022/97, judgment of 7 March 2003 (GC).

23 Merrills, J. G., 1990, *The development of international law by the European Court of Human Rights*, Manchester University Press, Manchester, p. 208.

24 McRae, D., Approaches to the Interpretation of Treaties: The European Court of Human Rights and the WTO Appellate Body, in Breintenmoser, S. and Ehrenzeller B. et al. (eds), 2007, *Human Rights, Democracy and the Rule of Law: Liber amicorum Luzius Wildhaber*, Zürich/St. Gallen Dike Baden-Baden Nomos, pp. 1411–1412.

25 In the seminal environmental case, *Powell and Rayner v. the United Kingdom*, no. 310/81, judgment of 21 February 1990, regarding the type of obligations imposed on states, the Court stated: "Whether the present case be analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicants' rights under paragraph 1 of Article 8 or in terms of an 'interference by a public authority' to be justified in accordance

Court confirmed this line of thinking in the first case where an environmental complaint was upheld – *Lopez Ostra v. Spain*, as well as in the highly debated *Hatton and others v. the United Kingdom* case.²⁶ This is rather understandable, since the Court places the biggest emphasis on striking the balance between individual and community interests; regardless whether the state's failure to fulfill its positive obligation or the interference with the applicant's rights are at stake.²⁷

2.3. THE MARGIN OF APPRECIATION DOCTRINE

Although the doctrine of margin of appreciation should concern the application of the Convention, in practice, it allows states certain discretion when deciding on the scope of individual Convention rights, thus entering the domain of interpretation of the Convention.²⁸ The Court has developed the doctrine of margin of appreciation in order to allow the contracting states some autonomy, a sort of space for manoeuvre²⁹ that the national authorities have (but within Convention limits), in fulfilling their obligations under the Convention. Also, some interpretation toll was necessary “to draw the line between what is properly a matter for each community to decide at local level and what is so fundamental that it entails the same requirement for all countries whatever the variations in tradition and culture.”³⁰

It is important to point out that the margin of appreciation doctrine is often criticised on two different levels, either in general as a doctrine³¹ or in its use in

with paragraph 2, the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention. Furthermore, even in relation to the positive obligations flowing from the first paragraph of Article 8, “in striking [the required] balance the aims mentioned in the second paragraph may be of certain relevance.” para. 41.

26 *Lopez Ostra v. Spain*, no. 16798/90, judgment of 9 December 1994; *Hatton and others v. the United Kingdom* (GC), paras. 98 and 119.

27 Later, the Court distinguished between positive and negative obligations in *Cuenca Zarzoso v. Spain*, no. 23383/12, judgment of 16 January 2018, where it was found that “the respondent State has failed to discharge its positive obligation to guarantee the applicant’s right to respect for his home and his private life, in breach of Article 8 of the Convention.” para. 54. See also: *Tătar v. Romania*, no. 67021/01, judgment of 27 January 2009, para. 107; *Di Sarno v. Italy*, no. 30765/08, judgment of 10 January 2012, para. 110.

28 According to Wisniewski, A., 2016, “The margin of appreciation doctrine is regarded as one of the most controversial among the principles, methods or techniques used by the European Court of Human Rights for interpreting and applying the European Convention on Human Rights.” p. 105. Therefore, he does not find it necessary to define whether the margin of appreciation is a principle or method or a technique. On the other hand, Senden, H. does not mention it, either as a method or as a principle.

29 Greer, S., 2005, p. 5.

30 Mahoney, P., 1998, Marvellous Richness of Diversity or Invidious Cultural Relativism, *Human rights law journal: in association with the International Institute of Human Rights, Human Rights Law Journal*, Vol. 19, No. 1, pp. 1–6, p. 1.

31 Jeffrey A. B., 2004–2005, The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law, *Columbia Journal of European Law*, Vol. 11, No. 1, pp. 113–150; Macdonald, R., The Margin of Appreciation in Macdonald, R., Mat-

certain circumstances.³² According to certain scholars, the Court nowadays uses the margin of appreciation as a substitute for coherent legal analysis of the issues at stake, as well as to avoid very controversial judgments.³³ However, scholars generally agree that the margin of appreciation doctrine can be justified,³⁴ but that the problem lies in knowing when and how to apply it to the facts of a particular case³⁵ as well as in the lack of criteria regarding wide and narrow margin of appreciation attributed to states. And, as will be seen, this is exactly the case with environmental cases.³⁶

It might be said that the principle of evolutive interpretation and the principle of effective interpretation can be derived from the (objective) teleological method of interpretation. However, it can also be said that all the interpretative aids discussed are closely connected with the comparative method of interpretation.³⁷ Both methods will be briefly presented in the text that follows.

scher, F. and Petzold, H. (eds), 1993, *The European System for Protection of Human Rights*, Martinus Nijhoff Publishers, Brill.

- 32 Greer, P., The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights, Human Rights Files, 17/2000, p. 5. Moderate critics agree with the use of the doctrine but claim that the Court should provide strong arguments when using it. Van Dijk, P. and van Hoof, G.J.H., 1998, *Theory and Practice of the European Convention on Human Rights*, Kluwer Law International, The Hague-Boston-London, p. 93.
- 33 Lord Lester of Herne Hill, 1998, Universality versus Subsidiarity: A Reply, 1 *European Human Rights Law Review*, pp. 73–81, p. 75. See also Judge Loucaides (former judge of the Court) in reflections on his experience as a judge of the Court. He particularly criticizes the jurisprudence showing certain reluctance of the Court (ERRC webpage 26 May 2010) <<http://www.errc.org/cikk.php?page=8&cikk=3613>> (1 June 2020); or Macdonald, R., *ibid.* Also, judge de Meyer in a partly dissenting opinion in the case *Z. v. Finland*, no. 22009/93, judgment of 25 February 1997, stated that “it is high time for the Court to banish that concept from its reasoning” and how “there is no room for a margin of appreciation which would enable the States to decide what is acceptable and what is not. [...] It is for the Court, not each State individually, to decide that issue, and the Court’s view must apply to everyone within the jurisdiction of each State,” point III.
- 34 In 2006, Yuval Shany argued that there was such a thing as a general margin of appreciation doctrine in international law and contended that it had two principal elements. While noting that international courts do not generally distinguish between them, he argued that the first element had to do with ‘judicial deference’, where international courts should refrain from reviewing national decisions de novo, and that the second element indicated ‘normative flexibility’, allowing different interpretations of the same norm depending on context. Shany, Y., 2005, Toward a General Margin of Appreciation Doctrine in International Law?, *European Journal of International Law*, Vol. 16 No. 5, pp. 907–940.
- 35 Carozza, P. G., 1998, Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights, 73 *NOTRE DAME L. REV.*, pp. 1217–1238, 1220; and Harris, D. J. et al., 2018, *Law of the European Convention on Human Rights*, Oxford University Press, Oxford, p. 13.
- 36 For example, the Grand Chamber sometimes decided the same case differently than the Chamber, while both decisions were reached by using the margin of appreciation attributed to states. This is completely legitimate; however, it can create some uncertainty among states, if the Court has not provided good legal reasoning for doing so. The best example of it is the well-known health environment case *Hatton and others v. the United Kingdom* (GC) and *Hatton and others v. the United Kingdom*, no. 36022/97, judgment of 2 October 2001.
- 37 According to Senden, “[e]volutive interpretation indicates the direction in which an interpretation might go and comparative interpretation provides the substantive justification for a specific evolutive interpretation.” Senden, H., 2011, p. 286.

2.4. THE TELEOLOGICAL METHOD OF INTERPRETATION

The teleological method is considered a basic interpretative method interconnected with numerous principles of interpretation. It can be derived from Article 31 of the VCLT stating that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Regarding the object and purpose of a treaty, we might say that judges can look at both the subjective and objective object and purpose. The subjective object and purpose of the Convention would mean the purpose the drafters had when creating the Convention. Although employing the subjective object and purpose can be considered important for consistent and coherent interpretation of the Convention, it is nowadays really rare.³⁸ On the other hand, the objective object and purpose are closely linked to the evolutive and effective (as well as autonomous) principles of interpretation, since they allow judges to establish what a rational lawmaker would consider the purpose to be at the time of the interpretation, which obviously might have even changed over time.³⁹ Bernhardt has argued that the special nature of human rights treaties requires the ECtHR to take an objective approach to interpretation, and the author agrees with this opinion.⁴⁰

2.5. THE COMPARATIVE METHOD OF INTERPRETATION

Unlike the teleological method, the comparative method cannot be derived from the VCLT, but has been developed by the courts themselves. The comparative method represents interpretation where the judge in question uses different internal and external materials to find the meaning of a specific provision, or to find whether there is a consensus among states regarding certain questionable issues.⁴¹ It is why it is also called the consensus method of interpretation. Writing on two components of comparative interpretation, Senden points out how the internal component means, “on the one hand, that the comparative study limits itself to a comparison between the countries that fall within the jurisdiction of the court in question.”⁴² The external component of comparative interpretation refers to the use of sources that are not covered by the internal component of this method. In general, that means reliance on documents or on information

38 This would imply the Court looking at the *travaux préparatoires* when interpreting the Convention, and the Court does so really rarely (although sometimes it does; see: *James and Others v. the United Kingdom*, no. 8793/79, judgment of 21 February 1986, para. 64. See also: *Nolan and K. v. Russia*, no. 2512/04, 12 February 2009, para. 48; *Banković and others v. Belgium and Others*, no. 52207/99, decision of 12 December 2001 (decision on admissibility)).

39 Senden, H., 2011, p. 96

40 Bernhardt, R., 1999, *Evolutive Treaty Interpretation, Especially of the Convention on Human Rights*, 42 *GYIL* 14, pp. 11–25, 68 and 71. Confirmed by Orakhelashvili, A., 2003, *Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights*, *European Journal of International Law*, Volume 14, Issue 3, pp. 529–568, p. 535.

41 Senden, H., 2011, pp. 66–67.

42 *Ibid.*, p. 115.

derived from outside the jurisdiction of the court in question.⁴³ There is wide criticism of the use of comparative interpretation, either in general or when it is used referring to external sources.⁴⁴ The author holds that the use of the (internal) comparative method is and should be closely connected to the use of the evolutive interpretation and the principle of effectiveness as well as with the doctrine of margin of appreciation. What about the external component of this method? This problematic issue will be further elaborated by looking at the Court's inconsistent use of external sources. Namely, both proponents and opponents of comparative interpretation agree that the decisive use of foreign material is inappropriate. However, despite this viewpoint, the Court does use foreign sources, and it often does so inconsistently, as will be seen in the next chapter.

3. INCONSISTENCY OF THE COURT'S DECISION MAKING IN ENVIRONMENTAL CASES WITH EMPHASIS ON THE USE OF EXTERNAL LEGAL SOURCES

3.1. MAIN FEATURES OF ENVIRONMENTAL PROTECTION

Before looking at the problem of inconsistency, main features of environmental protection under Article 8 will be briefly presented. The first feature of the right to (live in) a healthy environment is that the environment *per se* is not protected under any of the Convention provisions, but the Court examines whether environmental degradation affected the rights guaranteed under the Convention – or the existence of a causal link. In this regard, the *Kyrtatos v. Greece*⁴⁵ case may be mentioned, where the Court pointed out the need for existence of environmental impacts on private life and home, and marked “a general deterioration of the environment” as insufficient. Therefore, the Court would only examine environmental cases where there is a causal link between the environmental impact and the applicant's individual right as guaranteed under the Convention.⁴⁶ The assessment of the existence of a causal link is made in each

43 *Ibid.*, p. 115 et seq.

44 *Ibid.*, p. 123 et seq. We might say how the use of the internal component of comparative interpretation is justified under the Convention by reference to the Preamble, which refers to the “common heritage” of the European states. However, even this component can be debatable since there will rarely exist consensus among all member states.

45 *Kyrtatos v. Greece*, no. 41666/98, judgment of 22 May 2003.

46 If we want to divide the environmental cases into groups concerning similar factual situations, we might do so in the following manner: 1. cases concerning excessive noise (like *Powell and Rayner v. the United Kingdom*, *Hatton and others v. the United Kingdom*, *Dees v. Hungary* (no. 2345/06, judgment of 9 November 2010), *Mileva and others v. Bulgaria* (no. 43449/02, judgment of 25 November 2010), *Moreno Gomez v. Spain* (no. 4143/02, judgment of 16 November 2004), *Oluić v. Croatia* (no. 22330/05, judgment of 5 February 2009)); 2. cases concerning industrial pollution and waste management (*Lopez Ostra v. Spain*, *Jugheli and others v. Georgia* (no. 38342/05, judgment of 13 July 2017), *Bacila v. Romania* (no. 19234/04, judgment of 30 March 2010), *Fadeyeva and others v. Russia* (no. 55723/00, judgment of 9 June 2005), *Ledyayeva and others v. Russia* (nos. 53157/99, 53247/99, 53695/00 and 56850/00,

individual case and by applying the principles discussed. If the Court established the causal link it would examine whether the impact on the applicant's right satisfied the minimal level of severity⁴⁷ and whether the state failed to fulfil its positive obligations (or infringed with its negative obligations). How does the Court determine the minimal degree of severity? It was emphasized that, in addition to being assessed in each case separately, this determination is characterized by the following parameters: the intensity of disturbances or influences, their duration, the consequences they have for the individual, and the so-called general environmental context.⁴⁸ The impact of the environmental detriment on the rights alone is sufficient and it is not required that, for example, the applicant's health deteriorated due to any disturbances and influences.

The above seems relatively clear. However, the situation is not clear since the Court, in deciding environmental cases inconsistently, uses various interpretative methods and principles, thereby creating uncertainty among states and applicants; and what is particularly problematic – inconsistently uses external legal sources.

judgment of 26 October 2006), *Taşkin and others v. Turkey* (no. 46117/99, judgment of 10 November 2004), *Lemke v. Turkey* (no. 17381/02, judgment of 5 June 2007), *Tătar v. Romania*, *Ivan Atanasov v. Bulgaria* (no. 12853/03, judgment of 2 December 2010), *Dubetzka and others v. Bulgaria* (no. 30499/03, judgment of 10 February 2011), *Giacomelli v. Italy* (no. 59909/00, judgment of 2 November 2006), *Di Sarno and others v. Italy*, *Cordella and others v. Italy* (nos. 54414/13 and 54264/15, judgment of 24 January 2019)); 3. cases concerning spatial and urban planning (*Krytatos v. Greece*, *Martinez, Martinez and Maria Pino Manzano v. Spain* (no. 61654/08, judgment of 3 July 2012), *Dzemyuk v. Ukraine* (no. 42488/02, judgment of 4 September 2014), *Hardy and Maile v. the United Kingdom* (no. 31965/07, judgment of 14 February 2012)); 4. cases regarding risk assessment and access to information (like *McGinley and Egan v. United Kingdom* (nos. 21825/93 and 23414/94, judgment of 28 January 2000), *Guerra and others v. Italy* (no. 14967/89, [GC] judgment of 19 February 1998), *Roche v. France* (no. 32555/96, judgment of 19 October 2005), *Vilnes and others v. Norway* (nos. 52806/09 and 22703/10, judgment of 5 December 2013), *Brincat and others v. Malta* (nos. 60908/11, 62110/11, 62129/11, 62312/11 and 62338/11, judgment of 24 July 2014)).

47 In the case of *Fadeyeva v. Russia*, the Court stated how, in order to classify the case within the scope of Article 8, two conditions must be met: firstly, that there was an actual interference with the applicant's private sphere, and, second, that a level of severity was attained.

48 In the *Fadeyeva* case, from 1982 on the applicant and her family were living less than 500 meters from a large steel plant. In order to limit the impact of pollution from the plant, a 5,000 meter wide 'sanitary security zone' existed. The zone was supposed to separate the plant from residential areas although, in practice, several thousand people, including the applicant and her family, lived in the zone. In 1996, the government noted that the plant was responsible for 96 per cent of all emissions in the area and that the overlap between industrial and residential areas was plainly harmful to health. The pollution was found to be responsible for the huge increase in the number of children with respiratory and skin diseases and the higher number of adult cancer deaths. The Court observed that, in order to fall under Article 8, complaints relating to environmental nuisances have to show that there has been actual interference with an individual's "private sphere" and that these nuisances have reached a certain level of severity. In the case in question, the Court found that over a significant period of time the concentration of various toxic elements in the air near the applicant's house had seriously exceeded safe levels and that the applicant's health had deteriorated as a result of the prolonged exposure to the industrial emissions from the steel plant. Therefore, the Court accepted that the actual detriment to the applicant's health and well-being had reached a level sufficient to bring it within the scope of Article 8 as well as to find a violation of the same article.

3.2. THE COURT'S INCONSISTENT USE OF EXTERNAL LEGAL SOURCES

As was already mentioned, the Court did not set out clear standards or guidelines for deciding environmental cases, and this problem already became visible in one of the first environmental cases, *Hatton and others v. the United Kingdom*. In the mentioned case, both the Chamber and the Grand Chamber judgments were delivered with separate opinions, and various interpretative principles and methods were invoked in them. The mentioned judgments show how the lack of standards and guidelines in environmental matters allows the Court to invoke various interpretative methods and principles. The Chamber, by five votes to two, held that mere reference to the economic well-being of the country is not sufficient to outweigh the rights of others, thus finding a violation of Article 8. Two judges issued dissenting opinions invoking the Court's overly wide use of the living instrument doctrine, as well as stating that the Court has impermissibly narrowed the margin of appreciation attributed to states.⁴⁹ Later on, the case was referred to the Grand Chamber, which found no violation of Article 8. The majority of the Grand Chamber did not find that the authorities overstepped their margin of appreciation. However, five judges issued a joint dissenting opinion advocating a stronger role for the Court in responding to complaints concerning environmental pollution, and invoking the use of the living instrument doctrine.⁵⁰

Nevertheless, the focus here will not be on the problems surrounding the inconsistency of the Court's case-law on the right to live in a healthy environment in general, but on the problems arising out of the use of external legal sources.

3.2.1. *The case of Taşkin and others v. Turkey*

The first case where the Court explicitly invoked external legal sources came as early as 2004 – *Taşkin and others v. Turkey*. The case concerned the national authorities' decision to issue a permit to use a cyanidation operating process in a gold mine and the related decision-making process that, according to the applicants, had given rise to a violation of their rights guaranteed by Article 8. The Court found a violation of Article 8, pointing out that Article 8 applied to severe environmental pollution which could affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health. The Court reached its decision referring to the 1992 Rio Declaration and the 1998 Aarhus Convention, although the Rio Declaration is not itself a legally binding instrument, and Turkey is not a party to the Aarhus Convention. The Court invoked those instruments in the *infra* discussed *Tătar v. Romania* judgment; however, invoking those instruments in the *Taşkin and others* case is more problem-

49 *Hatton and others v. the United Kingdom*, partly dissenting opinion of judge Greve and dissenting opinion of Sir Brian Kerr.

50 Dissenting opinion of judges Costa, Rees, Turner, Zupančič and Steiner in the *Hatton and others v. the United Kingdom* judgment (GC).

atic, since Romania, at the time when the *Tătar* judgment was delivered, at least ratified the Aarhus Convention. The Aarhus Convention, and let alone the Rio Declaration, cannot be considered as part of customary international law, but they are clearly external legal sources to all states that have not ratified/accepted them. To date, the Aarhus Convention has 47 state parties⁵¹ (out of possible 193, but including the EU), most of them members of the Council of Europe; however, Turkey has not signed or ratified it. The Rio Declaration (on environment and development), although signed by 175 states, contains only non-binding principles, including the precautionary principle that will be discussed in the text that follows. Therefore, in the *Taşkin and others* judgement the Court used the evolutive principle of interpretation of Article 8, relying on the external component of the comparative method.

3.2.2. *The Tătar v. Romania case*

In the *Tătar v. Romania* case, the company S.c. Aurul S.A., used sodium cyanide while exploiting the Baia Mare gold mine. On 30 January 2000, an environmental accident occurred, and a dam breached, releasing about 100,000 cubic metres of cyanide-contaminated tailings water into the environment. The accident occurred in the vicinity of the applicants' home and the company did not halt its operations after the accident. In deciding on possible violations of the Convention, the Court noted that the applicant had failed to prove the existence of a causal link between exposure to sodium cyanide and asthma. Nevertheless, despite the lack of such a link, the existence of a serious and material risk for the applicants' health and well-being entailed a duty on the part of the state, under Article 8, to assess the risks both at the time it granted the operating permit for the extraction process in the gold mine, and subsequently to the accident that occurred, as well as to take appropriate measures. The Court concluded that the Romanian authorities had failed in their duty to assess the risks entailed by the activity and had failed to take suitable measures to protect the applicants' rights under Article 8 and more generally their right to a healthy environment. The *Tătar* judgment is relevant for several reasons. First, in this case the Court explicitly invoked the precautionary principle under environmental law and the principle of effectiveness by imposing positive obligations on states.⁵² Furthermore, the Court referred to the precautionary principle, as contained in the Declaration of Rio as well as in the jurisprudence of the European Court of Justice, both being external legal sources for the Court.

Therefore, in *Tătar* the Court invoked external legal sources and the principles contained therein, using the external comparative method of interpretation

51 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 2161 UNTS 447, 38 ILM 517 (1999).

52 *Tătar v. Romania*, paras. 75, 109 and 120. This principle is expressed in the Rio Declaration on Environment and Development (A/CONF.151/26 (Vol. I) REPORT OF THE UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT), which stipulates that, where there are "threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."

together with the principle of effectiveness. Besides being unwise for the Court to invoke external sources, it is even more dangerous to randomly invoke them, both for the reasons of legitimacy and consistency. And this is exactly what happened in a later judgment from 2010, *Bacila v. Romania*.

3.2.3. *The case of Bacila v Romania*

In this case the applicant claimed a violation of Article 8 due to emissions from a lead and zinc plant. Analyses carried out by public and private bodies established that heavy metals could be found in the air, waterways, soil and in vegetation while the rate of illness of inhabitants of the affected town was seven times higher than in the rest of the country. For that reason, the Court found a violation of Article 8 due to the state's failure to strike a fair balance between the public interest of maintaining economic activity of the biggest employer in the town and the applicant's effective enjoyment of the right to respect for private life and home. Again, the Court did not look for the causal link between the deterioration of health and economic activity, but only the existence of a risk. Here, the Court failed to invoke the precautionary principle. However, judge Zupančič in his concurring opinion raised some interesting points regarding precautionary principle:⁵³

“In both cases (*Tătar v. Romania and Bacila v. Romania*, emphasis added) what is at stake is the causal link between the environmental pollution, on the one hand, and the actual damage caused to the health of the application, on the other hand. [...] The precautionary principle is a constitutional principle in some countries (France, for example). It logically follows that it generates constitutional rights, for example the right to be protected by legislation as well as by judicial decisions questions of the constitutional principle of precaution. There is no doubt that the precautionary principle creates constitutional rights. By logical projection, Article 8 of the European Convention on Human Rights and perhaps other provisions of this instrument can in turn give rise to human rights which coincide with guaranteed constitutional rights [...] Consequently, in accordance with the precautionary principle, it is up to the company which engages in an activity dangerous for the environment that it is incumbent to prove, preferably in advance, that the activity in question will not be toxic to the environment and, by extension, neither will it be to humans....It is simply fair to overturn the presumption in order to protect the individual in his physical integrity and in his human dignity in an environment that would not be dangerously degraded if the legal and factual barriers available to the State were put in place and operated according to the precautionary principle.”⁵⁴

Judge Zupančič referred to the precautionary principle, not as an external source of law, but as a constitutional principle creating constitutional rights that

53 Judge Zupančič has, together with judge Gyuluman, issued a partly dissenting opinion in the *Tătar* case, agreeing with the majority that there has been a violation of (procedural) aspect of Article 8 but strongly dissenting the opinion of the majority that the applicant needed to prove the existence of the causal link between the exposure to certain doses of sodium cyanide and the worsening of his illness.

54 Concurring opinion of judge Zupančič in *Bacila v. Romania* (translated by the author, available in French).

can be, by logical projection, applied in a manner that Article 8 (and perhaps other provisions of the Convention) can in turn give rise to human rights that coincide with guaranteed constitutional rights. Maybe, if the Court followed the argumentation and reasoning of judge Zupančič and used the precautionary principle as an internal (constitutional) principle, it would clear the uncertainty surrounding the use of this principle as well as justify its use in environmental cases. However, the Court failed to do so, thereby leaving this principle outside the Convention legal space and leaving room for its arbitrary use.

3.2.4. *The case of Hardy and Maile v. the United Kingdom*

Later on, following the *Tătar* and *Bacila* cases, in the *Hardy and Maile* case the Court restated the main features of the causal link and within it the necessary/minimal level of severity and the state's positive obligations. In this case, the applicants complained on the construction and operation of two liquefied natural gas ("LNG") terminals on sites at Milford Haven harbour. The applicants claimed that the UK had failed in its duties under Articles 2 and 8 of the Convention regarding the regulation of hazardous activities and the dissemination of relevant information. The Court decided to look at the case only from the Article 8 standpoint, and in assessing the causal link and the minimal level of severity found that the potential risks posed by the LNG terminals were such as to establish a sufficiently close link with the applicants' private lives and homes for the purposes of Article 8. Article 8 was accordingly applicable. However, the Court found no violation of Article 8, raising similar argument as in the *Hatton and others* case. In reaching the conclusion that no violation took place, the Court specifically took note of the very extensive regulatory framework in place in the UK (including several licensing regimes) governing facilities of the relevant type. Just like in *Hatton and others* case, it concluded that in cases raising environmental issues the state must be allowed a wide margin of appreciation.⁵⁵ It is also interesting to notice that, after invoking the precautionary principle in the *Tătar* case, the principle was completely ignored here even though the applicants explicitly invited the Court to interpret Article 8 in light thereof. This, we might say, is a clear sign of the Court's viewpoint of the precautionary principle as an external source of law. The question remains why the Court invoked this principle in the *Tătar* case and decided to ignore it in later cases, particularly in the instant one where the applicants explicitly invoked it.

3.2.5. *The case of Di Sarno and others v. Italy*

The trend of relying on international environmental law and EU environmental law is also visible in the 2012 *Di Sarno* judgment. In this case, a state of emergency was declared in the Campania region from February 1994 to December 2009 regarding the collection, treatment, and disposal of waste. Eighteen nationals who lived and/or worked in the region of Campania initiated proceedings alleging a violation of their rights under Articles 2, 8 and 13. The reasoning of

55 *Hardy and Maile v. the United Kingdom*, para. 217.

the Court regarding violation of Article 8 is very interesting from the perspective of this paper. First, the Court found that the Italian authorities had satisfied their Article 8 procedural obligation to provide information about the risks to the individuals. Regarding the substantive aspect of Article 8, the Court examined the complaint from the standpoint of the state's positive obligations under Article 8. In reaching the decision, the Court invoked both positive obligations and the margin of appreciation states enjoy in the choice of the concrete means they use to fulfil their positive obligations under Article 8 of the Convention. Although the applicants had not complained of any medical problems and the Court determined that their lives and health had not been in danger as a result of their exposure to waste, it did find a violation of their Article 8 right to home and private life. The Court concluded, relying on the precautionary principle, that "[t]he collection, treatment and disposal of waste are without a doubt dangerous activities [...] That being so, the State was under a positive obligation to take reasonable and adequate steps to protect the right of the people concerned to respect for their homes and their private life and, more generally, to live in a safe and healthy environment."⁵⁶ Therefore, the Court reached its conclusion relying on EU law (this time the Court invoked the precautionary principle enshrined in Article 174 of the Treaty establishing the European Community and in the case-law of the Court of Justice of the European Union), which had found Italy in violation of its obligations under EU law, as well as on the Aarhus Convention and the draft Articles of the International Law Commission on state responsibility (in the context of dismissing Italy's claim that its failures were justified by references to *force majeure*). The Court again returned to the precautionary principle, here as part of EU law and not as a principle enshrined in the Rio Declaration, however, again without providing any legal justification for doing so.

3.2.6. *The case of Cordella and others v. Italy*

Finally, in its latest environmental case, *Cordella and others v. Italy* the applicants complained about the effects of toxic emissions from the Ilva steelworks in Taranto on the environment and on their health, and about the ineffectiveness of the domestic remedies.⁵⁷ In deciding the case, the Court invoked the *Fadeyeva* case and other relevant case-law, finding that the State had failed to strike a fair balance between the competing industrial and individual interests, and also failed to adopt the necessary measures to ensure the effective protection of the applicants' right to private life, thus violating Article 8. The Court grounded its decision on two crucial elements: first, the numerous scientific reports that established the existence of a causal link between Ilva's industrial emissions and the drastic sanitary records of people living in the "high environmental risk" municipalities; and second, the uncertainty generated by the political impasse and by the number of administrative and legal acts that consolidated the dangerous status quo. The Court, however, did not find it necessary to invoke any

⁵⁶ *Di Sarno and others v. Italy*, para. 110.

⁵⁷ The case of *Cordella and others v. Italy*, Press Release issued by the Registrar of the Court, ECHR 029 (2019) 24.01.2019.

of the principles of international environmental law or any other conventions or declarations.

As it has been mentioned in the first part of the paper, the inconsistent use of interpretative methods and principles can have serious impact on the Court's legitimacy. Here, the emphasis was placed on the Court's inconsistent use of the external component of the comparative method of interpretation.

3.3. THE PROBLEMS SURROUNDING THE USE OF EXTERNAL LEGAL SOURCES

The problem of invoking external legal sources has already been detected after the *Christine Goodwin v. the United Kingdom* judgment from 2001⁵⁸ where the Court simply changed the existing case-law under the aegis of Article 8 right to respect for private life, without even invoking European or international consensus⁵⁹ but only an international trend.⁶⁰ Furthermore, the Court invoked three principles of the rule of law: legal certainty, foreseeability, and equality, and yet in this case it did not apply any of those principles.⁶¹ In this case the Court decided to depart from its previous case-law⁶² and expand the scope of the right

58 *Christine Goodwin v. the United Kingdom*, no. 28957/95, judgment of 11 July 2002. See also: *I. v. the United Kingdom*, no. 25680/94, judgment of 11 July 2002.

59 If there is no consensus among states on a certain issue, the Court gives arguments to Waldron who strongly disagrees with judicial review (of legislation) calling it illegitimate and stating: "By privileging majority voting among a small number of unelected and unaccountable judges, it disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality in the final resolution of issues about rights." Waldron, J., 2006, The Core of the Case Against Judicial Review, *The Yale Law Journal*, pp. 1346–1406, p. 1353. The problem of democratic legitimacy of the Court has also been invoked by Dzehtsiarou, K., 2017, What is Law for the European Court of Human Rights?, *Georgetown Journal of International Law*, Vol. 49, No. 1, 2017, pp. 89–134. He writes regarding the use of internal and external sources that "by relying on internal legal sources, the Court injects some elements of majoritarian decision-making and increases the democratic legitimacy of its judgments. The Court considers what understanding of the Convention rights are adopted by the majority of the Contracting Parties. All of the Contracting Parties to the Convention are at least nominally democracies and, therefore, the inclusion of democratically adopted decisions into the Court's decision-making process would offer some response to the counter-majoritarian difficulty," p. 133. What also needs to be mentioned here is the criticism of the famous judge Scalia who, when criticizing the Court's use of the living instrument doctrine (for the first time in the *Tyrer* judgment) stated: "The Court was quick to adopt the proposition that the Convention was (as the Court put it in 1978) a 'living instrument which must be interpreted in the light of present-day conditions'. And thus the world, or at least the West, has arrived at its current state of judicial hegemony. I am questioning the propriety – indeed, the sanity – of having a value-laden decision such as this made for the entire society (and in the case of Europe for a number of different societies) by unelected judges." Justice Scalia, a speech delivered to the Polish Constitutional Court in 2009 named "Mullahs of the West: Judges as Moral Arbiters." <https://www.rpo.gov.pl/pliki/12537879280.pdf>, 1 October 2020, p. 14.

60 *Christine Goodwin v. the United Kingdom*, para. 84.

61 *Ibid.*, para. 74.

62 *Rees v. the United Kingdom*, no. 9532/81, judgment of 17 October 1976; *Cossey v. the United Kingdom*, no. 10843/84, judgment of 27 September 1990.

to private life, without providing legal reasons for using the external instead of internal aspect of the comparative method of interpretation.⁶³

We might say that the Court has created a relatively large case-law on the right to live in a healthy environment, however, without establishing clear standards on the methods and principles it uses. As Ole Pedersen wrote: “The Court’s attempt to develop the Convention in light of other instruments, while admirable, rests on somewhat vague jurisprudential and doctrinal grounds.”⁶⁴ It is completely legitimate to ask why the Court (occasionally) relies on CJEU’s findings relating to the EU’s waste directives or on the rules on state liability and *force majeure*, developed by the International Law Commission, and also randomly invokes the precautionary principle and environmental conventions and declarations. “When simply applying these rules and norms (thereby ignoring their inherent contingency), the Court is arguably guilty of simplifying matters, resulting in its case-law lacking doctrinal rigor.”⁶⁵

This problem has been detected and presented in detail in Kanstantsin Dzehtsiarou’s paper *What Is Law for the European Court of Human Rights*, albeit from a somewhat different perspective. However, we can summarise his main points as follows: judges of the European Court of Human Rights (ECtHR) take into account both legal and non-legal considerations when deciding “hard” cases. Legal considerations can be further divided into internal and external ones.⁶⁶ The former originate from within the Convention system, while the latter are provisions borrowed from outside of the realm of the Convention, such as international treaties or laws and practices from nations outside of the Council of Europe (like EU law or decisions of the CJEU). Only international legal norms which are implemented in the domestic legal systems of the contracting parties to the Convention become internal legal sources (which we cannot say of the Aarhus Convention and the Rio Declaration, and let alone the rulings of the International Law Commission). Therefore, reliance on internal, as opposed to external sources can help minimise the challenges that the ECtHR is currently facing regarding its legitimacy.⁶⁷

63 Also see: *Frette v. France*, no. 36515/97, judgment of 26 February 2002.

64 Pedersen, O. W., 2018, *The European Court of Human Rights and International Environmental Law*, Chapter 5 in Knox, J. H. and Pejan, R. (eds), *The Human Right to a Healthy Environment*, Cambridge, CUP 2018. Available online: file:///Users/mmarochini/Downloads/SSRN-id3196971%20(3).pdf, p. 11.

65 *Ibid.*

66 Dzehtsiarou, K., 2017.

67 *Ibid.* This is for the following reasons: reliance on internal sources can demonstrate to the contracting parties that the ECtHR is not a foreign or arbitrary decision-maker; and internal sources allow the Court to be creative and innovative, and, at the same time, to take its subsidiary role seriously; there is a presumption that internal legal sources are in compliance with the Convention since laws and practices of every contracting party must take the Convention into account; the Preamble to the Convention states its aim as the achievement of a greater unity among the European states through better protection of human rights; the contracting parties are the main addressees of the judgments and are instrumental for the legitimacy and effectiveness of the ECtHR; the Court’s reliance on the laws of the contracting parties is a well-established method of interpretation of the Convention since the Court

4. CONCLUSION

The right to live in a healthy environment can be considered a phenomenon in the Convention system, since it is a right not guaranteed under the Convention but developed by the Court through its use of various interpretative methods and principles.

One of the assumptions required for the protection of the right to live in a healthy environment, is that the effects and disturbances from the environment violate a certain Convention right. Regarding the types of disturbances and influences, it is not impossible to draw parallels with the types of emissions provided for in Article 110 of the Croatian AO. However, different types of disturbances and influences also appear within the Convention system and protection from them is equally provided, while these categories would more appropriately fit within our COA emission rules. Also, a more important difference between the protection afforded by the Court and the right to live in a healthy environment, on the one side, and the national protection against emissions, on the other, is shown by the fact that the Court unites, in a particular way, the types of protections known and provided for in our legal system under a “common umbrella”. With the necessary reservation, it might be said that the Court does not insist on distinguishing between indirect and direct emissions, nor does it insist on the excess of indirect emissions, at least not in the sense of our domestic property law rules.⁶⁸

As already said, in order for influences and disturbances to be Convention-relevant, it is required that they violate a Convention right and most importantly that they can be attributed to the state because of something it did / did not do, or something it should / should not do – the institution of positive / negative obligations of states or the principle of effectiveness. The domestic *actio negatoria* protection, even in its indemnity aspect, functions under different assumptions, although according to our rules on protection from emissions, it is not necessary for damage to occur due to emissions – something that can be singled out as a general link between the protection afforded by the Convention and our national protection. Another thing that can be emphasized is the need to strike a fair balance between the public and individual interests.⁶⁹

If we look at the scope of *actio negatoria* and compare it with the protection of the right to live in a healthy environment, the main difference is that the former can be sought preventively while the latter cannot; although even in such situation there may be exceptions, for example, in cases where the state failed to take certain preventive measures.

It can be concluded that there are significant differences between the *actio negatoria* involving emissions and the protection provided by the right to live in a healthy environment. However, we can imagine a situation where it will

started relying on them very early in its case-law; and internal sources reintegrate the notion of consent in the Court’s decision-making.

68 Mihelčić, G., Marochini Zrinski, M., 2018, p. 262.

69 *Loc. cit.*

become possible before national courts to raise an objection regarding the right to live in a healthy environment when its benefits (and this could be a possibility to determine the assumptions relevant to *actio negatoria* in a less complex way) might improve the position of the holder of *actio negatoria*. On the other hand, having in mind the option according to which property protection against emissions is preceded by the protection under special regulations, there is also a possibility that protection of the right to live in a healthy environment enables the overcoming of discrepancies in that sense.⁷⁰

Nevertheless, in order to have direct impact on the improvement of (any) national protection from emission, the Court must refrain from delivering inconsistent judgments. The fact is that the Court has taken the individualistic approach when deciding environmental cases and states have not disputed this approach. This individualistic approach means that the Court only looked at environmental cases when the applicant has proven the causal link between the environmental detriment and his right as guaranteed under the Convention. However, when delivering judgments, the Court relies on international and regional law instruments and principles contained therein, without any need for establishing clear standards or at least guidelines for the use of these instruments and principles.

What are the consequences for such conduct of the Court, from the legitimacy point of view?

Since the right to live in a healthy environment is not originally guaranteed under the Convention, it was preferable, or even necessary for the Court to choose an interpretative direction it would take when deciding an environmental case. However, the Court failed to do so, avoiding to directly invoke any of the interpretative methods and principles, and mainly invoking the margin of appreciation doctrine as an interpretative tool that allows it to decide on a case-by-case basis. However, all of it can be considered legitimate since the Court did not overstep its powers, but used legitimate interpretative tools available, even if it did so in a rather inconsistent manner. From the legitimacy point of view, the Court can claim the individualistic approach and the margin of appreciation doctrine in order to (or at least try to) defend the inconsistency in its case-law.

This brings us to the final point, one that can be hard to ignore and even harder to defend from the legitimacy point of view, and that is the Court's inconsistent use of external sources of law when deciding environmental cases. The problematic issues surrounding and arising out of the Court's use of external sources have been elaborated in the paper. The external legal sources the Court uses are generally not accepted by all member states of the Council of Europe, nor are they part of customary international law, thereby lacking consensus among states. It does not contribute to unity among states, and it creates uncertainty regarding their obligations under the Convention, particularly when it comes to those rights like the right to live in a healthy environment, not originally guaranteed under the Convention. Therefore, reliance on internal sources

⁷⁰ *Ibid.*, p. 263.

and on its own interpretative principles can contribute to and enhance the Court's legitimacy. Furthermore, arbitrary reliance on any sources, without clear guidelines on the cases and situations where it will use them, further threatens the Court's legitimacy, since it does not follow the principles of rule of law: legal certainty, foreseeability and equality.

In conclusion, if it aims to keep its legitimacy as well as its role as an ultimate arbitrator and authority in Europe, the Court needs to, both in general terms and in particular in cases concerning the right to live in a healthy environment, consistently rely on internal sources of law and minimize the use of external sources. The Court also needs to set out clear standards and guidelines as well as follow the principles of rule of law.

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SOUTH AFRICAN LAND REFORM, CONSTITUTIONAL ENVIRONMENTAL IMPERATIVES, AND A COMPARATIVE OVERVIEW

Abstract: *The South African land reform program has maintained a past-oriented approach, aiming to undo three hundred years of settler colonialism, inter-ethnic conflict, and the spatial injustices of apartheid-era land control legislation. However, legislation primed to usher in a more just distribution of land has failed to incorporate environmental concerns. This conclusion is drawn from a survey of existing land reform legislation. A more promising yet indirect example is the Spatial Planning and Land Use Management Act, which employs the Bill of Rights' environmental protection clause. A premise is crafted that South African law contains a constitutional duty of environmental protection which is not limited to the environmental clause itself but has bearing on other fundamental human rights, such as the property clause. This establishes the link between the land reform and property clause in Section 25 and the environmental clause in Section 24. The implication is that legislation and policy flowing from Section 25 must envisage an environmentally friendly future for land reform. This forms the basis for a brief survey of relevant South African legislation.*

In conclusion, an argument is made for future-oriented land reform, with a focus on West African, Brazilian and Scottish examples that deal with land-use management and ownership in an era of climate change and environmental degradation. This approach includes reform-orientated land-use planning as a passive, policy-based mechanism to protect tenancy, to direct redistributive policy efforts and to enforce environmentally-sound land-use planning.

Keywords: 1996 Constitution; environmental law, future-orientated; land reform; NEMA; past-orientated; Section 24; Section 25; SPLUMA; sustainable development.

1. INTRODUCTION

1.1 LAND: A HISTORICAL BACKGROUND

South African land as both a resource and a medium for human culture has been a point of contest for hundreds, if not thousands of years. Mellet¹ recently

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1 Mellet, TP, 2020, *The lie of 1652*, Cape Town: Tafelberg, pp. 10–15.

shed new light on the complex peopling process of the South African state's geographical area, documenting an intricate history of circular migrations, assimilation, and diversion all due to climatic changes, wars, dynastic marriage and other cultural processes such as agricultural innovation and metallurgy. This process came to a head in near modern history when Europeans arrived in southern Africa in 1652. This initial colonization of the Cape of Good Hope by the Dutch East India Company was followed by the British in 1795 and 1806. Before them, various groups of Khoi people inhabited large swaths of land stretching to the Great Kei river and possibly beyond. Nguni and Sotho peoples inhabited the coastal areas and the Drakensberg plateau regions to the north and east of the Cape. The period of European-Southern African contact was marked by political intrigue and war, as initially documented in the Dutch colonial commander Jan van Riebeeck's journal.² He documents how, as reiterated by Pienaar,³ the Dutch attempted to separate their new outpost from the local Khoi by planting a barrier of thorny bramble bushes and constructing watchtowers. This uncannily seems to forewarn of the system of physical ethnic separation which culminated in the apartheid regime and its negotiated demise. The constitutional era of the 1990s ushered in a social contract, the 1996 Constitution, aimed at breaking down the age-old practice of enforced ethnic separation and the inequitable allocation of land on the basis of race.⁴ The Constitution also drew a line in the sand against irredentist beliefs. While the property clause in Section 25 serves as an equitable mechanism to ensure progressive access to land through redistribution, restitution and tenure security, it protects extant land ownership at the same time through the non-arbitrary clause.⁵ Section 25 also governs expropriation and compensation.⁶ In so doing, the property clause attempts to redress past injustices, but does so on a basis of legal justification and is not informed by one group's wholesale "first claim" to the country's land. This is particularly clear from the restriction of restitution claims to 1913 and not beyond, since an extensive, complex, and contested political history exists before the first discriminatory land statute was passed in a unified South African polity in 1913.⁷ Giving effect to vague irredentist first claims would be anathema to the constitutional settlement of ushering in an entirely new and shared national destiny. The Constitution as a social contract aims to break with a past tainted by war, conquest and a culture of authority by ushering in a new set of norms – a culture of justification, as lawyer Etienne

2 Mellet, TP, 2020, pp. 110–120.

3 Pienaar, JM., 2014, *Land reform*, Cape Town: Juta & Co, pp. 52–53.

4 Race and ethnicity are used as interchangeable terms here.

5 Section 25(1) states: "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

6 Section 25(2): "Property may be expropriated only in terms of law of general application (a) for a public purpose or in the public interest; and (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court."

7 Natives Land Act 27 of 1913.

Mureinik famously noted⁸ – which guides access to public resources within a single South African nationhood.

1.2 LAND REFORM: A NEW PHASE

During the past six years, South Africa has been seized with a robust debate on expropriation without compensation (“EWC”). This matter is point of contest with roots in the argument that current land reform measures are slow and inefficient, leading to justice not being done and inequality being perpetuated.⁹ While EWC is undoubtedly an important and current topic, this article does not aim to discuss this hitherto unfinalized issue in much detail. What will be pointed out is that expropriation, even EWC, may be a useful tool to secure certain parcels of land for purposes of both land reform and environmental sustainability. At the time of writing, the Constitution’s property clause has not been amended, neither has the Expropriation Bill been passed, which attempts to regulate and detail the constitutional grounds for EWC. Apart from EWC, there has been a broad investigation into the progress and efficacy of the current land reform system. In two reports, one by a renowned University of the Western Cape-based research unit and the other by a special presidential advisory board, important diagnoses and suggestions were proposed to address the question of access to land and concurrent inequalities.¹⁰ These reports heralded a coming change in land reform policy. A big step in renewed land distribution, as promised by President Cyril Ramaphosa in his February 2020 State of the Nation address, came in October 2020 when the Minister of Agriculture, Land Reform and Rural Development Thoko Didiza announced the release of 700,000 hectares of “underutilized or vacant State land” in an effort to boost land reform.¹¹ Beneficiaries are offered a 30-year leasehold, with an option to buy. Another aspect of the report by the Special Presidential Advisory Board was the importance of environmental sustainability as a factor in the future land reform regime. So far, land reform policy has not taken cognizance of this, and there is a lack of case-law on the supposedly competing or possibly complementary fields of land reform law and environmental law. In this regard, the law is underdeveloped or at least unprepared. During the ruling African National Congress 2021 general meeting, known locally by its indigenous Tswana language term the *lekgotla*, President Ramaphosa emphasised that the party will focus in 2021 on the global issue of climate change and environmental protection. The President says this in the context of South Africa having to account at the 2021 UN Climate Change

8 Mureinik, E., 1994, A bridge to where? Introducing the Interim Bill of Rights, *South African Journal of Human Rights*, vol. 10, pp. 31–32.

9 Devereux, S., Solomon, C., 2018, Land expropriation without compensation in South Africa – a polarising debate, *Institute for Development Studies*, (<https://www.ids.ac.uk/opinions/land-expropriation-without-compensation-in-south-africa-a-polarising-debate/> 01.03.2021).

10 PLAAS, 2016, Diagnostic Report on Land Reform in South Africa; RSA, 2019, Final Report of the Presidential Advisory Board on Land Reform and Agriculture.

11 RSA, 2020, “Minister Thoko Didiza on allocation of state land” (<https://www.gov.za/speeches/minister-didiza-allocation-state-land-1-oct-2020-0000> 01.05.2021)

Conference of the Parties, to be held in November 2021 in Glasgow, Scotland. While climate change falls within the broad scope of environmental well-being, the South African focus tends to be on greenhouse gas emissions. As a heavy consumer of coal for purposes of energy,¹² this is a necessary prioritization. The Special Presidential Advisory Board, however,¹³ emphasises that the land reform and concurrent land-use system of the future must address the causes, triggers, and perpetuations of climate change, including deforestation and loss of biodiversity. It also argues for a system that works within a paradigm of environmental sustainability, particularly regarding agricultural development. On a policy level, the executive in the government is knowledgeable of the exigencies of environmental sustainability in land-use planning and land reform. This in turn lights up legal questions, such as the extent to which constitutional doctrine enjoins environmental rights to land reform as a mechanism of the constitutional property clause. Also, the question arises whether South African law can draw inspiration from how other nations introduced environmentally sound, or unsound, land-use and reform policies. This article firstly argues the doctrinal justification for a relationship between land reform as embodied in Section 25 and the environmental right in Section 24 of the Constitution. On the basis of this doctrinal justification, key South African land-use and land reform legislation is surveyed to determine if it gives effect to the constitutional nexus between the environmental and property clauses in the Constitution. Lastly, a comparative study is conducted to draw inspiration from and relate the South African legal position with the land-use and reform experience in other jurisdictions.

2. DOCTRINAL RELATIONSHIP

2.1 LAND, ENVIRONMENT AND TRANSFORMATIVE CONSTITUTIONALISM

In a seminal 1998 article, Karl Klare describes the South African Constitution as an example of “transformative constitutionalism”.¹⁴ Klare describes the transformative process facilitated by the Constitution as a large-scale overhaul and adaptation of the country’s social and political institutions in a fairer,

12 World Resources Institute Climate Analysis Indicator “Greenhouse Gas Emissions in South Africa” (2016) USAID 1–3 <https://www.climatelinks.org/sites/default/files/asset/document/GHG%20Emissions%20Fact%20Sheet%20South%20Africa%20-%202017-5-16%20USAIDSA-comm_rev08-26-16_Clean.pdf>

13 RSA Final Report of the Presidential Advisory Board on Land Reform and Agriculture (2019) 50–52.

14 Klare, K., 1998, Legal culture and transformative constitutionalism, *South African Journal of Human Rights*, vol. 14, pp. 146–150. The concept has since become a founding part of South Africa’s constitutional jurisprudence. See *Mkontwana v. Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (CC) para. 81; *Soobramoney v. Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (CC) para. 8. The High Court in *BP Southern Africa (Pty) Limited v. MEC for Agriculture, Conservation, Environment & Land Affairs* 2004 (5) SA 124 (W) found that the state must develop environmental rights along with socio-economic rights in order to fully address extant structural inequalities.

participatory, and more democratic direction. This transformation is at all times a set of non-violent political processes grounded in law.¹⁵ The transformative nature of the Constitution, according to Liebenberg,¹⁶ is illustrated by its origin during a time of political transition. Constitutions adopted during transitional periods are often exercises in transitional justice, entailing both a past- and future-focused orientation. The aim of a transitional constitution is to serve as a bridge between a particular past and an envisaged future.¹⁷ In the case of South Africa, the transition is also transformative: The Constitution as a whole, including the Bill of Rights in Chapter 2, sets certain legal requirements and standards with which the South African state must comply in order to bring about meaningful social, economic, and political change. South Africa must work actively to address the inequities and injustices of the past and must better the lives of the marginalized in society. Teitel¹⁸ argues that transitional justice is forward and backward acting, explaining that justice during transition periods does not only function as a correction of an unjust past but also entails a paradigm shift regarding the meaning of justice for the entire transitional society. Transitional constitutionalism is transformative specifically because the lived injustices of the past inform a new conception of justice, in constitutional form.¹⁹ Transitional constitutionalism does not simply dwell in the past so that a status quo “but for” the unjust events of the past can be restored. In the South African case, this is pertinently true. The Constitution aspires to bring about an entirely new form of society, and not to hark back to an uncertain and contested state of affairs in history.²⁰ Transitional justice as encapsulated in the South African Constitution is therefore not irredentist in outlook. What it does is to apply restorative justice as one element of transformation, such as land reform measures, while other constitutionalized human rights mechanisms envisage a society that looks radically different from any that has hitherto existed on South African territory.

The transformative nature of the Constitution presupposes that land reform is both a restorative project, as well as a program to make land as a resource available in a fair manner, in order to ensure an equitable and economically sustainable future for the people of South Africa.²¹ This explains why land reform is subdivided into three forms, namely land restitution (which echoes the restorative aspect of the transformative process), land redistribution and security of tenure. Together, these programs aim to restore dispossession as well as to found a fairer land allocation future in law. The same can be said of the environmental

15 Klare, K., 1998, p. 150.

16 Liebenberg, S., 2010, *Socio-economic rights: Adjudication under a transformative constitution*, Cape Town, Juta & Co., pp. 24–28.

17 Mureinik, E., 1994, A bridge to where? Introducing the Interim Bill of Rights, *South African Journal of Human Rights*, vol. 10, pp. 31–48.

18 Teitel, R., 1997, Transitional jurisprudence: The role of law in political transformation, *Yale Law Review*, vol. 106, pp. 2009–2014.

19 Teitel, R., 1997, p. 2015.

20 Teitel, R., 1997, p. 2059–2067.

21 Pienaar, JM., 2014, *Land reform*, Juta & Kie., pp. 182–184, 272–275. See also RSA, 1997, *White Paper on South African Land Policy*, pp. 4–9, 35–36.

human right in Section 24 of the Constitution:²² the future-oriented nature of this Section is specifically apparent in subsection 24(b), where the right to a protected environment is explicitly formulated “for the benefit of present and future generations”. This formulation is followed by the various benchmarks and measures to be promulgated to regulate environmental protection, and to promote sustainable development in tandem with socio-economic development. The text of the Constitution implores us to understand that the human rights contained therein operate by looking backward and working forward. For land reform to function properly within a transformative legal framework, it must work in synergy with the environmental human right (which itself is bound up with socio-economic development), to find both a restitutionary and an aspirational application in South African legislation, executive policymaking and case-law.²³

2.2 THREE PRINCIPLES

The constitutional possibility of a synergistic relationship between land reform and environmental law is underpinned by three principles of South African constitutional law. The first two principles are narrowly related, namely the non-hierarchical nature of constitutionalized human rights, and the interdependence or indivisibility of human rights. The final principle was established in South African constitutional jurisprudence as the “single system of law” principle. It was particularly expounded upon and systematically emphasised by the late Professor AJ van der Walt.²⁴ Together, these principles justify why it is constitutionally permissible, indeed necessary, to synergistically apply rights.

The first two principles mean that no basic human right is hierarchically superior to another, and that rights are interlinked and co-dependent. When rights are seemingly in opposition, courts weigh up the conflicting rights on the basis of the facts beforehand, and according to applicable mechanisms of limitation, but no right automatically trumps another. Also, rights should not be applied in a siloed fashion. In the South African Constitution, the Bill of Rights entails no hierarchy of rights, even though rights that are of a same heritage or political history are grouped together. Civil and political rights appear first and flow into socio-economic and other rights. This does not affect their justiciability or imply any hierarchy, as found by the Constitutional Court in the fundamental case of *Ex Parte Chairperson of the Constitutional Assembly*:

22 Section 24 reads: “Everyone has the right– (a) to an environment that is not harmful to their health or well-being; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that– (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”

23 Du Plessis, A., 2006, Land restitution through the lens of environmental law: Some comments on the South African vista, *Potchefstroom Electronic Law Journal*, vol. 9, pp. 10–11.

24 See for example in Van der Walt, AJ., 2012, *Property and the Constitution*, Pretoria: Pretoria University Law Press, and Van der Walt, AJ., 2011, *Constitutional property law*, Cape Town: Juta & Kie. Also see Van der Walt, AJ., 2008, Normative pluralism and anarchy: Reflections on the 2007 term, *Constitutional Court Review*, vol. 1, pp. 77–128.

*In re Certification of the Constitution of the Republic of South Africa, 1996.*²⁵ Case-law concerning environmental questions also noted the non-hierarchy between the environmental right and other rights, such as this finding by the court in *BP Southern Africa (Pty) Ltd v. MEC for Agriculture, Conservation, Environmental and Land Affairs*:²⁶

“[T]he constitutional right to environment is on par with the rights to freedom of trade, occupation, profession and property entrenched in ss 22 and 25 of the Constitution. In any dealings with the physical expressions of property, land, and freedom to trade, the environmental rights requirements should be part and parcel of the factors to be considered without any *a priori* grading of the rights. It will require a balancing of rights where competing interests and norms are concerned. This is in line with the injunction in s 24(b)(iii) that ecologically sustainable development and the use of natural resources are to be promoted jointly with justifiable economic and social development.”

The principle of interdependent or indivisible rights is closely tied to non-hierarchy. The principle originates as a fundamental rule of public international law. It can be found in Article 13 of the Teheran Proclamation of 1968:

“Since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social, and cultural rights, is impossible. The achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development.”

Based on a thorough survey of international legal texts, the difference between the terms “interdependence” and “indivisible” is merely semantic, warns Scott.²⁷ Furthermore, Scott argues²⁸ that there are two forms of interdependence between rights. The first is organic interdependence, whereby one right forms an integral part of another. Accordingly, such rights cannot be applied in practice without the other being applied as well. The second is indirect interdependence. This means that two interdependent rights maintain their separate identities and particular applications, but one inevitably supports the other during application. Importantly, the organic or indirect relationship between rights may vary, depending on the measure of application and the facts at hand.²⁹ Considering the nature of the interdependence between the environmental right and the rights effecting land reform is crucial, in order to determine the level of cooperative governance and planning. Organic interdependence presupposes that both

25 1996 (4) SA 744 (CC) paras. 77–78. This case was one of the final steps to usher in the new constitutional order as agreed in 1994. It was brought by the Constitutional Assembly (the body tasked with writing the new Constitution) so that the newly found Constitutional Court could test the text against priorly agreed constitutional principles.

26 *BP Southern Africa (Pty) Ltd v. MEC for Agriculture, Conservation, Environmental and Land Affairs* 2004 (5) SA 124 (W) paras. 143B-C.

27 Scott, C., 1989, Interdependence and permeability of human rights norms: Towards a partial fusion of the International Covenants on human rights, *Osgoode Hall Law Journal*, vol. 27, p. 779.

28 Scott, C., 1989, pp. 779–782.

29 Scott, C., 1989, pp. 786–790.

legal frameworks will apply during application and will have to be harmoniously worked into the particular execution. Indirect interdependence requires that at least the tenets of the other right are promoted or underscored during the application of a right. Conceptualizing the type of interdependence at hand is necessary to determine how application of rights should take place. In South Africa, case-law has established that the environmental right and socio-economic development, which itself is encapsulated in constitutional rights, should be applied in an integrated fashion, evincing a judicial pronouncement on interdependence of the underlying rights:

“The principle of integration of environmental protection and socio-economic development is therefore fundamental to the concept of sustainable development. Indeed, economic development, social development and the protection of the environment are now considered pillars of sustainable development.”³⁰

The third principle, namely the “single system of law” principle, was first enunciated in constitutional jurisprudence in the case of *Pharmaceutical Manufacturers Association of South Africa*:

“There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.”³¹

This principle holds that there are no parallel systems of law in South Africa that are based on a variety of legal sources. When navigating the law according to this principle, the common law, customary law and legislation as well as legal precedent are all part of the same system of South African law, with the Constitution and its jurisprudence as the highest and formative authority. The law of the country is unitary, and not “separate but equal” which is South Africa’s constitutional antithesis. The implication is that sources of law that have bearing on the same subject matter must be read and understood as harmoniously as possible, with the Constitution as a tiebreaker.³² As a consequence, one set of facts may not lead to two different conclusions should two different sources of law be applied. That would indicate parallel legal systems and could lead to “shopping” for sources: Parties would choose to apply the law source that best suits the outcome they have in mind. This fundamentally violates Section 9(1) – equality before the law, since different people could be adjudged with different standards. The doctrine of subsidiarity³³ flows from the single system of law and entails that legislation and pronouncements on legislation that are subsidiary to a constitutional prescript, must be applied before one may rely on the text of the Con-

30 *Fuel Retailers Association of Southern Africa v. Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (6) SA 4 (CC) para. 53.

31 *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para. 44.

32 Van der Sijde, E., 2015, *Reconsidering the relationship between property and regulation: A systemic constitutional approach*, LLD thesis, Stellenbosch University, pp. 181–182.

33 Van der Walt, A.J., 2012, *Property and Constitution*, Pretoria: Pretoria University Law Press, pp. 19–35.

stitution itself. This harmonizes the Constitution and laws passed to give effect to it. Legislation passed before the advent of the Constitution is read through the lens of the Constitution and is accordingly not jettisoned outrightly. Lastly, the test in *Thebus*³⁴ entails that courts must develop the common law if it is inconsistent with the Constitution, and even when it is consistent but falls short of the spirit, purport, and object of a constitutional provision.³⁵ In conclusion, the “single system of law” principle provides the foundation for working with potentially overlapping rights and the law that is subsidiary thereto. When investigating legislation on land reform and the environment for complementarity, the principle enjoins us to read overlaps harmoniously and identify deficiencies, while falling back on the constitutional text where the legislation provides no guidance.

3. SURVEY OF LEGISLATION

3.1 SELECTED LAWS AND HYPOTHESIS

The non-hierarchy of rights and their interdependence supplies the constitutional justification for suspecting and inspecting overlap between South Africa’s environmental and land reform laws. The single system of law principle supplies the guiding rule for the study of two sources of law covering the same subject matter, which is to read harmoniously and to start with law subsidiary to the constitutional text. While a study of policies and by-laws flowing from legislation is outside of this study, the approach to review only select legislation will show the overarching legal infrastructure that ought to underscore a future-focused, sustainable land reform system.

It is important to consider that land reform in South Africa has both rural-agricultural and urban potential. For this purpose, the differential impact of land reform legislation on urban and rural environments must be kept in mind, and it helps to consider the exemplary new land-use and planning legislation SPLUMA (Spatial Planning and Land Use Management Act 16 of 2013) for purposes of transitions between rural and urban environments. SPLUMA contains a balanced approach to environmental and land access principles, and may operate well when potentially redistributed, restituted land or land subject to tenure security measures are being prepared for use by future land reform beneficiaries. The National Environmental Management Act 107 of 1998 (“NEMA”) was enacted to give effect to the environmental human right in Section 24 of the Constitution. It introduced an environmental management system premised

34 *Thebus v. S* 2003 (6) SA 505 (CC).

35 *Thebus* at para. 28: “It seems to me that the need to develop the common law under section 39(2) could arise in at least two instances. The first would be when a rule of the common law is inconsistent with a constitutional provision. Repugnancy of this kind would compel an adaptation of the common law to resolve the inconsistency. The second possibility arises even when a rule of the common law is not inconsistent with a specific constitutional provision but may fall short of its spirit, purport and objects. Then, the common law must be adapted so that it grows in harmony with the “objective normative value system” found in the Constitution.”

on a range of environmental management principles³⁶ and the concept of integrated environmental management, providing for the holistic governance of the environment on the basis of an interdependent, human rights-based value system.³⁷ For land reform, the Upgrading of Land Tenure Rights Act 112 of 1991 (“ULTRA”), the Land Reform (Labour Tenants) Act 3 of 1996 (“LTA”), Extension of Security of Tenure Act 62 of 1997 (“ESTA”) and the Restitution of Land Rights Act 22 of 1994 (“RLRA”) are all key pieces of legislation. These laws address the three subprograms of tenure security, restitution, and redistribution.

3.2 ENVIRONMENTAL AND PLANNING LAWS

3.2.1 *Spatial Planning and Land-Use Management Act*

This Act is a new approach in planning legislation,³⁸ and environmental imperatives feature strongly in it.³⁹ SPLUMA is at the intersection of giving effect to land reform measures, environmental law as it pertains to land, and justifiable deprivations on private property in the form of town planning rules and land-use restrictions. It echoes the case of *Wary Holdings (Pty) Ltd v. Stalwo (Pty) Ltd*,⁴⁰ wherein the court stated that “[t]here is probably not a single functional area in the Constitution that can be carried out without land”.

Van Wyk, a leading author on South African planning law and land-use management, emphasises sustainable land-use in her definition of planning law, in tandem with the planned environment’s purpose of ensuring the health, safety and welfare of society as a whole.⁴¹ Along the lines of NEMA, SPLUMA is built on a range of first principles, forming a planning and land-use value system,⁴² as well as an emphasis on holistic, participatory land-use management and planning. Sections 12(1)(o) and 24(1) show SPLUMA’s commitment to such public participatory measures. This provides for the legality of interested parties from a community to interact with the local authorities when Spatial Development Frameworks (SDFs) and land use schemes are compiled, and in so doing creates room for the public to point out deficiencies with regard to environmental imperatives on the basis of SPLUMA itself. For example, SPLUMA connects with NEMA-ordained environmental management instruments (EMIs) by means of section 12(1)(m), which mandates that SDFs be compiled with cognizance of any EMIs that pertain to the subject matter of the SDF. Communities may then engage the compiling authorities regarding such identified environmental sensitivities on the basis of their right to participatory compilation. Should a draft

36 S.2 of the Act.

37 King, ND, Strydom, HA & Retief FP (eds.), 2018, *Fuggle & Rabie’s Environmental Management in South Africa*, Cape Town: Juta & Co., pp. 134–135.

38 King, ND, Strydom, HA & Retief FP, 2018, p. 1134.

39 See the wording of the Preamble, as well as sections 7, 12, 14, 19, 21, 24(2), 25(1) and 42(1).

40 2009 (1) SA 337 (CC) para. 128.

41 Van Wyk, J., 2012, *Planning Law*, Cape Town: Juta & Co., p. 5. See also King, ND, Strydom, HA & Retief FP, 2018, p. 1135.

42 S.7 of the Act.

SDF aim to establish residential developments in an environmentally sensitive area in a process of land distribution, or should the framework aim to rezone land that falls to be restituted, public participants may contribute by pointing out the applicable EMI.

While SPLUMA does not direct the initializing of the steps in the land reform program, it does regulate how land subject to reform may be developed and earmarked for land use change, in a framework that is sensitive to participatory environmentalism. Where the government aims to subject public land to land reform, the SPLUMA procedures to remove restrictions on such land will be at play.⁴³ Such a change in designation will be scrutinized through the lens of the Chapter 2 development principles, as well as the relevant SDFs, which must include cognizance of applicable environmental imperatives.⁴⁴

3.2.2 *National Environmental Management Act*

NEMA introduces an anthropocentric⁴⁵ and integrated environmental management system into South African law. The first principles in section 2 of Chapter 1 of NEMA rely heavily on the fact that environmental management is primarily done due to human needs and impact, which is more measurable, predictable, and controllable than natural forces and entities.⁴⁶ This also allows for environmental management that takes place sustainably and in tandem with socio-economic development. Like SPLUMA, section 2(4)(f) of NEMA also introduces public participation as a key first principle. The goal of this principle is “informed as well as legitimate decision-making”, a process that gives a platform to those with the least ostensible power to influence decisions regarding environmental management.⁴⁷ NEMA introduces the institution of environmental implementation and management plans, to be prepared by various state departments in an effort to underscore cooperative environmental governance. Schedules I and II of NEMA list the Department of Rural Development and Land Reform (“the Department”) as one of the departments who are enjoined to prepare these prescribed plans. On a survey of the Department’s Strategic Plan (2015–2020)⁴⁸ – the closest document to an environmental implementation and management plan – there are various singular references to sustainability, yet these are often in the context of socio-economic development. Environmental impact is not adequately integrated into this plan at all, meaning that the Department is apparently not complying with its duties under section 11(1) of NEMA. Even if the Strategic Plan (2015–2020) is accepted as a potential environmental implementation and management plan, the content materially falls

43 S.41(1) of the Act.

44 S.42 of the Act.

45 S.2 of the Act.

46 King, ND, Strydom, HA & Retief FP, 2018, pp. 138–139.

47 King, ND, Strydom, HA & Retief FP, 2018, pp. 142–143.

48 Department of Rural Development and Land Reform, 2015, *Strategic Five-Year Plan*, (<https://www.drldr.gov.za/sites/Internet/ResourceCenter/DRDLR%20Document%20Centre/drldr_strat_plan2015_2020_13march2015.pdf> 20.01.2021).

short of the environmental management principles in section 2 of NEMA. In general, it seems as if the Department uses environmentally descriptive language only as an embellishment.

Section 24(1) of NEMA requires that certain activities listed under the statute's environmental impact assessment (EIA) regulations must be reported to the designated EIA administrator. Section 24F also prohibits the commencement of a listed activity without prior environmental authorization. On a survey of the 2014 EIA Regulations promulgated in terms of NEMA,⁴⁹ there is no direct reference to land reform as an activity requiring EIA administration, but Appendix I lists various activities that may go hand in hand with land reform measures, such as residential or industrial development on afforested or agricultural land,⁵⁰ and the clearing of small parcels (less than 20 hectares) of indigenous vegetation.⁵¹ The list has other possible instances that may be present during land reform measures, but it remains curious why several activities are listed in detail and as instances of specific government or other programs, while land reform is left out. This is at odds with the NEMA statute's commitment to holistic human development principles,⁵² sustainable development⁵³ as a social, economic, and environmental nexus and with integrated environmental management as the integration of environmental management principles into all decisions that may significantly impact the environment.⁵⁴

3.3 LAND REFORM LAWS

3.3.1 *Land control reform legislation*

Land control reform aims to secure the rights of persons to the land on which they reside or have uncertain rights over. The apartheid land legacy was a fractured system of various forms of tenancy rights for people of colour, but no freehold title or other similar forms of land ownership. People in rural areas were particularly vulnerable owing to this state of affairs, leading to land control legislation such as the Upgrading of Land Tenure Rights Act 112 of 1991

49 RSA, 2014, *Government Gazette* 38282, Government Notices R982–985, also as RSA, 2018, EIA Regulations.

50 RSA, 2018, EIA Regulations, Appendix I, Item 28: “The clearance of an area of one hectare or more, but less than 20 hectares of indigenous vegetation, except where such clearance of indigenous vegetation is required for— (i) the undertaking of a linear activity; or (ii) maintenance purposes undertaken in accordance with a maintenance management plan.”

51 RSA, 2018, EIA Regulations, Appendix I, Item 27: “Residential, mixed, retail, commercial, industrial or institutional developments where such land was used for agriculture, game farming, equestrian purposes or afforestation on or after 01 April 1998 and where such development— (i) will occur inside an urban area, where the total land to be developed is bigger than five hectares; or (ii) will occur outside an urban area, where the total land to be developed is bigger than one hectare, excluding where such land has already been developed for residential, mixed, retail, commercial, industrial or institutional purposes.”

52 S.2(2) of the Act.

53 S.2(3)-(4) of the Act.

54 S.23(2)(a). See also King, ND, Strydom, HA & Retief FP, 2018, p. 157.

("ULTRA"). The ULTRA, passed by the De Klerk government in 1991, provided for the upgrading of land tenure rights into freehold title, or full common law ownership.⁵⁵ It was an important development for purposes of social and economic justice, but this pre-constitutional Act is devoid of any explicit references to environmental concerns or sustainable development. Section 12 does provide for the administration of land-use restrictions after the upgrading of rights in a formalized township. This section has possibly now been superseded by SPLUMA, whose integrated development plan (IDP) and SDF-based system will serve as the new point of departure for land-use administration. Be that as it may, even if s.12 of ULTRA is still applicable, this section must be read in terms of the spirit, purport and object of the Bill of Rights.⁵⁶ Given that s.12(3) provides for public consultation, the section may well be salvageable, but it can be argued that the public participation scope in SPLUMA is much wider than the measure provided for in s.12(3) of ULTRA. Should the section still be applied, it must serve to further the interdependent environmental right in light of the Bill of Rights, and an administrator will therefore have to consider subsidiary legislation in the form of NEMA, or management and implementation plans relating to NEMA, or environmental imperatives located in the local SDF.

ULTRA was followed by the Land Reform (Labour Tenants) Act 3 of 1996 ("LTA"). This Act specifically focused on the rural labor tenant, a class of persons who sold their labor in return for certain tenancy rights on land owned or leased by another, usually a white farmer.⁵⁷ The LTA helps to secure the tenure of such labor tenants by providing a right to occupy⁵⁸ along with eviction procedures⁵⁹ and minimum conditions of employment.⁶⁰ In section 16, a labor tenant is also given the right to acquire the land which they occupied. The Extension of Security of Tenure Act 62 of 1997 ("ESTA") has a broader scope than the LTA. It aims to strengthen rights of occupation for "occupiers", being defined in the statute as

55 The Act is being reconsidered after two pronouncements of the Constitutional Court found parts of it to be unconstitutional. In *Rahube v. Rahube* 2019 (2) SA 54 (CC), the Court found that section 2(1) of ULTRA indirectly yet unfairly discriminates against women, who could not be the holders of registered land tenure rights under apartheid land law. In *Herbert N.O. v. Senqu Municipality* 2019 (6) SA 231 (CC), the Court found that ULTRA denied equal protection to persons residing in former "Bantustan" areas, by excluding these areas from the scope of the Act's section 3. The Upgrading of Land Tenure Rights Amendment (ULTRA) Bill [B6-2020] is currently aiming to address these unconstitutionality.

56 Section 39 of the Constitution, 1996.

57 S.1 of the Act: "labour tenant" means a person— (a) who is residing or has the right to reside on a farm; (b) who has or has had the right to use cropping or grazing land on the farm, referred to in paragraph (a), or another farm of the owner, and in consideration of such right provides or has provided labour to the owner or lessee; and (c) whose parent or grandparent resided or resides on a farm and had the use of cropping or grazing land on such farm or another farm of the owner, and in consideration of such right provided or provides labour to the owner or lessee of such or such other farm, including a person who has been appointed a successor to a labour tenant in accordance with the provisions of section 3(4) and (5), but excluding a farmworker."

58 S.3 of the Act.

59 S.5-7 of the Act.

60 S.4 of the Act.

those residents on land who have express or tacit consent to reside, or some other legal right to occupy the land of another.⁶¹ The Act is aimed at rural occupiers, given the exclusion of its application to townships.⁶² The LTA and ESTA do not explicitly mention environmental concerns, neither is the environmental right invoked insofar as the applicable rights of occupiers under ESTA go.⁶³ The LTA governs the relationship between the labor tenant and the employer-landowner, with few apparent applications for environmental concerns. One possible linkage is the standard of justice and equity, which is to be met before a court may order the eviction of labor tenants.⁶⁴ This standard raises the question whether the voluntary declaration by a landowner of a protected area, in terms of s.28(2) (b) of the National Environmental Management: Protected Areas Act 57 of 2003 would be just and equitable grounds for eviction of a lawful ESTA- or LTA-occupier. The relevant Minister and Member of the Executive Committee must consult with such lawful occupiers before making a declaration. A harmonious reading of this provision militates against a “win or lose” solution; if ss.38–42 of NEMPAA is considered, it is clear that management plans and criteria envisage a situation where lawful occupiers of land can coexist with the rules governing a protected area. This makes it difficult to argue for eviction by reason of declaring a protected area as being just and equitable. The standard of justice and equity may similarly be unavailable where ESTA is at play.

Lastly, ESTA seemingly provides only one link to environmental protection, namely the duty on an occupier, in s.6(3)(b) of the Act, to refrain from causing material damage to the property wherein they possess rights of occupancy. It is unfortunate that the legislation does not contain similar duties for the landowner or lessee. The legislature probably thought this to be unnecessary, given that a landowner would not materially damage his own land. However, where this forms part of an act of intimidation directed at the occupier, an occupier may well raise the argument, under the catch-all prejudice clause in s.7,⁶⁵ that a landowner was damaging the environmental integrity of such occupier’s right of occupation.

3.3.3 *Land restitution: The RLRA 22 of 1994*

The Restitution of Land Rights Act 22 of 1994 is possibly the most “radical” of the land reform laws, since it entails the right of the dispossessed to launch a land claim in order to have their land returned. It gives effect to Section 25(7)

61 S.1 of the Act: “occupier” means a person residing on land which belongs to another person and who has or on 4 February 1997 or thereafter had consent or another right in law to do so, but excluding— (a) a labour tenant in terms of the Land Reform (Labour Tenants) Act, 1996 (Act No. 3 of 1996); and (b) a person using or intending to use the land in question mainly for industrial, mining, commercial or commercial farming purposes, but including a person who works the land himself or herself and does not employ any person who is not a member of his or her family; and (c) a person who has an income in excess of the prescribed amount.”

62 S.2 of ESTA.

63 S.5 of ESTA.

64 S.7(2) of the LTA.

65 S.7(2) of ESTA: “An owner or person in charge may not prejudice an occupier if one of the reasons for the prejudice is the past, present or anticipated exercise of any legal right.”

of the Constitution.⁶⁶ Compensation is payable by the state, in accordance with Section 25(2)(b) and (3) if the claim proceeds via expropriation.⁶⁷

The Land Claims Commission's broad investigative powers⁶⁸ are mostly geared to search the past for the cogency of a dispossession claim, and the Act itself seems entirely posed towards past-oriented reckoning, within the 1913 Native Land Act time limit as imposed by the Constitution.⁶⁹ It seems like concerns for future sustainability through environmentally conscious land restitution is not a concern at all in the Act. However, ss.33 and 34, detailing the factors and potential orders of the Land Claims Court ("LCC"), provide points of overlap and harmonisation with environmental imperatives. S.33 enjoins the LCC to consider six factors when adjudging a land claim. S.33(f) states:

"In considering its decision in any particular matter, excluding the review of a decision in terms of section 15, the Court shall ... have regard to [a – e] ... (f) any other factor which the Court may consider relevant and consistent with the spirit and objects of the Constitution and in particular the provisions of section 8 of the Constitution."

Section 8 referred to here is the equality clause from the 1993 Interim Constitution. The LCC must consider the objects of this right with the spirit and objects of the Constitution, particularly the interdependent rights on the facts at hand. The court must ask itself how environmental objects such as sustainability and combating climate change will be served by the claim. Should the court consider it necessary to attach guarantees for the sake of environmental integrity to the successful claim, it is empowered to do so in terms of s.35(2)(a):

"The Court may ... determine conditions which must be fulfilled before a right in land can be restored or granted to a claimant ..."

The LCC can therefore attach conditions regarding sustainable development to the claim. This may help to conserve animal and plant life where such sensitive parcels of land are claimed, or water and pasture. Additionally, it can direct how its order must be executed, according to s.35(2)(e):

"[G]ive any other directive as to how its orders are to be carried out, including the setting of time limits for the implementation of its orders ..."

This creates scope for extensive judicial oversight of claims, so that they are realized in the light of environmental imperatives. The court, lastly and signifi-

66 S.25(7): "A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress."

67 S.35(5) of the Act: "If the Court orders the State to expropriate land or a right in land in order to restore it to a claimant, the Minister shall expropriate such land or right in accordance, *mutatis mutandis*, with the provisions of the Expropriation Act, 1975 (Act No. 63 of 1975): Provided that the owner of such land or right shall be entitled to the payment of just and equitable compensation, determined either by agreement or by the Court according to the principles laid-down in section 28(3) of the Constitution: Provided further that the procedure to be followed by the Court in the determination of such compensation shall be as provided in sections 24 and 32 of this Act."

68 S.12 of the Act.

69 S.25(7) of the Constitution, 1996.

cantly, may direct that the beneficiary of a claim be given priority state resources to support land and housing development.⁷⁰ Although not stated, this must trigger any relevant SDFs and environmental implementation and management plans.

3.4 SUMMARY OF FINDINGS

This overview of environmental and land reform legislation is exhaustive of all potential points of overlap, or lack of such, between the two fields of law. The aim was to run a diagnostic of South African legislation on the basis of the constitutional principles discussed under 2.2 above. The land reform legislation enacted before the advent of the Constitution, and before the promulgation of large-scale holistically written statutes such as SPLUMA and NEMA, tends towards a siloed approach, where the value-based rights system does not feature yet, and the goal, rather, is to address a particular concern on its own. The rights-based constitutional system of the 1993 and 1996 Constitutions brought greater scope for integrated, interdependent approaches to statutes that provide different sources of law. Yet, by reading the pre-constitutional land reform statutes in light of the interdependency of rights as espoused by the Bill of Rights, a few linkages could be identified with which to vindicate land reform objects as well as environmental concerns. The RLRA, despite its seemingly narrow, past-oriented focus of restitution, showed a surprising capacity for linkage to environmental advancement. The statute empowers the LCC to make a broad range of orders. Typical of the rights-based system of justification in which it operates, the LCC must also consider a broad range of factors that highlight the interdependence between equality, restitutionary rights and other elements of the Bill of Rights, which includes environmental sustainability where impact on land is involved. Lastly, from the perspective of NEMA and SPLUMA, these new order statutes are clearly more suited to a constitutional system of interdependent and non-hierarchical human rights. SPLUMA exemplifies in its insistence on holistic evaluations of environmental, proprietary, and other socio-economic factors. NEMA, too, provides scope for public engagement and stakeholder-based decision-making on the basis of social, economic, and environmental sustainability. Its EIA mechanism is perhaps an overutilized and overemphasised way⁷¹ of ensuring the integration of sustainable environmental imperatives into any decision-making that impacts upon our natural surroundings.

4. A SURVEY OF OTHER JURISDICTIONS

It has been shown that South African land reform and environmental law are doctrinally intertwined, and that various land reform, spatial planning and environmental legal measures create a rough-and-tumble network of mutually

70 S.35(2)(d): "The Court may recommend to the Minister that a claimant be given priority access to State resources in the allocation and development of housing and land in the appropriate development programme ..."

71 King, ND, Strydom, HA & Retief FP, 2018, p. 157.

supporting rights and duties. While new order legislation tends to be open to an integrated approach between the subject matter of land reform and environmental law, land reform statutes tend to be past-orientated, aiming to undo the inequalities resulting from centuries of settler colonialism and ethno-political strife. Statutes passed prior to 1994 are particularly focused on providing “quick fix” solutions to the political thorns of the day, but are not future orientated. This lack of ambition lies in the siloed approach to land reform taken by these statutes, with little linkage to related human rights matters such as sustainable development, environmentally responsible spatial planning, or resource conservation. While holistic, purposeful statutory interpretation by the courts can incrementally help the process, it will be helpful to commit a brief comparative survey in order to identify future-orientated best practices in other jurisdictions, as well as to inspect potential pitfalls or extra-legal chaos that may ensue if land reform is not holistically planned and executed.

4.1 SCOTTISH LAND REFORM

Scotland devolved from the United Kingdom in the late 1990s, with the Scottish Parliament at Holyrood being re-established in 1999.⁷² Having been in political union with the powerful southern neighbour England since 1701, and a union of Crowns since 1601, the country has been ravaged by various rebellions as the successive London monarchs and their governments encroached on Scottish land. After the last Jacobite Rebellion in 1745, the last pretenders to the Crown were defeated and the British government under the Hanover dynasty of monarchs proceeded with expropriative action in the troublesome Scottish Highlands. Culminating in the Highland Clearances, a traumatic eviction of commoners and local disloyal Gaelic chieftaincies alike, the Scottish way of life was dramatically uprooted. The Scottish Gaelic language never fully recovered, and the Gaelic way of life suffered state-sponsored oppression. The colonial action ended with large parcels of Scottish land ending up in the hands of a small number of absentee landlords, with feudal tenure persisting for those lucky enough to still have a measure of access to land.⁷³ During the 1800s, the landed aristocracy of Crown loyalists engaged in great agricultural enterprise, but the landless did not find much solace in the successes of the landed, leading to a phase of agricultural radicalism as means of protesting high rent and general lack of access to land.⁷⁴

Unequal patterns of land ownership and tenure served as the bedrock for the land reform process in Scotland since the 2000 Abolition of Feudal Tenure (Scotland) Act.⁷⁵ The newly devolved Holyrood Parliament led the establishment of

72 Combe, MM., Glass, J., Tindley, A., 2020, *Land reform in Scotland: History, law and policy*, Edinburgh: Edinburgh University Press Ltd, pp. 4–5.

73 Macinnes, AI., Land, labour and capital: External influences and internal responses in Early Modern Scotland, pp. 24–33, in Combe, MM., Glass, J., Tindley, A., 2020.

74 Casey, B., The impact of agricultural radicalism on land reform in Scotland and Ireland, 1879–1903, pp. 56–73, in Combe, MM., Glass, J., Tindley, A., 2020.

75 Combe, MM., Glass, J., Tindley, A., 2020, pp. 4–5.

the 2001 Scottish Land Fund, which financed community land acquisitions. The first Land Reform (Scotland) Act of 2003 provided Scottish communities with a right of pre-emption, in order to ensure community purchasing power over land in their vicinity. Crucially, Combe et al.⁷⁶ explain the future-orientated nature of Scottish land reform. Land reform proceeded from a premise that social justice can be greatly enhanced by addressing unequal land ownership patterns by placing land rights in the hands of communities, effectively decentralizing the property market from the control of larger, extra-communal (and often non-Scottish) developers and land speculators. Community-led land reform places community revitalization in the hands of the beneficiaries themselves, as informed by the need to reduce poverty, increase employment, and enhance human dignity. A human rights-based approach underlies land reform in Scotland. Importantly, for purposes of this study, land reform drives sustainability in Scotland.⁷⁷ Preservation of the environment can be driven by communities instead of centralized conservation authorities. Scottish land reform envisages a future where the socio-economic and the environmental needs of Scottish communities are addressed directly by decentralized land reform action. The right of pre-emption plays a key role in this.

Section 97C(2) of the Land Reform (Scotland) Act of 2003 (“LRSA”) provides that a community may acquire land that is neglected, abandoned or whose current use and management is causing direct or indirect “harm to the environmental well-being of a relevant community”.⁷⁸ This striking legal mechanism combines land reform with environmental legal imperatives in a powerful fashion. In South Africa, NEMA does provide a measure of stakeholder engagement, but this is to provide the decision-maker with first-hand information and to legitimize the environmental decision-making process.⁷⁹ Authority is not decentralized to community level in the same manner, and planners may still make decisions that overrule the wishes of stakeholders. Another important feature in Scots land reform law is the LRSA’s approach to sustainable development, which has been defined by the 1998 Land Reform Policy Group as “development that is planned with appropriate regard for its longer-term consequences and is geared towards assisting social and economic advances, that can lead to further opportunities and a higher quality of life for rural people, whilst protecting the environment.”⁸⁰ The LRSA in section 51(3) holds that a Scottish Minister shall not consent to a community proposal to purchase land unless the community has satisfactorily indicated that what it proposes to do with such land furthers

76 Combe, MM., Glass, J., Tindley, A., 2020, pp. 6–7.

77 Land reform as a driver of agricultural sustainability has also been considered elsewhere: see Prosterman, RL., Hanstad, T., 2006, Land reform in the 21st century: New challenges, new responses, *Seattle Journal for Social Justice*, vol. 4, p. 772.

78 Lovett, JA., Towards sustainable community ownership, p. 196–197, in Combe, MM., Glass, J., Tindley, A., 2020.

79 Oosthuizen, M., Van der Linde, M., Basson, E., The National Environmental Management Act 107 of 1998 (NEMA), p. 142–143, in King, ND, Strydom, HA & Retief FP, 2018.

80 Ross, A., The evolution of sustainable development, p. 243, in Combe, MM., Glass, J., Tindley, A., 2020.

the achievement of sustainable development. This is significant, as South African land reform statutes, as surveyed above, do not qualify land reform action in such as proscriptive fashion. This may be due to the past-orientated nature of South African land reform statutes, while Ross⁸¹ pertinently states that Scots land reform law is:

“[Not] about righting past wrongs but rather [about] increasing the opportunities for local enterprise and addressing the concerns about the concentration of land ownership in Scotland among a few large estates, some of whom had non-resident or absentee owners.”

While the Scots approach has steered clear of explicit restorative justice in land reform and opted for a solely future-orientated approach to a better life, the South African constitutionalized land reform program envisages transitional justice, which incorporates an element of restoration. While a better, sustainable, and socio-economically just future is envisaged in the Bill of Rights, including Section 25 of the Constitution,⁸² South African land reform is also about righting past wrongs, and thereby committing to restorative justice. This is why land restitution features as a main subset of South African land reform, but Scots land reform law does not contain such a mechanism.

Overall, the Scottish emphasis on the community as the main actor in bringing about revitalization and sustainable outcomes through land reform is an integrated step further than the South African system, where designated authorities and central bureaucracy hold sway. It is advisable, in light of environmental management and planning principles that attempt to engage public participation, that the Scottish version of direct community empowerment is seriously considered.

4.2 PITFALLS IN WEST AFRICA

A 1999 study of West African land reform measures by Ouedraogo and Toulmin,⁸³ documented the perils of overcentralization of land tenure reform measures by the state, both for the environment and community sustainability. Along with overcentralization, it warned of hasty bypassing of age-old traditional forms of land tenure in rural communities in favor of conferring individual title of ownership or other tenure. The study relates how state-led individualization of title led to the conferral of political patronage in Nigeria's case, with the

81 Ross, A., p. 243, in Combe, MM., Glass, J., Tindley, A., 2020.

82 S.25(4)-(5): “(4) For the purposes of this section— (a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and (b) property is not limited to land.

(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.”

83 Ouedraogo, H., Toulmin, C., 1999, Tenure rights and sustainable development in West Africa: A regional overview, *DFID Workshop on Land Tenure, Poverty and Sustainable Development* (<<https://mokoro.co.uk/land-rights-article/tenure-rights-and-sustainable-development-in-west-africa-a-regional-overview/>> 06.01.2021).

politically loyal and well-heeled receiving land rights in such a way that the socio-economic and environmental sustainability of communities were curtailed, in favour of the few.⁸⁴

In Niger, the titling of individuals over the concerns of a heavily family-based land ownership system has led to woman and girls being side-lined in the titling process, and undermined concern for environmental sustainability in this arid Sahelian state, by excising the oversight role of families and communities. This interrupted a custom of democratized land-use management that existed sustainably for generations.⁸⁵

Burkina Faso has proved to be the exception, at least for a while, with grass-roots-level land-use management being ushered in via community-based land tenure in this resource-scarce and environmentally strained country, by means of a village-based resource management strategy (termed *gestion des terroirs*).⁸⁶ While the Burkinabe approach was lauded, the lack of at least a measure of individualized tenure responsibility has been blamed for the project running out of steam, and for a lack of succession by leader figures in the programme. By not respecting how communities themselves delegate tenure responsibilities and rights, a tragedy of the commons of sorts occurred, leading to a laudable program losing its momentum quickly.⁸⁷

4.3 THE BRAZILIAN EXPERIENCE

Land reform, if left unaddressed, may give birth to extra-legal protest-and-occupation-based reform, as illustrated by the Brazilian Landless Workers Movement (*Movimento dos Trabalhadores Rurais Sem Terra*, “MST”), as found by Rosset and Boyce.⁸⁸

By the 1980s, large swaths of Brazilian land belonged to absentee landlords, who often had little interest in cultivating their land and mainly made income via rent paid by a few rural farmers and sharecroppers. The MST mobilised thousands of landless families to illegally occupy land belonging to such landlords and held out until the landowner was expropriated on the basis of their non-use of the land, which in Brazilian law could be grounds for losing one’s title. Brazilian property law, argue Rosset et al.,⁸⁹ is based on land ownership title as a social function, meaning that non-use does not add to the premise of taking property at hand within a community of active owners. Property ownership in Brazilian law only carries enforceable meaning if it is used. Absenteeism, or ostensible abandonment was the successful target of MST occupations. Insofar as sustainability goes, absenteeism led to “islands” of unutilized, mostly virgin land

84 Ouedraogo, H., Toulmin, C., 1999, p. 7.

85 Ouedraogo, H., Toulmin, C., 1999, pp. 8–9.

86 Ouedraogo, H., Toulmin, C., 1999, p. 13.

87 Ouedraogo, H., Toulmin, C., 1999, pp. 14–15.

88 Rosset, P., Boyce, J., Stanton, E., 2005, Land reform and sustainable development, *Political Economy Research Institute*, vol. 98, p. 5.

89 Rosset, P., Boyce, J., Stanton, E., 2005, p. 5.

not being used at all, let alone sustainably. Given that the landless were confined to small enclaves surrounding such swathes of unused land, environmental degradation followed. For the MST, acquiring ostensibly abandoned property could save the greater ecosystem from degrading to the point where no sustainable use would be possible anymore.⁹⁰

South Africa has also seen a spate of illegal land occupations, which can only be dealt with legally via the Prevention of Illegal Evictions and Unlawful Occupation of Land Act 19 of 1998 (“PIE”). This Act provides strict statutory protection to illegal occupiers, in an effort to stem homelessness through summary evictions, that could lead to social instability in a nation with severe housing crises. While land reform and the eventual provision of housing in terms of Section 26 of the Constitution are closely related, Brazil’s case of supposedly beneficial, extra-legal land reform activism differs from the South African situation. Firstly, while South African occupations often take place under the direction of organized community leadership, landowners are very often still in use and possession of their land when the occupations take place. This leads to agricultural production being curtailed, job losses, and stalling of enterprise. This has a chilling effect on organized agriculture, and relevant to this essay, occupations tend to damage land and soil that could sustainably serve as agricultural and natural “green belt” areas, which is crucial for an environmentally sustainable rural community. It is important that land reform leads the way to sustainability in an organized manner, instead of being caught up in bureaucratic sloth, which adds to the landless losing patience and taking the law into their own hands, leading to a severe toll on the environment due to non-sustainable slum development and poverty-driven deforestation.

5. CONCLUSION

In this article, the aim was to show how land reform and environmental law can be considered together on the basis of constitutional doctrine, and how this imperative harmony is at the heart of a future-focused sustainable land reform system, located within a transitional constitutional dispensation. South African land reform, spatial planning and environmental laws show promising capacity for future-based, integrated co-application. However, land reform legislation can be clearer in this regard, in the same way that post-1994 statutes such as NEMA and SPLUMA depart from first principles that employ holistic, integrated responses to their subject matter, which never occurs in a silo. The “single system of law” doctrine means that constitutional supremacy will guide and reframe the application of older land reform statutes. There is still uncertainty, however, on how this doctrine can practically help us to achieve harmonious co-application and interpretation of statutes covering human rights with different subject matters. In Scotland, a robust community-led approach to land reform as a driver of environmentally sustainable development is exemplary of what can be read

90 Rosset, P., Boyce, J., Stanton, E., 2005, pp. 6, 10–13.

in or legislated locally. The West African experience, however, warns us against overcentralization of land reform and side-stepping community-led land tenure reform, particularly if such centralized reform loses touch with the particular environmental and sustainability needs of a given community. An over-zealous future-orientated idealism based on centralized tenure reform loses sight of co-dependent issues such as the environment, just as a narrow past-focused program may do. And finally, while activist-led land reform has proved to be successful and even justifiable by environmental and land reform standards in Brazil, the same cannot necessarily be said of South Africa, a wholly different society with different manifestations of such activism.

While harmonious co-application of land reform and environmental law requires more doctrinal study, the last word, for now, is that South African land reform and environmental law need to focus more on community-led initiatives to determine what is best for reckoning with a painful past, while keeping an intrepid, creative eye on the future.

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Sameera Mahomedy*

**INVESTIGATING THE ROLE OF PARTICIPATION
IN UPGRADING INFORMAL SETTLEMENTS IN SOUTH
AFRICA: THE CASE OF MELANI AND THE FURTHER
RESIDENTS OF SLOVO PARK INFORMAL SETTLEMENT
V. CITY OF JOHANNESBURG¹**

Abstract: *The advent of the Constitution of the Republic of South Africa in 1996 was a major milestone for South Africa in terms of redressing the atrocities of apartheid. While this resulted in major legal developments, remnants of apartheid are still present and can be seen in the continuation of vast socio-economic inequalities. One of the major remnants of apartheid is the large number of informal settlements that were established as a result of a combination of factors, which included various race-based planning legislation. The government has provided nearly 4 million houses since 1994. However, the growth of informal settlements far exceeds the rate of the provision of low-income housing. In an attempt to remedy this, the government has shifted its attention from conventional housing programmes to upgrading existing settlements, specifically focusing on the in situ upgrading of informal settlements. Community participation and deliberation on the process of upgrading are vital. Participatory planning has recently become increasingly significant given its potential to address issues relating to inter alia urban sprawl, sustainable development, and socio-economic and environmental concerns. As such, it holds value in addressing issues related to housing provision and achieving spatial justice. However, concerns relating to the implementation of participatory processes in upgrading informal settlements have been raised. In light of the above, this paper investigates the role that participation plays in upgrading informal settlements. This is undertaken by examining the participatory tools used in the upgrading of informal settlements in South Africa.*

Keywords: informal settlements, in situ upgrades, housing, human rights, participation.

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This article is based on various sections of my unpublished LLD dissertation entitled 'Investigating the role of participation in upgrading informal settlements in South Africa: Identifying challenges and opportunities'. My gratitude goes to Professor Boggenpoel for her guidance and helpful comments. Further thanks are due to the National Research Fund for their financial assistance.

1 *Melani and the Further Residents of Slovo Park Informal Settlement v. City of Johannesburg* 2016 (5) SA 67 (GJ).

1. INTRODUCTION

The advent of the Constitution of the Republic of South Africa of 1996 (“the Constitution”) was a major milestone for South Africa in terms of redressing the atrocities of apartheid.² While the enactment of the Constitution has resulted in major legal developments, remnants of apartheid are still present and noticeable in the continuation of vast socio-economic inequalities.³ Planning law played an instrumental role in orchestrating and perpetuating the system of apartheid⁴ and the unequal distribution of land in South Africa.⁵ While all racially-based land control measures have been declared unconstitutional⁶ and attempts have been made to remedy the unequal distribution of land,⁷ access to housing and spatial justice remains elusive to many South Africans.⁸ The development of effective mechanisms to realise the right of access to housing and to achieve spatial justice for all citizens should therefore be a high priority to remedy the past and to ensure greater socio-economic equality in post-apartheid South Africa.

One of the major remnants of apartheid is the large number of informal settlements that were established as a result of a combination of factors, which in-

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- 2 M Rapatsa, 2014, Transformative constitutionalism in South Africa: 20 years of democracy, *Mediterranean Journal of Social Sciences*, vol. 5, no. 27, pp. 887–895 at p. 888; J van Wyk, 2012, *Planning law* 2; S. Liebenberg, 2010, *Socio-economic rights: Adjudication under a transformative Constitution* 1–2; S. Liebenberg, 2000, Human development and human rights: South African country study, *Human Development Report*, p. 7.
 - 3 Statistics South Africa has estimated that roughly 49.2% of the adult population live below the upper-bound poverty line. The General Household Survey has found that housing projects are failing to reduce the percentage of households in informal dwellings and that 13.1% of all households still live in informal dwellings. See Statistics South Africa, 2019, *Statistical release P0318: General household survey ix*. See also JS Modiri, 2011, The grey line in-between the rainbow: (Re) thinking and (re) talking critical race theory in post-apartheid legal and social discourse, *Southern African Public Law*, vol. 26, no. 1, pp. 177–201 at p. 183.
 - 4 See M Strauss, 2017, *A right to the city for South Africa’s urban poor*, Stellenbosch University, pp. 19–59. See also M Huchzermeyer, 2009, The struggle for *in situ* upgrading of informal settlements: A reflection on cases in Gauteng, *Development Southern Africa* vol. 26, no. 1, pp. 59–73 at p. 60.
 - 5 A combination of measures, including racially-based planning legislation, contributed to the large number of informal settlements in South Africa. For a detailed discussion on these measures, see JM Pienaar, 2012, Unlawful occupier in perspective: History, legislation and case law in: H Mostert & MJ De Waal (eds.), *Essays in honour of CG van der Merwe*, pp. 309–330. See also J van Wyk, 2012, *Planning law*, p. 457.
 - 6 J van Wyk, 2012, *Planning law*, pp. 44–45; B Maharaj, 1997, Apartheid, urban segregation, and the local state: Durban and the Group Areas Act in South Africa, *Urban Geography*, vol. 18, no. 2, pp. 135–154 at p. 135.
 - 7 These attempts include inter alia the enactment of legislation, such as the Expropriation Act 63 of 1975, as well as attempts at land reform, the subprogrammes of which are redistribution, restitution and tenure reform. See JM Pienaar, 2014, *Land reform*, p. 272; White Paper on South Africa Land Policy, 1997, *Pretoria: Department of Land Affairs*, (<http://www.ruraldevelopment.gov.za/phocadownload/White-Papers/whitepaperlandreform.pdf>, 10–02–2021), 9.
 - 8 S Beukes, 2018, Promise of right to housing remains elusive in democratic South Africa, *News24* (<https://www.news24.com/Columnists/GuestColumn/promise-of-right-to-housing-remains-elusive-in-democratic-south-africa-20181127> accessed 08–02–2021).

cluded various race-based planning legislation.⁹ Informal settlements have been defined by Van Wyk and Huchzermeyer as unauthorised and unplanned settlements on land, which has not been surveyed, nor earmarked, for residential purposes.¹⁰ Informal settlements occupy contested spaces in South African cities and are associated with a variety of issues.¹¹ Firstly, they are illegal as they are formed on land usually without the owner's permission.¹² Secondly, the locations of informal settlements are problematic as they are often formed on dangerous sites, for example near mine dumps or on land that is unsuitable due to its topography.¹³ Thirdly, service provision¹⁴ is often lacking as a result of limited investment from both private and public sectors.¹⁵ There are also issues of poverty and vulnerability that are associated with informal settlements, specifically relating to poor health, unemployment and HIV/AIDS.¹⁶ Furthermore, informal settlements frequently display high levels of crime and social fragmentation that has been linked to problems such as rape, child abuse, substance abuse and domestic violence.¹⁷

The government has provided nearly 4 million houses since 1994.¹⁸ However, the growth of informal settlements far exceeds the rate of the provision of

- 9 JM Pienaar, 2014, *Land reform*, pp. 659–670. See also W Fieuw, 2015, “Deep rooted knowledge? Assessing the lack of community participation in UISP projects”, in: Good Governance Learning Network (ed.), *Pursuit of responsible and responsive local governance: Perspectives from civil society on local governance in South Africa*, pp. 59–73 at p. 59; J van Wyk, 2012, *Planning law*, pp. 458, 460; JM Pienaar, 2011, Unlawful occupier in perspective: History, legislation and case law, in: H Mostert & MJ De Waal (eds.), *Essays in honour of CG van der Merwe*, pp. 309–330; M Huchzermeyer, 2004, *Unlawful occupation: Informal settlements and urban policy in South Africa and Brazil*, p. 1.
- 10 J van Wyk, 2012, *Planning law*, pp. 458, 460. See also M Huchzermeyer, 2011, *Cities with ‘slums’: From informal settlement eradication to a right to the city in Africa*, pp. 5–9. Although the land in these situations could be earmarked for residential purposes, an informal settlement could still be developed on said land in spite of it being allocated for other purposes. This happens because those in need of land do not generally enquire or care about the purposes for which land is earmarked. Informal settlements arise out of situations of desperation and necessity.
- 11 M Huchzermeyer, 2009, The struggle for *in situ* upgrading of informal settlements: A reflection on cases in Gauteng, *Development Southern Africa* vol. 26, no. 1, pp. 59–73 at p. 59. See also M Strauss, 2017, *A right to the city for South Africa’s urban poor*, Stellenbosch University, pp. 87–89, 90–95; M Pieterse, 2014, Development, the right to the city and the legal and constitutional responsibilities of local government in South Africa, *South African Law Journal*, vol. 131, no. 1, pp. 149–177 at p. 153–156; T Coggin & M Pieterse, 2012, Rights and the city: An exploration of the interaction between socioeconomic rights and the city, *Urban Forum*, vol. 23, no. 3, pp. 259–262.
- 12 Department of Human Settlements, Definitions, *NUSP*, (<http://www.upgradingsupport.org/definitions> 08–02–2021). See also J van Wyk, 2012, *Planning law*, pp. 460, 506.
- 13 *Ibid.*
- 14 This can include water, sanitation and refuse removal. See Department of Human Settlements, Definitions, *NUSP*, (<http://www.upgradingsupport.org/definitions> 08–02–2021). See also J van Wyk, 2012, *Planning law*, p. 460.
- 15 Department of Human Settlements, Definitions, *NUSP*, (<http://www.upgradingsupport.org/definitions> 08–02–2021). See also J van Wyk, 2012, *Planning law*, p. 460.
- 16 *Ibid.*
- 17 *Ibid.*
- 18 A Osman, 2017, South Africa urgently needs to rethink its approach to housing, *The Conversation* (<http://theconversation.com/south-africa-urgently-needs-to-rethink-its-approach-to-housing-78628> 25–01–2021).

low-income housing.¹⁹ An estimated 3.3 million households still live in informal settlements, which includes temporary relocation areas.²⁰ Statistics South Africa has reported that 13.6% of households still live in informal dwellings.²¹ According to 2016 statistics, approximately 1 in 7 households live in informal settlements.²² However, these are all conservative figures as they do not necessarily take into account the constant movement of people within these areas as well as the rapid growth (estimated at approximately 2% to 6% per annum across municipalities) of informal settlements.²³

The development and expansion of informal settlements has been exacerbated by rapid population growth that resulted in its densification.²⁴ Although the government has attempted to rectify these issues, its efforts remain futile since the approach²⁵ to formal housing has been ineffective in remedying the

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- 19 Department of Human Settlements, Introduction, NUSP, (<http://www.upgradingsupport.org/08-02-2021>).
- 20 S Beukes, 2018, Promise of right to housing remains elusive in democratic South Africa, *News24*, (<https://www.news24.com/Columnists/GuestColumn/promise-of-right-to-housing-remains-elusive-in-democratic-south-africa-20181127> 28-01-2021). See also SERI, 2018, *Informal settlements and human rights in South Africa*, pp. 5-6; H Dawson & D McLaren (Commissioned by Studies in Poverty and Inequality Institute), 2014, *Monitoring the right of access to adequate housing in South Africa*, p. 33; M Napier, 2011, Government policies and programmes to enhance access to housing experiences from South Africa, *Bank of Namibia Annual Symposium in Windhoek*.
- 21 Statistics South Africa, 2019, *Statistical release P0318: General household survey*, p. 3.
- 22 Socio-Economic Rights Institute of South Africa, Institute for Poverty, Land and Agrarian Studies & Studies in Poverty and Inequality Institute, 2018, *Informal Settlements and Human Rights in South Africa: Submission to the United Nations Special Rapporteur on adequate housing as a component of the right to an adequate standard of living*, pp. 5-6.
- 23 Socio-Economic Rights Institute of South Africa, Institute for Poverty, Land and Agrarian Studies & Studies in Poverty and Inequality Institute, 2018, *Informal Settlements and Human Rights in South Africa: Submission to the United Nations Special Rapporteur on adequate housing as a component of the right to an adequate standard of living*, pp. 5-6.
- 24 W Fieuw, 2015, Deep rooted knowledge? Assessing the lack of community participation in UISP projects, in: Good Governance Learning Network (ed.), *Pursuit of responsible and responsive local governance: Perspectives from civil society on local governance in South Africa*, pp. 59-73 at p. 59. See also M Maseko, 2018, Upgrading of informal settlements programme; human settlements policies & processes working session, *Parliamentary Monetary Group* (<https://pmg.org.za/committee-meeting/27038/> 27-01-2021); J van Wyk, 2012, *Planning law*, 479.
- 25 Section 26 of the Constitution of the Republic of South Africa, 1996 provides that the government must progressively provide access to adequate housing. Since 1994, the government has attempted to achieve this through housing programmes, such as the Reconstruction and Development Programme ("RDP"), which was aimed at building houses for the homeless. However, this programme faced various implementation challenges including backlogs, budget cuts and misuse of the programme. Thus, government changed its approach and instead focused on human settlements (settlements that attract housing investment from the government and that have easy access to basic services and social amenities). See R Davies, 2019, Provision of adequate land and housing has been one of democratic SA's failures, *Daily Maverick* (<https://www.dailymaverick.co.za/article/2019-04-26-provision-of-adequate-land-and-housing-has-been-one-of-democratic-sas-failures/> 30-01-2021); A Osman, 2017, South Africa urgently needs to rethink its approach to housing, *The Conversation* (<http://theconversation.com/south-africa-urgently-needs-to-rethink-its-approach-to-housing-78628> 30-01-2021); Department of Housing, 2009, Failed Reconstruction and Development Programme (RDP) housing projects are under housing rectification programme, *South African Govern-*

housing backlog.²⁶ As a result, there has also been an increase in service delivery constraints, lack of secure tenure, and safety issues, all of which has led to an increase in the vulnerability of people living in informal settlements.²⁷

In an attempt to remedy these problems, the government has shifted its attention²⁸ from conventional housing programmes,²⁹ which focused on the incremental provision of subsidised housing, to upgrading existing settlements, specifically focussing on the in situ³⁰ upgrading of informal settlements.³¹ The Upgrading of Informal Settlements Programme (“UISP”) was introduced in 2004 with the aim of minimising disruption to residents’ lives by incrementally improving the quality of the lives of those living in informal settlements.³² Various methods are used for the

ment (<https://www.gov.za/failed-reconstruction-and-development-programme-rdp-housing-projects-are-under-housing-rectification-30-01-2021>).

- 26 Since 1994, the government has provided close to 4 million houses. However, 15–17% of the urban population are still without housing. See A Osman, 2017, South Africa urgently needs to rethink its approach to housing, *The Conversation* (<http://theconversation.com/south-africa-urgently-needs-to-rethink-its-approach-to-housing-78628> 25–01–2021); Department of Human Settlements, Introduction, NUSP, (<http://www.upgradingsupport.org/> 08–02–2021). See also M Maseko, 2018, Upgrading of informal settlements programme; human settlements policies & processes working session, *Parliamentary Monetary Group*, (<https://pmg.org.za/committee-meeting/27038/>> 27–01–2021); W Fieuw, 2015, Deep rooted knowledge? Assessing the lack of community participation in UISP projects, in: Good Governance Learning Network (ed.), *Pursuit of responsible and responsive local governance: Perspectives from civil society on local governance in South Africa*, pp. 59–73 at p. 60; J van Wyk, 2012, *Planning law*, pp. 548.
- 27 W Fieuw, 2015, Deep rooted knowledge? Assessing the lack of community participation in UISP projects, in: Good Governance Learning Network (ed.), *Pursuit of responsible and responsive local governance: Perspectives from civil society on local governance in South Africa*, pp. 59–73 at p. 60.
- 28 This shift in attention is also in response to international movements such as the United Nations’ Millennium Development Goals and Sustainable Development Goals as well as the right to housing under General Comment No. 7 of the United Nations Committee on Economic, Social and Cultural Rights. See UNGA (United Nations General Assembly), 2000, United Nations Millennium Declaration, UN doc A/RES/55/2, adopted by the United Nations General Assembly, 18 September 2000; UN Committee on Economic, Social and Cultural Rights (CESCR), 1997, General Comment No. 7 on The Right to Adequate Housing, (Art.11.1): Forced Evictions, E/1998/22.
- 29 For more information on the conventional housing approach, see T Manomano, P Tanyi, PT Tanga, 2016, Housing problems and housing programmes in South Africa: A literature review, *Journal of Sociology and Social Anthropology*, vol. 7, no. 2, pp. 111–117 at p. 111–112; S Charlton & C Kihato, 2006, Reaching the poor? An analysis of the influences on the evolution of South Africa’s housing programme, in: U Pillay, R Tomlinson & J Du Toit (eds.), *Democracy and delivery: Urban policy in South Africa*, pp. 252–282 at pp. 254–256; A Osman, 2017, South Africa urgently needs to rethink its approach to housing, *The Conversation* (<http://theconversation.com/south-africa-urgently-needs-to-rethink-its-approach-to-housing-78628> 30–01–2021).
- 30 Although the government’s focus is on in situ upgrading, some cases will inevitably necessitate relocation and thus, for a holistic discussion, it is important to also consider the implications of the use of participation in cases where relocation is necessary.
- 31 W Fieuw, 2015, Deep rooted knowledge? Assessing the lack of community participation in UISP projects, in: Good Governance Learning Network (ed.), *Pursuit of responsible and responsive local governance: Perspectives from civil society on local governance in South Africa*, pp. 59–73 at p. 59. See also J van Wyk, 2012, *Planning law*, p. 479.
- 32 This programme makes provision for in situ upgrades as well as upgrades where relocations are necessary as will be discussed below. M Huchzermeyer, 2009, The struggle for *in situ*

provision of housing, including: self-built houses; Enhanced People's Housing Process;³³ social housing; affordable rentals; and individual subsidies, or consolidation subsidies.³⁴ The aim of these methods is to upgrade informal settlements to ensure that they are better serviced and well-located.³⁵ The term "well-located" does not have a specific definition but it generally refers to a location that has "good public transport and/or pedestrian access to economic opportunities and social amenities (in particular, schools and health facilities)".³⁶ Relocation of households during upgrading should be minimised as far as possible.³⁷ However, in some cases, relocations are a necessity. This is often due to health and safety concerns. In these cases, the impact that the relocation may have on those involved should be considered carefully and measures must be taken to ensure that schools and other social services are accessible.³⁸ Furthermore, community participation and deliberation on the process of upgrading, as well as alternatives thereto, are vital.³⁹ Participation is therefore crucial in relation to upgrading informal settlements and it becomes necessary to place the involvement of the communities affected under the spotlight. It is this notion of participation in the context of upgrading informal settlements that will be the focus of this paper.

The first section of this paper will briefly delineate the legal tools applicable to upgrading informal settlements in South Africa with a specific focus on the role that these tools envisage for participation. The second section of this paper will then turn to a case discussion to investigate the role that participation plays in practice when upgrading projects are undertaken.

2. LEGAL FRAMEWORK FOR UPGRADES IN SOUTH AFRICA

2.1. UPGRADING OF INFORMAL SETTLEMENT PROGRAMME ("UISP")

As mentioned above, the UISP provides the processes and procedures for the upgrading of informal settlements. The UISP is embodied in Chapter 13 of the National Housing Code and is the result of the 2004 Breaking New Ground

upgrading of informal settlements: A reflection on cases in Gauteng, *Development Southern Africa* vol. 26, no. 1, pp. 59–73 at p. 59. See also J van Wyk, 2012, *Planning law*, p. 480; Department of Human Settlements, Resources, *NUSP*, (<http://www.upgradingsupport.org/resources/08-02-2021>).

33 This process allows beneficiaries of housing to be actively involved in the decision-making process relating to housing. See Department of Human Settlements, 2017, *Enhanced People's Housing Process, Western Cape Government* (<https://www.westerncape.gov.za/service/enhanced-peoples-housing-process-ephp/21-01-2021>).

34 Department of Human Settlements, Resources, *NUSP*, (<http://www.upgradingsupport.org/resources/08-02-2021>).

35 J van Wyk, 2012, *Planning law*, p. 479.

36 Department of Human Settlements, Definitions, *NUSP*, (<http://www.upgradingsupport.org/definitions/08-02-2021>).

37 *Ibid.*

38 *Ibid.*

39 *NUSP*, 2015, *Section 3 policies and programmes*, p. 19.

(“BNG”) policy.⁴⁰ One of the prominent elements that should feature throughout these processes and procedures is community participation.⁴¹ This is confirmed by the fact that one of the main policy objectives of the UISP is community empowerment.⁴² This includes combating socio-economic exclusion through participatory processes.⁴³ The aim of these participative processes is to gain insight into the communities’ broader needs so that they can be addressed.⁴⁴ Participation is particularly important in South Africa given the unequal distribution of land resulting from colonial and apartheid planning laws that were imposed in a top-down fashion on the black population of South Africa.⁴⁵ In this regard, those affected had no say on the matter of where they were forcibly relocated. As such, incorporating participation in relocations is extremely important to ensure that those affected are involved in the process and that what was previously a depersonalised process that ignored the circumstances of those being evicted, must now be replaced with humanised processes.⁴⁶ Thus the incorporation of participation can assist in mitigating the exclusionary patterns created by colonialism and apartheid, and in achieving more responsive solutions that speak to the needs and realities of those affected.⁴⁷

UISP projects are divided into four stages. The first three phases all place emphasis on community participation.⁴⁸ Throughout these stages, the UISP requires participation between local government and the communities involved in respect of various logistical details relating to the upgrade project such as determining the infrastructural needs of the community as well determining who is responsible for the provision and maintenance thereof.⁴⁹ Participation should also take place in relation to the options of tenure available⁵⁰ as well as the determination of locally appropriate stand sizes, which should not be uniform.⁵¹ Furthermore, there should

40 JM Pienaar, 2014, *Land reform*, pp. 678, 680; Department of Human Settlements, 2009, *National Housing Code, Volume 4 Upgrading Informal Settlement Part 3*, p. 9; LR Cirolia, T Gorgens, M van Donk, W Smit & S Drimie, 2016, *Upgrading informal settlements in South Africa: A partnership based approach*, p. 7; M Strauss, 2017, *A right to the city for South Africa’s urban poor*, Stellenbosch University, p. 208.

41 Department of Human Settlements, 2009, Part 3 upgrading informal settlements, *The National Housing Code*, pp. 15, 25.

42 *Ibid.*, p. 13.

43 *Ibid.*

44 *Ibid.*

45 JM Pienaar, 2014, *Land reform*, p. 660.

46 Section 10 of the Constitution of the Republic of South Africa, 1996; *Port Elizabeth Municipality v. Various Occupiers* 2005 1 SA 217 (CC) para. 12.

47 S Liebenberg, 2018, Participatory justice in social rights adjudication, *Human Rights Law Review*, vol. 18, no. 4, pp. 623–649 at pp. 624, 630, 632, 635, 645; K Young, 2012, *Constituting economic and social rights*, pp. 265–268; N Maphazi, K Raga, JD Taylor & T Mayekiso, 2013, Public participation: A South African local government perspective, *African Journal of Public Affairs*, vol. 6, no. 2, pp. 55–67 at pp. 56, 60; *Doctors for Life International v. Speaker of the National Assembly* 2006 (6) SA 416 (CC) para. 205; National Planning Commission, 2012, *National development plan: Our future make it work 2030*, p. 437.

48 Department of Human Settlements, 2009, Part 3 upgrading informal settlements, *The National Housing Code*, p. 26.

49 *Ibid.*, pp. 14, 37.

50 *Ibid.*, pp. 15, 38.

51 *Ibid.*, pp. 14, 37.

be participation with communities on the provision of social and economic amenities.⁵² Participatory processes should also be conducted when determining the design and layout of the settlement, once again based on the needs of the community.⁵³ Participation can also be seen in the need for a beneficiary satisfaction survey, which is used to measure the impact of the project on the community members' lives.⁵⁴ Strategies to manage the settlement once the upgrading projects come to an end should also be developed in collaboration with the community and should include the community's role to ensure continuity.⁵⁵ Additionally, the UISP states that, should relocation be necessary, the community should be actively involved in determining the logistics surrounding the relocation.⁵⁶

In the first stage of UISP projects, the application phase, a variety of levels of participation are used.⁵⁷ The government is encouraged to use a bottom-up approach as opposed to a top-down approach.⁵⁸ Participation is also sometimes the result of communities placing pressure on municipalities to undertake an upgrade project.⁵⁹

In terms of the second phase, the initiation phase, varying levels of participation are needed.⁶⁰ According to the National Upgrading Support Programme ("NUSP"), which was drafted to give guidance to the UISP, consultation will suffice in certain instances, but in others, there will be need for full control and co-operation.⁶¹ It is important to note that consultation is viewed as a weaker form of participation.⁶² Thus, the government must be wary of relying too much on this form of participation.

In terms of phase 3, being the implementation phase, a variety of levels of participation may be necessary to assist communities in participating.⁶³ Reporting back is considered an important step in this phase.⁶⁴

52 *Ibid.*, p. 29.

53 *Ibid.*, p. 32.

54 *Ibid.*

55 *Ibid.*, p. 56.

56 *Ibid.*, pp. 9, 14, 16, 37.

57 Department of Human Settlements, 2009, Part 3 upgrading informal settlements, *The National Housing Code*, pp. 43, 47; NUSP, 2015, *Introduction to informal settlement upgrading section 4: participatory approaches*, p. 15.

58 NUSP, 2015, *Introduction to informal settlement upgrading section 4: participatory approaches*, p. 16.

59 *Ibid.*

60 Department of Human Settlements, 2009, Part 3 upgrading informal settlements, *The National Housing Code*, pp. 43, 51–55; NUSP, 2015, *Introduction to informal settlement upgrading section 4: participatory approaches*, p. 16.

61 NUSP, 2015, *Introduction to informal settlement upgrading section 4: participatory approaches*, p. 16.

62 L Chenwi, 2011, 'Meaningful engagement' in the realisation of socio-economic rights: The South African experience, *Southern African Public Law*, vol. 26, no. 1, pp. 128–156 at p. 128; SR Arnstein, 1969, A ladder of citizen participation, *JAIP*, vol. 35, no. 4, pp. 216–224 at p. 217.

63 Department of Human Settlements, 2009, Part 3 upgrading informal settlements, *The National Housing Code*, pp. 43, 55–67; NUSP, 2015, *Introduction to informal settlement upgrading section 4: participatory approaches*, p. 16.

64 NUSP, 2015, *Introduction to informal settlement upgrading section 4: participatory approaches*, p. 16.

The level of participation in phase 4, the consolidation phase, depends on the basis for consolidation.⁶⁵ For example, if the People's Housing Process is undertaken, the level of participation would be full control – meaning the transfer of power from those with control (the government) to the disempowered (the housing beneficiaries). However, if subsidised housing is provided, then simply informing the housing beneficiaries would be more applicable.⁶⁶ It is questionable whether informing the housing beneficiaries would ever be sufficient in the context of upgrading projects, especially given the focus on a needs-orientated approach and on meaningful participation as opposed to superficial participation. However, this would depend on what was decided on in the early stages of the project.

2.2. BREAKING NEW GROUND

BNG is aimed at developing sustainable human settlements.⁶⁷ BNG mirrors the UISP by highlighting the need for an approach which maintains community networks that are generally already fragile, while minimising disruption and enhancing community participation throughout the upgrading process.⁶⁸ BNG makes provision for various phases of upgrading.⁶⁹ Phase one includes surveying the community, and determining the needs of the community, both housing and infrastructure-related, through participative processes.⁷⁰ Once again, emphasis is placed on the need to move away from viewing housing as a commodity to viewing housing as “responsive mechanisms” used to combat the multi-faceted issues that human settlements are currently facing.⁷¹ More specifically, BNG supports the UISP's vision of participatory upgrading by focusing on being responsive to the communities' needs, preferences and circumstances, and by providing various “support measures” to empower communities to actively engage with local government and accommodate a variety of needs and preferences in relation to tenure and economic standing.⁷² This once again speaks to the potential of participation to provide responsive solutions and gives effect to the needs-orientated approach. Furthermore, it recognises the need for more diverse options for housing, which includes inter alia a wider range of tenure options, housing

65 Department of Human Settlements, 2009, Part 3 upgrading informal settlements, *The National Housing Code*, pp. 43, 67; NUSP, 2015, *Introduction to informal settlement upgrading section 4: participatory approaches*, p. 16.

66 NUSP, 2015, *Introduction to informal settlement upgrading section 4: participatory approaches*, p. 16.

67 Department of Housing, 2004, *Breaking new ground: A comprehensive plan for the development of sustainable human settlements*, p. 3.

68 Department of Housing, 2004, *Breaking new ground: A comprehensive plan for the development of sustainable human settlements*, p. 25.

69 *Ibid.*

70 *Ibid.*

71 Department of Housing, 2004, *Breaking new ground: A comprehensive plan for the development of sustainable human settlements*, p. 12.

72 Department of Housing, 2004, *Breaking new ground: A comprehensive plan for the development of sustainable human settlements*, pp. 12, 32.

types, layouts, and locations.⁷³ This approach has been chosen in an attempt to allow for more flexibility and for communities to participate in and shape housing projects so that they have control over their living circumstance, as opposed to having it dictated to them as has been the case under apartheid and colonialism.⁷⁴ It also assists with providing those involved with a sense of ownership over the projects. This participatory approach also aims to integrate communities into the broader urban fabric, as opposed to shunning them to the peripheries as previously done in other housing programmes.⁷⁵ Strategies should also be developed in terms of BNG to ensure that information relevant to the upgrading project is communicated to the communities.⁷⁶ This information includes housing-related information and focus must be placed on community mobilisation.⁷⁷ This can assist with ensuring transparency and accountability.

2.3. NATIONAL UPGRADING SUPPORT PROGRAMME (“NUSP”)

NUSP reiterates that one of the basic principles of the UISP is participatory processes and giving communities a voice through the upgrading project.⁷⁸ It is interesting to note that neither of the two documents previously discussed provided a definition for participation. According to NUSP, the definition of participation is “some form of involvement of people with similar needs and goals, in decisions affecting their lives”.⁷⁹ Additionally, it recognises that participation is complex and that there are no blueprints for a standard, one-size-fits-all successful participatory approach.⁸⁰ This is especially true in South Africa given the diversity and the variety of needs and interests that need to be taken into account. Thus, participation needs to be locally relevant and should cater to the circumstances at hand.⁸¹ Once again, this is in line with participation having the potential to obtain responsive solutions.

Furthermore, NUSP highlights that participation can take various forms. For example, it can be an open-ended process or a series of events.⁸² There are also a variety of participatory techniques and approaches that can be used depending on the purpose and circumstances of each situation.⁸³ Participation

73 Department of Housing, 2004, *Breaking new ground: A comprehensive plan for the development of sustainable human settlements*, pp. 12, 27.

74 JM Pienaar, 2014, *Land reform*, 660; Department of Housing, 2004, *Breaking new ground: A comprehensive plan for the development of sustainable human settlements*, p. 12.

75 Department of Housing, 2004, *Breaking new ground: A comprehensive plan for the development of sustainable human settlements*, p. 12.

76 *Ibid.*, p. 39.

77 *Ibid.*

78 NUSP, 2015, *Introduction to informal settlement upgrading section 4: participatory approaches*, p. 1.

79 *Ibid.*

80 *Ibid.*

81 *Ibid.*

82 *Ibid.*

83 *Ibid.*

should be aimed at fostering common ground between local government and communities.⁸⁴ NUSP also states that participation is crucial to making upgrading processes successful and effective, which includes ensuring that all stakeholders benefit equally from the project.⁸⁵

NUSP also explains the importance of participation in upgrading projects, namely that the community members all have different expertise and insights into what they need, and this should be used to ensure that the decisions taken are in the best interest of the community members and that the project responds to their needs.⁸⁶ In order to achieve this, all the stakeholders need to develop respect for each other as well as for the knowledge that each party can contribute.⁸⁷ NUSP also highlights the importance of internal knowledge (community knowledge, skills and experiences) and external knowledge (municipal and specialist knowledge), which is often viewed as more technical and specialised.⁸⁸ This once again links to the potential of participatory processes to provide responsive solutions and also speaks to the need to move away from the trend of ignoring these groups' needs and opinions, as was seen under colonialism and apartheid.

The above discussion has highlighted the important role that participation should play in order to ensure that upgrade projects are a success in South Africa. The next section now turns to a case discussion in order to determine whether effect is given to the role that participation should play in practice.

3. MELANI AND THE FURTHER RESIDENTS OF SLOVO PARK INFORMAL SETTLEMENT V. CITY OF JOHANNESBURG⁸⁹

3.1. THE FACTS

In this case, the applicants, who were approximately 10,000 extremely poor residents living in Slovo Park, wanted the Court to review and set aside the respondent's failure to decide to upgrade Slovo Park, and to compel the City of Johannesburg to commence this process, under the UISP.⁹⁰ The City contended that Slovo Park was a risk to the residents given that it is situated on dolomitic ground.⁹¹ The applicants argued that the City should provide them with adequate housing using the UISP and one of the main issues was whether an in situ

84 *Ibid.*

85 *Ibid.*

86 *Ibid.*

87 *Ibid.*

88 *Ibid.*

89 *Melani and the Further Residents of Slovo Park Informal Settlement v. City of Johannesburg* 2016 (5) SA 67 (GJ).

90 *Melani and the Further Residents of Slovo Park Informal Settlement v. City of Johannesburg* 2016 (5) SA 67 (GJ) para. 1.

91 *Melani and the Further Residents of Slovo Park Informal Settlement v. City of Johannesburg* 2016 (5) SA 67 (GJ) para. 8.

upgrade was feasible.⁹² The applicants even created their own plans to assist with the provision of housing and secure tenure for the residents of the settlement.⁹³ These plans involved the land that they stayed on or land nearby being used to provide housing and secure tenure to the applicants.⁹⁴ The applicants presented these plans to the City and made numerous and vigorous efforts to engage with the City to implement said plans.⁹⁵ However, the City made no decision as to the application of the UISP.⁹⁶ Instead, the City decided to relocate the residents to Unaville, a site that was allegedly a suitable site for development.⁹⁷ This decision goes against the need to include residents' views and to promote their active participation in the process of relocations in upgrading projects. It is also in line with the concerning trend, which stems from colonialism and apartheid, of government ignoring the views of residents and imposing decisions on them in the context of upgrading of informal settlements.

The applicants contended that this decision to relocate them to another site goes against the UISP, which aims to promote in situ upgrades where possible, while relocation should be undertaken as a last resort.⁹⁸ They contend that the relocation is unlawful because: the UISP constitutes delegated legislation; it is the main instrument that should be used by government for people living in informal settlements; the UISP is flexible and regulates upgrades of informal settlements comprehensively; and compliance with the UISP's principles is not optional.⁹⁹ Thus, according to the residents, the City should have followed the UISP and failure, or refusal, to make a decision to follow the UISP is unlawful as the City is in breach of the UISP.¹⁰⁰ The City contended that the main issue is whether the applicants have shown that an in situ upgrade is feasible.¹⁰¹ Additionally, the City argued that the applicants are incorrect in their contention that only the UISP is applicable in terms of the City's duty to provide the residents with housing.¹⁰² The City further stated that it was complying with its duty by making use of Unaville for development.¹⁰³

92 *Melani and the Further Residents of Slovo Park Informal Settlement v. City of Johannesburg* 2016 (5) SA 67 (GJ) paras. 9, 28.

93 *Melani and the Further Residents of Slovo Park Informal Settlement v. City of Johannesburg* 2016 (5) SA 67 (GJ) para. 10.

94 *Ibid.*

95 *Ibid.*

96 *Melani and the Further Residents of Slovo Park Informal Settlement v. City of Johannesburg* 2016 (5) SA 67 (GJ) para. 11.

97 *Ibid.*

98 *Melani and the Further Residents of Slovo Park Informal Settlement v. City of Johannesburg* 2016 (5) SA 67 (GJ) para. 12.

99 *Melani and the Further Residents of Slovo Park Informal Settlement v. City of Johannesburg* 2016 (5) SA 67 (GJ) para. 13.

100 *Melani and the Further Residents of Slovo Park Informal Settlement v. City of Johannesburg* 2016 (5) SA 67 (GJ) para. 14.

101 *Melani and the Further Residents of Slovo Park Informal Settlement v. City of Johannesburg* 2016 (5) SA 67 (GJ) para. 15.

102 *Melani and the Further Residents of Slovo Park Informal Settlement v. City of Johannesburg* 2016 (5) SA 67 (GJ) para. 17.

103 *Melani and the Further Residents of Slovo Park Informal Settlement v. City of Johannesburg* 2016 (5) SA 67 (GJ) para. 18.

The City opposed the in situ upgrade on the basis that the land at Slovo Park is dolomitic.¹⁰⁴ However, the applicants stated that regardless of the sinkholes, the land could still be developed and that the UISP provides funding to address these types of issues.¹⁰⁵ In this regard, the City contended that the residents did not provide sufficient evidence to refute the City's concerns about the dolomitic nature of land at Slovo Park.¹⁰⁶ Various technical reports, commissioned by the MEC, were provided by experts such as Intatakhusa, Arcus Gibb and Hadebe Khumalo to purportedly indicate that the land is suitable for an in situ upgrade.¹⁰⁷ All the reports showed that Slovo Park had a low dolomite risk and that it was in fact feasible to develop the land regardless of the presence of dolomite in the land.¹⁰⁸ Additionally, the UISP makes provision and funding for upgrades on land needing rehabilitation, for example land that needed to be restored due to sinkholes.¹⁰⁹ The City conceded that an in situ upgrade was possible for at least 482 households.¹¹⁰ However, the City decided against upgrading under UISP.

3.2. THE COURT'S VIEW ON PARTICIPATION

Strauss AJ noted the importance of upgrading settlements in partnership with residents under the UISP, which is premised on community participation.¹¹¹ She also emphasised that the UISP is centred on holistic development aimed at minimising the disruption of “fragile community networks and support structures” and that relocation is the exception.¹¹² Should the need for relocation arise, the community should approve of the new location, which should be as close as possible to the existing settlement.¹¹³ The community should also approve of the relocation strategies.¹¹⁴

Additionally, Strauss AJ found¹¹⁵ that the City's failure to apply the UISP was unlawful and it breached the residents' rights to access to adequate housing.¹¹⁶ She

104 *Melani and the Further Residents of Slovo Park Informal Settlement v. City of Johannesburg* 2016 (5) SA 67 (GJ) para. 26.

105 *Ibid.*

106 *Melani and the Further Residents of Slovo Park Informal Settlement v. City of Johannesburg* 2016 (5) SA 67 (GJ) para. 27.

107 *Melani and the Further Residents of Slovo Park Informal Settlement v. City of Johannesburg* 2016 (5) SA 67 (GJ) para. 29.

108 *Ibid.*

109 *Melani and the Further Residents of Slovo Park Informal Settlement v. City of Johannesburg* 2016 (5) SA 67 (GJ) para. 30.

110 *Melani and the Further Residents of Slovo Park Informal Settlement v. City of Johannesburg* 2016 (5) SA 67 (GJ) para. 31.

111 *Melani and the Further Residents of Slovo Park Informal Settlement v. City of Johannesburg* 2016 (5) SA 67 (GJ) para. 34.

112 *Melani and the Further Residents of Slovo Park Informal Settlement v. City of Johannesburg* 2016 (5) SA 67 (GJ) para. 35.

113 *Ibid.*

114 *Ibid.*

115 See paras. 41–50 for details on the Court's findings.

116 *Melani and the Further Residents of Slovo Park Informal Settlement v. City of Johannesburg* 2016 (5) SA 67 (GJ) para. 42.

also criticised the City for making decisions relating to the relocation without properly consulting and engaging with the residents, especially given that the decision failed to consider the social disruption to the residents.¹¹⁷ This was aggravated by the fact that the applicants were promised for more than 20 years that they qualified for an in situ upgrade, which created a legitimate expectation.¹¹⁸ The Court thus reviewed and set aside the City's failure to apply the UISP and ordered it to begin the process, to apply the UISP and upgrade Slovo Park.¹¹⁹ The City was also ordered to report back in terms of the steps taken to comply with the order.

This case is concerning given that the government was unwilling to apply the UISP at all. Additionally, there was an issue with government imposing decisions on residents without properly taking into account what the community has to contribute, which is also problematic. In this case, this was an issue as the residents devised plans to assist with the provision of housing and secure tenure for the residents of the settlement.¹²⁰ However, these plans were completely ignored by the government. While the importance of proper community participation was highlighted in this case, there does not seem to be any sanctions imposed on the government for failing to adhere to the obligation to facilitate proper participatory processes in line with the legislative tools. Of particular concern is the fact that it took 20 years and a court order to even begin the process of the upgrading project.¹²¹ Had the government been willing to enter into proper and effective participatory processes, this timeline could have been drastically shortened. Additionally, the parties could have mutually decided that an in situ upgrade would be the most beneficial approach. This could have circumvented the need to approach the court for relief and would have saved time and money in this regard.

4. CONCLUSION

The above case discussion has confirmed the importance of community participation, which has been delineated in the various legal instruments discussed. However, it has also illustrated that there is an unwillingness on the government's part to facilitate proper participatory processes in line with the legal instruments discussed. Instead, it appears that the government views participation as ceremonial and uses weaker, top-down forms of participation, such as informing residents

117 *Melani and the Further Residents of Slovo Park Informal Settlement v. City of Johannesburg* 2016 (5) SA 67 (GJ) para. 46.

118 *Melani and the Further Residents of Slovo Park Informal Settlement v. City of Johannesburg* 2016 (5) SA 67 (GJ) paras. 47, 48. See Socio-Economic Rights Institute, "Slovo Park: Twenty years of broken promises" (2014), *Community Practice Notes: Informal Settlement Series 2-19* for details on this timeline.

119 *Melani and the Further Residents of Slovo Park Informal Settlement v. City of Johannesburg* 2016 (5) SA 67 (GJ) paras. 49, 50.

120 *Melani and the Further Residents of Slovo Park Informal Settlement v. City of Johannesburg* 2016 (5) SA 67 (GJ) para. 10.

121 See Socio-Economic Rights Institute, 2014, Slovo Park: Twenty years of broken promises, *Community Practice Notes: Informal Settlement Series*, pp. 2-19 for details on this timeline.

of decisions already taken. This mitigates the justifications posited for participation and also results in decisions being imposed on residents.

Additionally, the government seems hesitant to upgrade settlements in situ and instead ordinarily opts to relocate residents to other sites, which are often not suitable in terms of location and safety. Thus, it seems that not much has changed in practice from the initial approach to informal settlements, which was numbers-driven and focused on demolition and relocation, in the sense that the approach to upgrading informal settlements is still control-orientated and not needs-orientated. Solutions are thus not responsive to the residents' needs as envisaged by the UISP.

However, these issues have been challenged on numerous occasions by communities of informal settlements and civil society organisations, an example of which can be seen from the above case discussion.¹²² Thus, with the help of the court, communities can oblige the government to take the UISP seriously and to implement it accordingly. However, the issues that arise are: do communities have to approach the court every time a UISP project is undertaken to ensure that they can partake in participatory processes? What about those who do not have time or resources to go to court, or who are simply unaware of their rights?

It seems from the case discussed that, for the most part, successful implementation of the UISP, at least in terms of the participatory dynamic, requires court intervention.¹²³ Of particular concern is the fact that the government seems to be aware of their obligations in terms of facilitating participation throughout the upgrading process. The issue arguably lies in the government being unwilling to view participation as more than a box that needs to be ticked. What is even more concerning is that the *Melani* case highlighted that the government was not even willing to implement the UISP without court intervention. There is thus a need to investigate firstly, mechanisms that will oblige government to make use of the UISP and the other legal tools available and secondly, mechanisms to ensure that participatory processes are meaningful and not just ritualistic. Without this, the approach to informal settlements in South Africa will perpetuate the history of disregarding black people's human dignity and excluding them from decisions that affect them.

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122 Socio-Economic Rights Institute of South Africa, Institute for Poverty, Land and Agrarian Studies & Studies in Poverty and Inequality Institute, 2018, *Informal Settlements and Human Rights in South Africa: Submission to the United Nations Special Rapporteur on adequate housing as a component of the right to an adequate standard of living*, p. 24.

123 Socio-Economic Rights Institute of South Africa, Institute for Poverty, Land and Agrarian Studies & Studies in Poverty and Inequality Institute, 2018, *Informal Settlements and Human Rights in South Africa: Submission to the United Nations Special Rapporteur on adequate housing as a component of the right to an adequate standard of living*, p. 24.

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COMMUNAL RIGHT IN MONTENEGRO. A CONTRIBUTION TO OSTROM'S ANALYSIS OF GOVERNING THE COMMONS

Abstract: *In Montenegro, there is a specific form of community (joint) property that includes all the mountains, all the forests and almost all the pastures and meadows. It is owned by the community of individual tribes, clans, municipalities and villages. The people call this common property a commune. Therefore, Montenegro has tribal, clan, municipal and village communes. The area of these communes occupies a half of land in Montenegro, if not more. Also, many tribes, clans, villages and settlements have in their community fishing sites, mills and other assets. How did this common national property come to exist, how is it managed, how is it exploited, what are the rights enjoyed by certain households or individuals to this common property – all these questions have received little consideration until now, so this is the topic that the author of this paper deals with. This topic is all the more interesting because it illustrates the relevance of Ostrom's eight design principles for the common pool resources management institutions, a theme that is so important in the 21st century when the humanity tries to find just and sustainable ways of managing the natural resources.*

Keywords: communal rights, customary law, common property, natural resources, tribal and village communities.

1. INTRODUCTION

In her book “Governing the Commons. The Evolution of Institutions for Collective Action” first published in 1990¹ Elinor Ostrom has analysed several instances of management of natural resources held in common.² This analysis helped her to develop eight organizational principles to be followed as a precondition of a successful management of common pool resources. Briefly stated these principles read as follows: the boundaries of common resources, as well as users of these resources must be clearly determined; there has to be set of clear rules regulating just appropriation of portions of common resources, just division of costs in labour, money etc. to sustain the common resource, and these rules have

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1 Ostrom, E., 1990, *Governing the Commons. The Evolution of Institutions for Collective Action*, Cambridge University Press, p. 58.

2 *Ibid.*, pp. 58–103.

to be related to local conditions; those who are affected by these rules should be able to participate in the modification of these rules; there has to be monitoring by the users themselves or by persons accountable to users; there has to be set of sanctions for rule breakers containing graduated sanctions proportional to the gravity of a breach; efficient, low-cost and locally based dispute resolution mechanisms; recognition of these institutional arrangements for the management of common pool resources by the public authorities; and finally complex systems of common pool resource management need to be layered, they need to have more levels of organization with lower levels nested in higher ones.³ Ostrom continued her work along with her associates throughout the years testing her principles and it seems they have endured the test of time.⁴ Which is more it turns they are becoming more and more relevant in the 21st century⁵ which is hardly a surprise given that the just and sustainable management of natural resources has never been more important than in the present time.

Knowing this, the goal of this paper is to give an overview of the customary law on the use of communal natural resources in tribal and village communities of Montenegro up to twentieth century, as an additional and interesting illustration of the relevance of Ostrom's eight principles. This way the author wishes to make this interesting historical tale from his home country another piece in the supporting structure of an idea so important for the future.

2. COMMUNAL RIGHT IN MONTENEGRO

Communal right is a community right, and its essence is based on two fundamental rights: 1) the right to use communal land and 2) the right to a share in a division or sale of communes. These rights did not have to exist simultaneously. Most frequently, all of the villagers had an equal right to use communes (pastures and forests), but selling land or sharing money from a sold commune breaches traditional egalitarianism or community members, so some received equal shares, some unequal ones, and some were left out of the divisions.⁶ New settlers found it particularly hard to acquire the right to divide or sell rural communes.

2.1. COMMUNAL RIGHTS OF NEW SETTLERS

In order to acquire communal right, new settlers paid double the price for the smallest estate if the estate was located in a tribe which had plenty of commune pastures. Such purchases would make them a competition to tribes people, who had already had a share in the tribal commune. In order to prevent this,

3 *Ibid.*, pp. 88–102.

4 Ostrom, E., & al. 2012, *The Future of the Commons. Beyond Market Failure and Government Regulation*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2267381 August 1st 2021, p. 78.

5 *Ibid.*, p. 68.

6 Lj. Ćirić-Bogetić, *Communes in Montenegro in the 19th and the Beginning of the 20th Century*, Istorijski institut u Titogradu, Cetinje, 1966, p. 113.

a rule was established around 1883 that a person who does not belong to the tribe must not pay a price higher than the real price of the estate. This was also due to the fact that a tribesperson who moved away usually kept their commune right in case they return to the tribe.⁷ A newcomer acquires communal rights gradually. It is often the case that a tribesman takes a newcomer's cattle "to the mountain", and then the newcomer enters into "a contractual agreement" with one of their neighbours.

Newcomers and new settlers did not have a share on the Vasojević mountain pastures. They were usually, on the basis of a decision of the parliament, able to rise temporarily as a contracting party. The Lijeva Rijeka folk did not recognize communal rights in Komovi, Banovići and Golići, even though they had been living together with them for over a century.⁸ Highlanders sometimes allowed new settlers certain communal rights, so the owner of an estate at the foot of a mountain commune could take material from the commune to construct their mill or take firewood. Over time, the new settler would acquire full communal right.

2.2. COMMUNAL RIGHTS OF "TRIBAL NEWCOMERS"

In Montenegro, new settlers who later inhabited and came under the protection of a stronger clan, adopting its patron saint and all public obligations were referred to as "tribal newcomers". Despite the fact that "among tribespeople they never acquire the position that is enjoyed by a real tribesperson,"⁹ the need to defend a commune and constant legal insecurity required allowing them to enjoy community rights and thereby reinforce the tribe in numerical and military terms. Motivated by a more efficient defense, the Drobnjak family gave communal rights in their communes to "every Serbian brother, as long as they adopt the tribal patron saint St. George as their own."¹⁰ Other Montenegrin tribes followed Drobnjak's example. A custom law practice was established in the 10th century that "tribal newcomers from one clan or one village enjoy the same right to the clan or village commune, and that when the commune is divided, a tribal newcomer receives the same amount as if they were a real tribesperson."¹¹ Despite the generally accepted understanding that "whoever was received in the clan and village, they enjoy all the rights of the clan members."¹² The position of a newcomer was uncertain, so the Drobnjak family was able to pay off the newcomer's estate and exclude them from any collectivity.¹³

7 Bogišić's library, Cavtat, XIX, 6. *On Communes, Debt Settlement, etc.* in publ. *Legal Customs*.

8 R. V. Vešović, *Relations of Vasojević Tribe with Montenegrin History and Tribal Life of Neighbouring Highlands*, Sarajevo, 1935, pp. 70–72.

9 V. Bogišić, *Legal Customs in Montenegro, Herzegovina and Albania*, book 4., Belgrade-Podgorica, 1999, p. 97. The same reference (it is said in the response of N. Dučić that "tribal newcomers exist in almost all tribes (for example, "Mašo is Vrbica, tribal newcomer to Njeguši")."

10 S. Vukosavljević, *History of Village Society*, book I, Organization of Villagers' Land Property, Belgrade, 1953, p. 40.

11 Bogišić's library, Cavtat, XVI, 25.

12 *Ibid.*

13 S. Tomić, *Drobnjak*, Serbian Ethnographic Anthology, IV, Belgrade, 1902, p. 404.

Our examinees were not familiar with the existence of any “tribal newcomers” in Morača or Rovci. All except one of them said that they are not familiar with such cases and that they have not heard of any,¹⁴ and the one examinee responded that he cannot recall any such cases in this region in the 20th century, but that he had heard of their existence before that time. So, not frequently, but they existed and these cases mostly involved few newcomers who were poor.

2.3. COMMUNAL RIGHTS OF MATRILocal HUSBANDS

A new settler was able to become a member of a community, just like in other archaic property communities,¹⁵ if he marries into his wife’s home and acquires the title of a “matrilocal husband”.¹⁶ A direct effect of this matrilocal marriage is that the matrilocal husband represents an active workforce and strengthens the economic power of the clan, as well as its defensive force. A poll conducted by Bogišić speaks of a relatively bearable position of matrilocal husbands in terms of acquiring communal rights, because “if the commune has not been divided, once the division occurs, he is to receive a share like everyone else.”¹⁷ “In the village, a matrilocal husband enjoys the same share in the commune as his father in law.”¹⁸ The communal rights of matrilocal husbands is treated differently in legal customs of different tribes. Thereby, in Kuči, matrilocal husbands had an intact communal right,¹⁹ while their right to a share in Drobniak was quite stern, because to acquire that right, a matrilocal husband had to “take his wife’s last name and patron saint.”²⁰ Banjani also did not allow matrilocal husbands to acquire communal rights, and even if they did, it was a single case.²¹ At first, matrilocal husbands found it hard to acquire communal rights in Gornja Morača. Later on, this process was easier, and it is worth pointing out that in 1884 the High Court considered matrilocal husband as a community member during the division of communes in Gornja Morača.²²

14 Announcement of Vojislav Vojo Simonović from Podgorica.

15 In Punjab, a foreigner was able to become a member of a community if a landowner gives him a part of his estate and makes him his son in law. See: E. Lavelie, *Property and Its Original Forms*, VIII (issued by the Dimitrije Nikolić – Belja Fund), Belgrade, 1899, p. 269.

16 Montenegrins thought it to be dishonourable to settle in a wife’s house and become a matrilocal husband. This was due to the fact that, by moving into their wives’ families, matrilocal husbands accepted their wives’ patron saint and last name, giving up on their own. However, major poverty forced people to make such sacrifices (A. Ilić, *Household Community Legal System in Montenegro*, Belgrade, 1936, p. 106).

17 Bogišić’s library, XVI, 25.

18 *Ibid.*

19 S. Dučić, *Life and Customs of Kuč Tribe*, Serbian Ethnographic Anthology, vol. XLVIII, Belgrade, 1931., p. 132.

20 M. Barjaktarović, *On Land Boundaries in Serbs*, a SASA publication, Belgrade, 1952, p. 26.

21 It is known that Tujanjani from Banjani do not allow matrilocal husbands the right to take a share of the village commune, because none of them was allowed to sell their commune, even if they sold their entire house and entire household estate. They pointed out one exception of a matrilocal husband Janičić from Petroviči, who acquired all village, tribal and communal rights (S. Tomić, *Banjani*, Serbian Ethnographic Anthology, vol. LIX, Belgrade, 1949, p. 699).

22 State archives of Cetinje, Supreme Court, 1884, F. I (1–500), no. 310.

2.4. COMMUNAL RIGHTS OF WOMEN

Bearing in mind traditionally unfavourable legal position of women in Montenegrin custom law and patrilocal societies in general, one may find it impressive that this right was not denied to female family members in Montenegro. A shareholder's widow or daughter enjoy communal right up until they marry or die (daughter) or until they remarry or die (widow). In a clannish commune in Crmnica, the female members of the clan had communal rights.²³ In line with the ancient law, the Governing Senate in 1871 ordered Captain Lazo Petrović of Njeguši the following: "The wife of commune's late Đuro Vasov is free to enjoy (the rights) with the girl as if she was the son of Đuro Vasov, until she marries."²⁴ Communal right was acknowledged and sanctioned not only when it comes to the daughter of a deceased commune member, but the right was prescribed to his widow if she left the household community after her husband's death. This rule was followed when the Senate ordered the captain of Čev to bestow a woman named Ćetna Petrova, who separated from her sons with a piece of highland and waters alongside arable land.²⁵ If a widow who lives alone with children in the estate gives birth to illegitimate child, which was quite rare in patriarchal Montenegrin society, the custom law envisaged an impressively humane rule for such cases: An illegitimate child enjoys the same rights as other children.²⁶

2.5. THE SIZE AND THE CHARACTER OF COMMUNAL SHARE

The acquisition of communal rights assumed the possession of a private land property in a certain place. Additionally, it was required that a communal family exists, but the number of household members and the size of a private land tenure do not affect the size and scope of communal share. No tradition of any Montenegrin tribe or clan underlines the size of a private tenure which would, accordingly, define the size of a communal share. In Montenegro, communal shares were completely equal, unlike the shares of villagers in land communities in Croatia.²⁷ Communal shares in Montenegro never transformed into specifically determined shares within the commune, which confirms an old custom law rule: "A villager enjoys a share in a commune, but does not know where his share is located".²⁸ Community right is not a property right with intact freedom of disposal, but it is in principle an inalienable right, except in case of division. In Piva, a commune was inalienable.²⁹ In Drobnjak as well, commune members were not able to freely dispose of the share in collective land that they used. The scope of this right could not be increased or decreased by means of purchase,

23 J. Vukmanović, *Religious and Social Customs in Crmnica*, Historical Acts, Oct., Cetinje, 1953, p. 226.

24 State archives of Cetinje, *Orders of Governing Senate*, 1871. F. I, no. 531.

25 State archives of Cetinje, *Orders of Governing Senate*, 4/3, 1875, no. 96.

26 V. Bogišić, *Legal Customs in Montenegro*, op. cit., p. 74.

27 I. Krbek, *Land Community*, Zagreb, 1922, p. 26.

28 S. Stanojević, *National Encycloedia II*, Zagreb, 1925, p. 361.

29 S. Tomić, *Piva and Its Folks*, Serbian Ethnographic Anthology, vol. LIX, Belgrade, 1949, p. 52.

inheritance, dowry. In other regions of Montenegro too, every house could have a single share in the commune, and that share could not be bigger or smaller than that of other commune members. A man called Jovan Lukovac from Mi-oska bought an entire estate from female owners and demanded to receive the communal share that their household had previously used. However, complying with the rule of custom law that everyone can own just one communal share, the Senate denied his claim “because he holds a share in the same commune as any other member of the clan.”³⁰ In Kuč, “a shareholder cannot have more than one shack for all times.”³¹ If everyone in a household die, then its communal share is allocated to the share of other shareholders.

A household was entitled to the right to a communal share and it had the status of a shareholder in the collective land ownership. Although, the terms “the right to share” or “shareholder” are far from being a good choice of words. In Vasojevići, communal shares are usually called “iseta” and their holder “isetnik”. The term “participants” is also used.³² General Property Code does not have a special legal name for shareholders’ right, i.e. the right of a household on collective land. Some people believe that apart from the right to a commune, the term shareholders’ right has long been used by the people.³³ In a poll conducted by Bogišić, there is a phrase “shareholding in commune”.³⁴ The aforementioned 1937 Regulation calls communal rights holders “shareholders”, and the right itself “shareholding right”. The dissertation of Lj. Ćirić – Bogetić suggests the term commune members as more adequate. We believe the difference is more of a matter of terminology than content.

A household as a commune member could not dispose of its share. This was due to the fact that collective estates in general, until commodity-monetary relations became more present, mostly fell outside the scope of legal transactions. Unless in special cases, an individual was not allowed to sell their communal share to another person. The same rule applied to mountains and summer settlements (katuns).³⁵ In Vasojevići, in principle, “according to the tribal law, no one in Komovi could sell their right to use the ‘mountain’, unless when they decide to leave the tribe and the area for good, and sells their house and heirdom”.³⁶ Furthermore, the right of a commune member to obtain a part of the money from “selling the right to graze cattle on commune’s grass”, acorn, commune’s forest, is a result of a more recent age. At first, such sales were unknown. That is why a household could not independently dispose of their communal share (bequeath, pawn or give it away). Also, it could not

30 Bogišić’s library, Cavtat, XV/2, 1873.

31 S. Dučić, *Life and Customs of Kuč Tribe*, Serbian Ethnographic Anthology, vol. XLVIII, Belgrade, 1931, p. 132.

32 R. V. Vešović, n. d, pp. 70–72.

33 D. Vučković, *A Contribution to the Study of Tribal, Village and Clan Forests in Montenegro*, Forestry Journal, Zagreb, 1940, no. 8 and 9; pp. 8, 461.

34 Bogišić’s library, Cavtat, XXV, 10, vol. 1–4, 6/18. Oct. 1893.

35 J. Erdeljanović, *Kuč Tribe in Montenegro*, Ethnological Study, SKA, Serbian Ethnographic Anthology, Settlements of Serbian Lands, vol. IV, Belgrade, 1907, p. 230.

36 R. V. Vešović, *op. cit.*, p. 71.

break it into smaller parts, and keep one part while alienating another. When dividing a family cooperative, its communal share in the mountain was not divided and broken into parts, but rather, each newly formed household received an equal share in the joint commune. In Vasojevići, in a general commune in the mountain, every “smoke” (household) holds an equal “part” (share).³⁷ A household was not authorised to unilaterally break a community by abandoning it or separating its share. It could acquire the right only by dividing the commune which could only be permitted by the entire village. Earlier Montenegrin custom law in Kuči and beyond prescribed the following: “A commune can be divided only if the entire tribe jointly agrees and unanimously consents to do so.”³⁸ Shareholders’ right to a share in a commune has no ownership or co-ownership attributes. That right is not autonomous from other real rights. It is not consistent and does not have its own development path, but is subordinated to the common goals of the collective. This right only guaranteed to its holder the right to a share in the use of the commune (grazing cattle, construction of summer settlements, watering), as well as the right to a share during the division or sale of communes, if such a thing happens.

True, the commune enabled “even the poorest peasants to keep their own and other people’s cattle, to supply wood for the most important household needs, to maintain their existence.”³⁹ However, this egalitarianism was only of a principled nature, because the extent of exploitation of communes was conditioned by the property strength of each household. Thus, the right of each commune member to use the communal land was correlated with the fact whether he had enough cattle. There is a saying throughout Montenegro: “The owner of sheep, the owner of the mountain.” A greater number of cattle meant a more numerous household and a larger estate. The poorest villagers usually found it unprofitable to climb distant mountains with little cattle, so instead of mountain pastures, they used village grass “selina” to graze cattle. That is why the egalitarianism in the exploitation of communes is doubtful. Principled egalitarianism, however, did not manage to bridge the gap between wealthy and poor villagers. Available archive data and ethnographic research witness that even formally not all households enjoyed the same rights. Many historical documents assure us that many Montenegrin houses were deprived of communal rights. Acquisition and use of communal land is conditioned by certain subjective properties. Certain limits were set for the acquisition of communal rights. The main difference was between natives and newcomers, and between more numerous and smaller clans, i.e. between the “strong” and the “weak”, to the detriment of the latter. The fund of collective land is unequally divided into individual shareholders and some villages. The stronger villages and clans seized larger and better communes, and the weaker ones got less, if any at all. The acquisition and termination of communal rights is regulated by the old Montenegrin custom law. For centuries, this law favoured the autarchic economy of small collectives, and

37 *Ibid.*, p. 70.

38 J. Erdeljanović, 1907, p. 228.

39 Lj. Ćirić-Bogetić, *op. cit.*, p. 106.

with the help of the right of precedence of purchase in favour of relatives, neighbors and other tribespeople, it denied newcomers the acquisition of property, and thus the acquisition of communal rights in a tribal commune, which was in collision with itself in the 19th century. The genesis of Montenegrin custom law manifested itself in two equally strong aspirations. First, relying on tradition consistently insists that only tribespeople, who are, as natives, holders of other tribal rights, have communal rights. And secondly, the aspiration conditioned by the socio-economic development of the Montenegrin village to recognize this right to newcomers as well.

Those who were the first to occupy a certain land (pasture, forest, water), aspired and managed to form a narrow circle of privileged people, and to deny others the right to use that land. In accordance with their numerical superiority, they seized a larger scope of the right to exploit natural resources, and that right was guaranteed by the bodies of tribal self-government. The situation was similar in Serbia. After 1815, Serbia was affected by the process of mass settlement, which was sharply opposed by the natives, so even Prince Milos had to mediate.⁴⁰

The hard-core rule of the old communal right in Drobnjak categorically orders “that communes: a mountain, a highland or a forest may in no case be sold to a foreigner or another villager”,⁴¹ thus depriving a newcomer from the right to a communal share and directly jeopardizing his existence. The legal customs of other Montenegrin tribes in this area are no more humane, so in Kuči “there is an old custom that neither by means of lease nor by right of dowry can someone from another tribe acquire the right to a share in a summer settlement (katun)”⁴² The old Montenegrin custom law sanctioned the communal right of those houses, which had held this right “from old times” and which transferred it by collective inheritance from “one” to “another”. If this right of theirs was violated, then public opinion would enter the scene, which was ruthless towards the violator, since the Montenegrin villager was sincerely committed to respecting these ancient rights. However, population migrations and the momentum of commodity-money relations in Montenegro, aided by the frequent purchase of land, promoted a more liberal acquisition of communal rights. There was a collision between traditional custom law and the new rules regarding the equality of all villagers. Montenegrin custom law became more flexible, meeting the demands of modern times, and allowing newcomers to acquire communal rights to an extent.⁴³

40 R. Guzina, *Principality and Genesis of Serbian Bourgeois State*, Belgrade, 1955, p. 42.

41 S. Tomić, *Drobnjak...*, p. 403.

42 S. Dučić, cited work, p. 132.

43 On the occasion of the disputes between Pođani (Prekobrdani) and Božo Kupinjaš on August 8, 1873 over the share in the village forest, the state government, following the demands of modern times and in principle advocating the equalization of communal rights of natives and newcomers, ruled as follows: “we considered the dispute, we gave Kupinjaš 9 forest shares from the forest shares of Petar Mišnić, Risto Milivojević and Pero Cigranić, and we compensated them from the village commune”. (Bogišić’s library, Cavtat, *Protocol of the Morača Principality*, 1873, F. XV, pp. 5, 17).

As a rule, every Montenegrin household had the same authority over the communes, which retained their collective characteristics. A commune in Montenegro did not allow a shareholder to separate their share from the joint land, but maintained itself as a coherent property of the rural community, trying to preserve the spirit of egalitarianism of all shareholders. The principle of equality of all commune members was eroded by the difference in communal shares between the natives and the newcomers.

Inequality was especially fueled by yobbish tribal chiefs, abusing the tribal mountain. From a large number of such phenomena, as an illustration, we cite the example of the famous Jolo Piletić, who, among other things, traded in cattle. The villagers of Rečina near Kolašin did not complain about him to the Master for no reason, because “he pillaged all their summer settlements”.⁴⁴ We notice that community rights in Montenegro had a dual character; in form it was associated with clan, and essentially, it was unevenly divided between various rural collectives, so within one collective it was favourable for the creation of surplus livestock products for the market, increasing the number of livestock and enlarging land tenure. With this, social property slowly lost its egalitarianism, which opened the way for economic differentiation of farmers as soon as in the first half of the 19th century.

Custom law is not burdened with some special formalities related to the acquisition, change and termination of communal rights of certain households, except for the solemn reception into the clan and written confirmation of communal rights exclusively for newcomers, but not always, although it was related to certain legal facts, among which time represented an important legal fact. In principle, every house, as a subject of communal rights, could use that right or

44 The text of the complaint seems interesting to us, so we cite it in its entirety: “Your Grace, Merciful Lord.

We report humbly because concerning our mountain and because of the cattle graze of Jola Piletić, as you gave him 12 shares of meadow in Bjelasica and a permission to graze the cattle in the mountain. And he sold a meadow and two summer settlements (katuns) to the Morača tribesmen. And we, Your Lord, would not bother you with that, so it has been 3 years since he started grazing cattle on our mountain, which was given to us by Your Grace. And we have a way and a deadline for the graze, just like any tribe, and he did not respect our deadline or the way of the tribe for a single year, but gathered three or four rivals of 8 hundred men in total, then appeared in the summer settlements 15 days before us and devastated all of them, so we have nothing to graze the cattle on there. And especially this year. When he appeared in Rečine, we faced him and persuaded him to stop in Rečine with us and we gave him, oh Lord, our corrals and our huts, and we moved away from them so that he stops breaking the tribal rules and devastating our summer settlements. And he did not even blink, but he broke all the promises and went to the mountain. And we, good Lord, will not cause a dispute with you and your Senator, and we beg you Your Grace, praying to Saint Peter, to move Jolo Piletić or all of us, because he makes our life unbearable. And that is what Vučeta Perišić and Perko Đurović will confirm.

May God bestow good health on you.

Your humble servants, Captain Radovan Begov and Commander Milisav Mišnić, Battalion Chief Dragiša Perkov and your entire people from Rečine”. (DAC, 1870/71, F. I – undated acts; “Victory”, May 23, 1978).

not. Communal right could be revoked due to prolonged non-execution. Communal rights did not have the character of an absolute right, which originated from the right of ownership of an individual or a household in a commune, because the bearer of that right was the collective as a whole, so it is the right to exploit pastures, summer settlements, watering sites and sheepfolds in the commune, but the fundamental right of ownership still belonged to the tribe. The communal share could be taken away due to long-term non-use. In exceptional cases, custom law would support an emigrated tribesman, who did not use his communal right due to absence. The legal customs in Kuči guarantee the right to a “mountain”, not only to the returnee, but also to the distant descendant of every emigrated Kuči local, if they return to their homeland.⁴⁵ The legal customs of the Piper and other mountain tribes contain similar solutions. It happened that a tribesman who lived in a tribe, and did not use his communal right for a long time, risked, although less often, the revocation of his right. The following example illustrates this: a certain Jovan Markov from Piper moved to Morača around 1858, selling his entire estate, except for the communal share. After 15 years, the villagers in his former village of Zavale divided their commune and sold their shares among themselves without hindrance. The man came to claim his share, but his former neighbours denied him that right. The Senate confirmed that since Jovan moved from Piper before the division of the commune, he lost the right to a share in the division after his relocation.⁴⁶ It was almost implied that a communal right was lost when the household died out, or “when the house was extinguished,” as the people usually say. We emphasize the rule that in Montenegro, communal rights were difficult to acquire, and even more difficult to extinguish. It is not easy to determine the legal nature of communal right. The communal right of individual households, to the use of clan and tribal communes and how it manifested itself in the 19th century, especially in its first decades, cannot be equated with the right of servitude, because the right of individual Montenegrin households is significantly more comprehensive than the classic property right to someone else’s assets. Communal right not only gave its holder the right to exploit the clan or tribal commune, graze cattle, and collect material from it for their own needs, but in addition to these, there are other rights, which are closely related to other forms of social life in summer settlements (joint search for lost livestock, assistance when beasts slaughter livestock or in case of some other significant material damage, providing material for building a house, helping widows, the poor, those whose houses were burnt down, pursuing contracts and contractual relations, mutual help among households, etc.). Due to the immovability and impediment of commune members to own collective land in a certain proportion, communal rights cannot be equated with co-ownership of all houses in a fraternity or tribe, but a special right, community right apply in this collective land – utilization of collective land, considering that commune itself is a consequence of a special living milieu and political ambience of the then Montenegro.

45 S. Vukosavljević, *Organization of Dinari Tribes*, SAS, Belgrade, 1957, p. 3.

46 Bogišić’s library, Cavtat, VX, 1873, p. 12.

3. CONCLUSION

This overview of Montenegrin customary law on the usage of common natural resources has underscored the relevance of Ostrom's eight principles. The described arrangements in Montenegro had endured for centuries and in them one can recognize the said principles. There were clearly determined users and geographical boundaries of the communal resources. The importance of the support of public authorities is obvious especially when it comes to restraining individuals who thought they were above the rules. There were also rules on mutual assistance of the members of the community not just the rules on the appropriation. The failures to provide just distribution of common resources described above again confirm the importance of the eight principles because they occurred when the rules were not followed and were not enforced or when they were too abstract or not clear enough. This vignette from Montenegrin legal history thus underpins the work of Ostrom and of those who follow the path she paved. It also shows that history has a lot to teach us not just about the past, but about the future too.

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*Bojana Vasiljević Poljašević**

TAX AND LEGAL TREATMENT OF INTELLECTUAL PROPERTY FROM THE ASPECT OF REPUBLIC OF SRPSKA

Abstract: *In recent years, even decades, we have witnessed strong and comprehensive growth and development of the global economy, digital economy, creative economy and other, similar, modern models of economy. At the same time, we are witnessing a strong growth in the assets of numerous companies in the form of intangible assets such as patents, trade secrets, copyrights, trademarks, trade names, and computer software and other new forms of intellectual property. Hence, the tax authorities and governments around the world, now more than ever, are interested at seeking to tax their fair share of value generated from intellectual property and intellectual property rights, as well.*

Regarding this, the aim of this paper is to identify the tax and legal treatment of intellectual property in Republic of Srpska, and to propose certain solutions and measures that should be taken into account when creating a new, more stimulating tax and legal framework and Intellectual Property taxation in Republic of Srpska. Such a changed business environment and more favorable tax and legal treatment of Intellectual Property would certainly lead to stronger growth of the overall economy in Republic of Srpska, “increase” the newly created value, lead to an increase in the number of employees, higher salaries, higher amounts of collected public revenues, and finally to stronger attraction and volume of Foreign Direct Investment and Technology Transfers in Republic of Srpska.

Key words: Intellectual property, Intellectual property right, tax and legal treatment

1. INTRODUCTORY NOTES

The term “intellectual property generally refers to intangible rights protecting commercially valuable products of the human intellect. The category comprises primarily trademark, copyright, and patent rights, but also includes trade-secret rights, publicity rights, moral rights, and rights against unfair competition. It also refers to a commercially valuable product of the human intellect, in a concrete or abstract form, such as a copyrightable work, a protectable trademark, a patentable invention, or a trade secret”¹.

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1 See BLACK’S LAW DICTIONARY, 2009, 4th ed., p. 909.

According to the Oxford Dictionary of Law “*intellectual property is intangible property that includes patents, trade marks, copyright, and registered and unregistered design rights.*”²

Thus, it could be said that the term intellectual property (hereafter: IP) is used to more closely denote the special, specific, rights that authors, inventors and other holders of intellectual property have.

Historically, the term “intellectual property” was firstly mentioned in U.S. courts as early as the mid nineteenth century in the 1845 in case of *Davoll v. Brown*, when a District of Massachusetts Circuit Court defined intellectual property as “...we protect intellectual property, the labors of the mind, productions and interests as much a man’s own, and as much the fruit of his honest industry, as the wheat he cultivates, or the flocks he rears...”³

However, regardless of the fact that the term IP, ie the coin “intellectual property” is mentioned for the first time in the previously mentioned verdict a District of Massachusetts Circuit Court, the fact is that this term, in a slightly different way, was used a few hundred years earlier. For example, in 1421, the Republic of Florence passed a law giving Brunelleschi what is thought to be the first true patent of an invention,⁴ and in the United Kingdom, patent law dates from the Statue od Monopolies in 1623.⁵ In the United States, for example, between 1783 and 1786, twelve of the thirteen states passed varying versions of copyright statutes, and the eventual adoption of the Constitution in the fall of 1787 established federal authority to grant authors and inventors legal protection over their intellectual property.⁶ Also cases of Venetian glassmakers dating back

2 See Oxford Dictionary of Law, 2002., 5th ed., Oxford University Press, p. 257.

3 *Davoll v. Brown*, 7 F. Cas. 197, 199 (C.C.D. Mass. 1845) (“A liberal construction is to be given to a patent, and inventors sustained, if practicable, without a departure from sound principles. Only thus can ingenuity and perseverance be encouraged to exert themselves in this way usefully to the community; and only in this way can we protect intellectual property, the labors of the mind, productions and interests as much a man’s own, and as much the fruit of his honest industry, as the wheat he cultivates, or the flocks he rears.”) in Nguyen, X.-T., Maine, J. A, 2011, The History of Intellectual Property Taxation: Promoting innovation and other intellectual property goals?, *SMU Law Review*, Volume 64. Issue 3., p. 799.

4 That was patents for Novel Inventions. Fillipo Brunelleschi invented a novel kind of boat that he believed would allow merchants to bring goods into Florence for less money. In 1421, the Republic of Florence passed a law giving Brunelleschi what is thought to be the first true patent of an invention. A preamble to the law stated that Brunelleschi had refused to make his invention available to the public, but he would do so if he would receive protection from others who might copy his invention. The preamble continued, declaring it was desirable that his hidden invention “*be bought to light, to be of profit both to Fillipo and to our whole country.*” The law gave Brunelleschi the exclusive right to operate his new method of water transportation for three years. The result of granting this privilege, the preamble stated, would “animate Fillipo to even higher pursuits” and stimulate him to more “subtle investigations.”

More about history of intellectual property see: <https://www.crf-usa.org/bill-of-rights-in-action/bria-23-4-a-the-origins-of-patent-and-copyright-law>

5 English Statute of Monopolies of 1623 (https://www.ipmall.info/sites/default/files/hosted_resources/lipa/patents/English_Statute1623.pdf)

6 Pelanda, B. L., 2011, Declarations of Cultural Independence: The Nationalistic Imperative Behind the Passage of Early American Copyright Laws, 1783–1787, *Journal of the Copyright Society of the U.S.A.*, Vol. 58, p. 434.

to the mid-fifteenth century who could seek 10 years of legal protection from potential infringers are known.⁷

Given that today, in other words in the time of global, virtual, digital and other different forms of creative economy, IP is a major component of modern economy and having in mind the relatively almost overcome economic crisis of 2008–2009, as well as the last crisis caused by the pandemic The Covid 19 virus of 2020 (which is still ongoing) should come as no surprise the demand of all governments around the world to collect as much public revenue as possible. Correlated with the last mentioned requirement is the issue of taxation of IP, and IP an Intellectual Property right (hereafter: IPR) as well.

Furthermore, bearing in mind the fact that the growth of the world economy is significantly contributed by the strong development of the creative economy, based predominantly on the knowledge economy, i.e. on IP, and bearing in mind that optimizing the value and revenue-generating capability of intellectual property is crucial to majority of now-days business, the problem of taxation of intellectual property and intellectual property rights becomes even more evident. Study that was made jointly by the European Union Intellectual Property Office and European Patent Office showed that 45% of the total economic activity (GDP) in the EU is attributable to industries that make intensive use of the various types of intellectual property right.⁸ In United States IP intensive industries account for over 1/3– or 38.2%– of total U.S. GDP.⁹ Also, nowadays a significant number of companies – 80% or more of their market value is attributable to intangibles, “...including IP in some small companies, the only value is the intellectual property they own in an exciting new innovation that they have developed. IPR has truly become an “intellectual currency” helping to promote economic growth, company competitiveness and innovation world-wide”.¹⁰

On the other hand, the great mobility of people, capital, services and goods, aggressive tax planning and harmful tax practices as well, require tax practitioners to keep up with the latest developments if the set goals of the government are to be achieved, in terms of the volume of revenues collected on the basis of IP and / or IPR taxes.

7 May C. and Sell, S., 2006, *Intellectual property rights*, Lynne Rienner Publisher, Boulder.

8 European Union Intellectual Property Office, European Patent Office, 2021, Intellectual property rights and firm performance in the European Union, p. 10. As the IP rights study has observed only patents, trade marks and designs (or any combination of the three) while copyright, plant variety rights and geographical indications, were not included in this study. (https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/reports/IPContributionStudy/IPR_firm_performance_in_EU/2021_IP_Rights_and_firm_performance_in_the_EU_en.pdf)

9 IP-intensive industries employ over 45 million Americans, and hundreds of millions of people worldwide. The average worker in an IP-intensive industry earned about 46% more than his counterpart in a non-IP industry. America’s IP is worth \$6.6 trillion, more than the nominal GDP of any other country in the world. More about these figures see on: (<https://www.theglobalipcenter.com/resources/why-is-ip-important/>)

10 International Chamber of Commerce: *Intellectual-Property-Powerhouse-for-Innovation-and-Economic-Growth*, Paris, France, p. 2 available on: (<https://iccwbo.org/content/uploads/sites/3/2011/02/Intellectual-Property-Powerhouse-for-Innovation-and-Economic-Growth.pdf>)

2. DETERMINATION OF INTELLECTUAL PROPERTY IN THE REPUBLIC OF SRPSKA

So, how can we define intellectual property in Republic of Srpska? What is Intellectual Property?

If IP were observed and analyzed exclusively in the spirit of legal science, then IP “*could be said to be the same res in commercio, ie. a thing that can be the subject of legal affairs, and thus objects of private property. Furthermore, it is really incorporeales- i.e. an incorporeal thing, that is, a thing that cannot be touched, that is, it is an intangible asset. Finally, IP is res mobiles – that is, it is a moving thing that can change its position in space without destroying its essence or changing its previous structure*”.¹¹

If IP and IPR would be viewed from the angle of accounting coverage and recording, i.e. in accordance with the International Accounting Standards (hereafter: IAS), it is evident that IP and IPR are neither inventories, nor real estate, facilities, nor equipment, but in accordance with these standards, can be included and recorded only in accordance with IAS 38 – intangible asset which applies to expenditures for advertising, training, business start-up, research and development activities, as well as rights under license agreements for items such as which are feature films, videos, plays, manuscripts, patents and copyrights.¹²

3. TAXATION OF IP UNDER DOMESTIC LAW(S)

IP Laws and Regulations in Republic of Srpska, and BiH as well, are primarily Constitution of BiH, FBiH, Republic of Srpska respectively and Statute of Brcko District of BiH.¹³

Also, although the mentioned constitutions IP and IPR within BiH are regulated in a general way, Copyright and Related rights are clearly defined by Law on Copyright and Related Rights,¹⁴ Law on the Collective Management of Copyright and Related Rights,¹⁵ while the industrial property right is more closely regulated by Law on Patents,¹⁶ Law on Trademarks,¹⁷ Law on Industrial Designs,¹⁸ Law on

11 Vasiljević Poljašević, B., 2019, Tax and legal Treatment of Cryptocurrencies from the Aspect of the Republic of Srpska or Bosnia and Herzegovina, *Proceedings of papers*, Faculty of Law, Novi Sad, Vol. 4, pp. 1258–1260.

12 IAS No. 38 (https://www.vladars.net/sr-SP-Cyrl/Vlada/Ministarstva/mf/Documents/%D0%9C%D0%A0%D0%A1%2038%20%D0%9D%D0%B5%D0%BC%D0%B0%D1%82%D0%B5%D1%80%D0%B8%D1%98%D0%B0%D0%BB%D0%BD%D0%B0%20%D0%B8%D0%BC%D0%BE%D0%B2%D0%B8%D0%BD%D0%B0_434323778.pdf)

13 BD of BiH does not have a constitution, but the Statute of BD as the highest legal act in BD BiH.

14 Law on Copyright and Related Rights, *Official Gazette of BiH*, No. 63/10.

15 Law on the Collective Management of Copyright and Related Rights, *Official Gazette of BiH*, No. 63/10.

16 Law on Patents, *Official Gazette of BiH*, No. 53/10.

17 Law on Trademarks, *Official Gazette of BiH*, No. 53/10.

18 Law on Industrial Designs, *Official Gazette of BiH*, No. 53/10.

the Protection of Indications of Geographical Origin,¹⁹ Law on the Protection of Topographies of Integrated Circuits²⁰ and Law on the protection of new varieties of plants in Bosnia and Herzegovina²¹ and many bylaws as well.²²

It is important to know that Tax laws into Republic of Srpska and BiH, as well, does not provide definitions of specific types of IP, so their determination is drawn from the above laws.

3.1. MEANING AND QUALIFICATION OF INCOME DERIVING FROM UTILIZATION OF INTELLECTUAL PROPERTY IN REPUBLIC OF SRPSKA

After the IP is defined and determined as an intangible asset, it is necessary to ask the question of taxation of this property, ie taxation of IP and IPR in the Republic of Srpska. It should be noted that, even while property taxation in Republic of Srpska was regulated by the Law on Property Taxes,²³ real estates were considered taxable property only. That is, in Republic of Srpska, taxable rights to real estate were considered the exclusive right of ownership, right of usufruct, right of use and right of residence, right of lease of apartment and right of lease of business premises and other real estate, and right of use of city construction land.

Today, the law that taxes property (but just Real Estate) in the Republika Srpska is The Law on Real Estate Tax.²⁴ Similarly, as with the previous law, in

19 Law on the Protection of Indications of Geographical Origin, *Official Gazette of BiH*, No. 53/10.

20 Law on the Protection of Topographies of Integrated Circuits, *Official Gazette of BiH*, No. 53/10.

21 Law on the protection of new varieties of plants in Bosnia and Herzegovina, *Official Gazette of BiH*, 14/10 and 32/13.

22 The BiH Council of Ministers adopted a Decision on Strategy for the Implementation of Intellectual Property 2018. – 2022. This Strategy is the basis for defining and establishing a comprehensive and efficient system for the enforcement of intellectual property rights in accordance with the requirements of accession to the World Trade Organization (WTO) and the European Union (EU).

By the EK report announced in october 2021 BiH “... with regard to copyright and neighbouring rights, the legislative framework is largely aligned with the EU *acquis*. Further alignment is needed, in particular in the area of orphan works and collective rights management. Copyright works and related rights were deposited and registered in the IIP. Six organisations in the country are authorised for the collective management of copyright and related rights, states the EC report.

In the area of industrial property rights, the legislative framework is partially aligned with the EU *acquis*. Further alignment is needed, in particular for patents, trademarks and trade secrets. Bosnia and Herzegovina has acceded to the relevant multilateral conventions, as required by the SAA, except for the European Patent Convention, for which it still has to adopt relevant amendments to the Law on Patents”. European Commision report available on: (<https://www.ipr.gov.ba/en/novost/10301/ec-report-bih-moderately-prepared-in-the-field-of-intellectual-property-rights>)

23 The Law on Property Tax, *Official Gazette of Republic of Srpska*, No. 51/01 and 53/07.

24 The Law on Real Estate Tax, *Official gazette of Republic of Srpska*, No. 91/15.

accordance with the provisions of this (today's) Law as the subject of taxation are determined the real estates in the Republic of Srpska which are not exempted from taxation in accordance with this Law, buildings and land that make up a whole, and are not owned by the same person, and may be taxed separately, and finally, residential and business units that are part of buildings (that shall be taxed separately).²⁵

From the above, it could be concluded that the taxation of intellectual property, i.e. its possession or ownership over it in Republic of Srpska is not taxed. But also, it would be completely wrong to conclude.²⁶ But also, it would be completely wrong to conclude that IP, especially IP right is non-taxable in Republic of Srpska.

In Republic of Srpska, income from IP is taxable, and which law will be applied depends on which person (legal entity or natural person) earns income on that basis. In other words, income will be taxed in accordance with the provisions of The Law on Income Tax²⁷ (hereafter: RS PIT Law) if the income is generated by natural persons, or in accordance with the provisions of The Law on Corporate Income Tax²⁸ (hereafter: RS CIT Law) when income is generated by legal entities.

In accordance with article 3. RS PIT Law, PIT will be calculated and paid on income from personal income, self-employment, copyright, rights related to copyright and industrial property rights, capital, capital gains, income from foreign sources and other income.

So, RS PIT Law utilizes the ordinary meaning of royalties, copyright and rights related to copyright and industrial property right for general income tax purpose in Republic of Srpska.

However, the coverage of IP and IPR is somewhat different when viewed only within domestic legislation and then when viewed in the context of the 39 Double Taxation Agreements (hereafter: DTA) signed between BiH and other states to date.²⁹ For example, if a natural person from Ireland, earns income on the basis of copyright in Republic of Srpska and on that basis issues an invoice with payment to a foreign currency account in Ireland, this non-resident natural person who earns income taxable under the RS PIT Tax Law, shall not pay PIT in Republic of Srpska because in accordance with the provisions of Convention between Ireland and BiH for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains,³⁰ royali-

25 *Ibid.*, article 3.

26 Republic of Srpska holds a different position on intellectual property and intellectual property right when it comes to taxation.

27 The Law on Income Tax, *Official gazette of Republic of Srpska*, No. 60/15, 5/16, 66/18, 105/19, 123/20 and 49/21.

28 The Law on Corporate Income Tax, *Official gazette of Republic of Srpska*, No. 94/15, 1/17 and 58/19.

29 BiH has 39 ratified treaties on the avoidance of double taxation that have, inter alia, provisions concerning the tax treatment of IP. All DTAs are available on: (<https://mft.gov.ba/Content/Read/sporazumi-u-primjeni>)

30 Convention between Ireland and BiH for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains, *Official Gazette of BiH – International Treaties*, No. 2/12.

ties are treated on different/broader way. Article 12. para.1. of this Convention³¹ stipulates that Royalties arising in a Contracting State and beneficially owned by a resident of the other Contracting State shall be taxable only in that other State (in this case Ireland), unless the beneficial owner of the royalties, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties arise through a permanent establishment situated therein and the right or property in respect of which the royalties are paid is effectively connected with such permanent establishment. Thus, non-resident natural person taxpayer (from Ireland) shall not be taxed on copyright income in the Republika Srpska if he invokes Article 12 of the previously mentioned Convention between BiH and Ireland.

Article 29. of RS PIT Law defines list of IPs “ordinary” income taxable by this Law, as income from authored works, i.e. categories protected by copyrights as 1) written works (literary, scientific, professional, publicist and other works, studies, reviews, etc), 2) verbal works, 3) dramatical and musical works, 4) cinematographic works, 5) literal works, 6) conceptual designs, sketches, drawings and other works made of plastic materials that relate to architecture, geography, topography or any other field of science or art, 7) translation, editing, music arrangements and other alterations of works of copyrights and 8) other copyrights works. Also, by this “ordinary” income taxable by the same Law, but as income based on rights related to copyright are defined: artist performance rights, 2) phonogram producer rights, 3) video game producers rights and 4) broadcast producer rights. Finally, as “regular” income are defined income from industrial property rights on the following groun 1) patent, 2) trade mark, 3) model and pattern and 4) technical improvement.

The taxpayer of tax on income from copyright, rights related to copyright and industrial property rights is by the RS PIT Law a natural person who is the author, holder or owner of the rights which derives income from these rights.³² The taxpayer will as a tax deductible expenditures in tax purpose will be recognized expenditures incurred to generate income from copyright, rights related to copyright and industrial property rights in the amount of 40%, 50% i 60% of revenue depending on the income source.³³ The tax base for these incomes is determined as the difference between income and tax-deductible expenses, on which the tax is calculated and paid at the rate of 10%.

All other incomes from other types of IP or IPR that are not defines ad “ordinary” income from copyright, rights related to copyright and industrial property rights, as for example, income from confidential information, trade secret or

31 Read DTA.

32 Article 6. RS PIT Law stipulates that the taxpayer is a natural person who earns taxable income under the provisions of that Law and is: 1) a resident of the Republic of Srpska for income earned in the Republic of Srpska, the other Entity, Brčko District of BiH or other country or 2) a non-resident, for income earned in the Republic of Srpska.

33 The standardization of tax-deductible expenses is regulated in more detail by the Rulebook on the type and amount of expenses that are necessary for realization income from copyright, rights related to copyright and industrial property rights, *Official Gazette of Republic of Srpska*, No. 98/15.

know how, image rights, and etc. althou not specifically defined by RS PIT Law, will be considered for tax purpose in Republic of Srpska as “other” income, and it will be taxable by the article 51–52. RS PIT Tax Law. Also, when it comes to this “other” income, the PIT is, once again, calculated and paid at a rate of 10% on the tax base. In previously mentioned case, as taxpayer is natural person that earned income in accordance with the provisions of Article 51 of the RS PIT Law, and only paid contribution³⁴ are recognized as tax-deductible expenses for the purpose of determining the tax base. However, if a person earns income based on a certain IP, such as image right, know how and etc. and which according to the Law on Contributions is not defined as Contributions Debtor, then contributions will not be calculated and paid on the realized income on that basis.

Also, assignment or transfer of IP will be, or may be taxable by article 36. and article 39. RS PIT Law if they are characterized as capital gain income depending on the positive difference between the sale price of rights and property and its purchase value, which the taxpayer realises by selling or otherwise transferring with or without compensation, and provided that the transaction occurred within a maximum period of 7 years continuously from the time of IP acquisition. In the case the purchase price cannot be determined, which is often case with copyright or rights related to copyright, the purchase price shall be the market price in the year in which the right or property was acquired, as determined by the Tax Administration of Republic of Srpska.

The taxpayer of tax on income from capital gains is a natural person, the transferor of rights that will be obliged, in this case too, to calculate and to pay PIT at 10% rate on net positive difference between the sale and purchase price.

In the case when incomes based on IP and IPR are generated by legal entities, then taxation is done in accordance with the provisions of RS CIT Tax Law.³⁵ But, here too, it is important to keep in mind earlier mentioned ratified DTAs between BiH and other 39 states.

For example, if a legal entity, for example Canada with which BiH has not signed a DTA, would be engaged as an intermediary in the collection of sports TV broadcasting rights in the Republika Srpska, and if on that basis it would generate taxable income in accordance with RS CIT Law pursuant to the provisions of Article 3, para. 5 of the RS CIT Law, a non-resident of the Republic of Srpska shall be designated as a taxpayer in the Republic of Srpska, as a non-resident legal entity that generates income in the Republic of Srpska. Furthermore, this person will calculate and pay withholding tax on that income in accordance with the provisions of Article 45., para. 1, point 3 of RS CIT Law at the rate of 10% on the amount of income of non-residents, bearing in mind that BiH and Canada do not have signed DTA. However, if it was assumed that the legal entity is a resident of Ireland, instead of Canada, in accordance with Article 12. of the previously mentioned DTA between BiH and Ireland,

34 More on contributions, their amounts and the method of payment in the Republika Srpska, see the Law on Contributions, *Official Gazette of Republic of Srpska*, No. 114/17.

35 Rulebook on the manner and procedure of of taxation with withholding tax, *Official Gazette of Republic of Srpska*, No. 115/17.

it would be exempt from paying this tax in the Republic of Srpska. Of course, there are other cases depending on the legal norms of different DTAs that we will leave for some future research.

Generally speaking, as taxpayer by RS CIT Law are defined: 1) legal person from the Republic of Srpska, for profit obtained from any source in the Republic of Srpska, the Federation of Bosnia and Herzegovina, the Brčko District of BiH or abroad, 2) business unit of a legal person with permanent place of business in the Federation of Bosnia and Herzegovina or Brčko District of BiH, for profit obtained in the territory of the Republic of Srpska, 3) Foreign legal person performing business activity and having a permanent place of business in the Republic of Srpska, for profit relating to the permanent place of business, 4) Foreign legal person obtaining income from immovable property located in the Republic of Srpska, for profit relating to such immovable property.³⁶

Further, as income (profit) from sources in Republic of Srpska are Article 3b, para. 1, point 9. of RS CIT Law certain fees are determined on the basis of copyrights, rights related to copyright or industrial property rights, as well as fees from rent paid by a resident taxpayer or a permanent seat in Republic of Srpska. Also, other incomes are considered to be the same article, i.e. para. 2, as income from sources in the Republic of Srpska, if they are generated by performing activities in Republic of Srpska.

In accordance to Article 5. RS CIT Law the tax base for a fiscal year is the difference between taxable income and deductible expenditures for such fiscal year. Further, article 12. Para. 1. point 2. the same Law stipulates that depreciation of intangible asset³⁷ shall be recognized as expenditure in the amount calculated on the purchase value by applying proportional annual depreciation rates. This depreciation rate for all intangible asset, except software, shall be calculated as 10% on tax base.³⁸ On the other hand, the basis for calculating the amortization of intangible assets is their purchase value which is determined in accordance with the regulations governing accounting.

In this sense, for example, for tax treatment, and under the assumption that it is R&D, then under the assumption that the business partner of the resident legal entity is based in a country with which BiH has / does not have signed a DTA, then under assuming that the resident legal entity of Republic of Srpska finances the project in the research phase, i.e. finances the testing of the new motor drive of the vehicle, its use and development, and the development of the technological process of its use, and provided that the benefit that the domicile legal entity would achieve on ownership rights or using the results of the project,

36 Article 3. RS CIT Law, *op. cit.*

37 Except goodwill

38 Article 3. of the Rulebook on the depreciation of fixed assets for tax purposes, *Official Gazette of Republic of Srpska*, No. 96/17. defines as intangible assets "assets without physical content and includes intangible investments such as: concessions, patents, licenses, trademarks, models, copyrights, franchises and other rights. Depreciation expenses on computers, information systems, software and server (which are determined as fixed assets) are recognized annually when calculating the tax base, by applying the degressive method to grouped assets according to the 40% depreciation rate. See article 12. RS CIT Law, *op. cit.*

bearing in mind that it is a multi-phase and multi-year project, tax treatment of investments, in terms of recognition / non-recognition of costs when calculating the tax base, as well as calculating withholding tax would be as follows:

In the accounting sense, the domestic company would recognize all research expenditures related to the project as expenses in the income statement in the period when they were incurred. In this way, after the completion of the research phase, the domestic company would have proved that the intangible asset exists and will produce certain future economic benefits. In that phase, the domicile legal entity would begin the phase of development of a new technological process related to the testing of the new engine drive of the vehicle, as well as its use. In this phase of development, the domestic company would start the process of capitalization of costs incurred in the development phase, ie in this phase, the recognition of intangible assets would begin.³⁹ Therefore, from the moment the development phase begins, all expenditures related to the project are recognized in the cost of intangible assets and are recorded under intangible assets in preparation. When the asset is available for use, then its putting into use, ie recognition of intangible assets, depending on its nature (for example, investment in development), will be performed, and the depreciation process will begin if the said asset has a limited useful life. As stated earlier in the paper, depreciation costs for each period are recognized in the tax balance,⁴⁰ that is, when determining the tax base as tax-recognized expenses. Article 8. RS CIT Law stipulates that for calculating the tax base the expenditures recognized in income statement in accordance with the regulations governing accounting and auditing, except for expenditures treated differently in accordance with this Law, shall be recognized.⁴¹ On the other hand, as stated earlier, the depreciation of intangible assets, in this case, incurred in the development phase, is covered by the legally prescribed proportional rates on an annual basis, and these expenses are recognized in the tax balance.⁴²

On the other hand, pursuant to the provisions of the RS CIT Law⁴³ and the provisions DTA (if signed) it is prescribed that withholding tax is calculated and paid when paying income to a nonresident by applying a rate of 10% to the amount of income of a nonresident, if DTA did not otherwise arranged. Therefore, if this hypothetically business partner of a domestic company, a non-resident person, was registered in, for example, the USA with which BiH has not signed a DTA, the same tax in the Republika Srpska in the amount of 10% would

39 With the fulfillment of legally prescribed conditions, such as technical feasibility, intention to complete intangible assets and to use or sell them, future economic benefits, etc.

40 But also in the balance of statement.

41 For the incurred expenses in the research phase, it is necessary that there is credible accounting documentation, and that the stated expenses refer to the activity performed by the taxpayer. In this hypothetical case, the beginning of the development phase, and the use of assets to perform the technological process, as well as the expected revenue on that basis would be evidence that the said assets are used to perform the activity performed by the taxpayer

42 Article 3–6. Rulebook on the depreciation of fixed assets for tax purposes, *op. cit.*

43 Article 44. RS CIT Law, *op. cit.*

be calculated and withhold when paying the realized revenues on the territory of Republika Srpska, while on the other hand, if this person were, say, a resident of Ireland, he would again be exempt from withholding tax.⁴⁴

Finally, when transactions related to IP and IPR in the Republika Srpska, i.e. BiH are viewed from the angle of competence of the Indirect Taxation Authority of BiH, it is necessary to indicate that IP will be (non) taxable, also, depending on the nature of the legal transaction. For example, article. 3. the Law on Value Added Tax stipulates that Value Add Tax (hereafter: VAT) shall be calculated and paid on the supply of goods and services that the taxpayer, within the performance of his economic activities, makes for financial fee within the territory of Bosnia and Herzegovina and for the import of goods into Bosnia and Herzegovina, as well, at a standard BiHs VAT 17%.⁴⁵ In this regard, article 8. para.1. the same Law defined as a turnover of services, *inter alia*, the transfer and assignment of copyrights, patents, licenses, trademarks, as well as of other property rights.⁴⁶

Pursuant to the above taxable turnover of services, it can be concluded that the turnover of IP and IPR is taxable according to the provisions of the Law on VAT. However, if the taxpayer of Bosnia and Herzegovina, for example, deals with the processing, storage and provision of data related to, say, the right of TV broadcasting for a recipient of these services based abroad, then it will be considered that the BiH taxpayer, ie. a person based in BiH performs taxable turnover of services because it is about “*the services of consultants, engineers, lawyers, auditors, accountants, interpreters, data processing and data*”.⁴⁷ It is important to note that according to the provisions of the Law on VAT if the before mentioned services are supplied by a taxpayer who has his seat or place of residence in BiH for the recipient of services who does not have his seat or place of residence in BiH, the place of the supply of the service shall be deemed to be the place where the recipient of the service has the seat of his company or

44 See article 7. and 12. Convention between Ireland and BiH for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains, *op. cit.*

45 Law on Value Added Tax, *Official Gazette of BiH*, No. 09/05, 35/05, 100/08 i 33/17.

46 Article 4. Law on VAT defines supply of goods as transfer of the right to the disposal of items to the person who may dispose of these goods as owner. Water, electric power, gas and heating energy or the like are also considered as goods. The supply of goods, within the meaning of this Law, also considered: 1. the transfer of the right to dispose of goods for consideration, on the basis of a decision by a State body, a local self-government body, or on the basis of law; 2. the sale of goods under contract on the basis of which commission is payable on the sale or purchase of goods; 3. the transfer of goods on the basis of a contract of hire for a certain period or on the basis of a sales contract with deferred payment which provides that the right of ownership shall be transferred no later than the payment of the final instalment; 4. the transfer of the right to dispose of newly-built construction objects or economically divisible units within these objects (hereinafter: objects); 5. the transfer of the business assets of a taxpayer by an authorised person, including liquidators, bankruptcy administrators and custodians, except for the cases referred to in paragraph 2 of Article 7 of this Law; 6. the use of the goods of a taxpayer for non-business purposes; 7. the exchange of goods for other goods or services.

47 Article 15. para.1. and article 15. para. 2. point. 4 (c) Law on VAT, *op. cit.*

place of residence, i.e. abroad. Thus, the taxpayer as a provider of such services is obliged to, in order to prove that services are provided to a foreign person. Acquiring the conditions for exemption from payment from the obligation to calculate VAT, take the name and surname, address and passport number for a natural person from the recipient of services, ie the certificate of registration of the taxpayer for a legal entity.⁴⁸

However, Article 16. of the Law on VAT prescribes the possibility for the Indirect Tax Authority of BiH to determine the place of provision of services as a place of supply of services in order to avoid double taxation or non-taxation for the services referred to the transfer, ceding, omission and placing at someone's disposal of property rights, copyrights, rights to patents, licences, trademarks and other rights of intellectual property in case the services would not be taxable with value added tax in the recipient's country abroad.

Finally, in the case of any services for which the place of turnover cannot be determined in the manner defined in Article 15 para. 2 of the Law on VAT within BiH applies the general principle of taxation according to which the place of turnover is the place where the taxpayer has a permanent seat from which services are provided, or in the absence of such a place, has a permanent address or usual residence.

4. INSTEAD OF CONSLUSION

In recent years many owners and founders of knowledge economy around the world are aware that their intellectual property is contributing an significant amount of value in their business, and "produce" significant amount of revenue and profit as well. At the same time, there have been a number of changes in tax laws affecting IP and IPR worldwide.

Although the nominal rate at which incooms from IP and IPR are taxed in Republic of Srpska is 10%, the effective rate is, due to deductible expenditures, even lower, and that the VAT rate applied to trade in services (and goods) in Republic of Srpska and BiH is 17%, it would be good to introduce more stimulating tax breaks/relief on the example of some of the many countries that have an IP box regime in the Republic of Srpska, which would relieve investment in IP even more tax relief, i.e. become attractive.⁴⁹ For example, in Serbia from 2020 through tax relief for those who invest in knowledge, education, development and research and create intellectual property in Serbia and which is registered in Serbia, the effective tax rates on intellectual property income are 3%, instead of the previous 15%.

48 Article. 21. para. 9 Rulebook on the implementation of the Law on VAT, *Official Gazette of B&H*, No. 93/05, 21/06, 60/06, 06/07, 100/07, 35/08 and 65/10.

49 IP Box Regime all over the Europe, can be divided in two big groups: first one that is implemented by France, Netherlands and United Kingdom and that provides for reduced rates of tax on qualifying income, and second one that is implemented by Serbia, Spain, Luxembourg, Belgium, Hungary and Cyprus that provides for an exemption of a specified proportion of revenues. The last mentioned group can, also be divided into two schemes, first that exempt a proportion of gross and second that exempt a proportion of net revenues.

Given that the “new” tax measures in Serbia have been in force only since last year, it would be ungrateful to give a somewhat accurate assessment of their effects in terms of attracting FDI and increasing the number of employees. However, having in mind that information technologies⁵⁰ in Serbia have grown at a rate of 30% per year in recent years, that the Information Technology sector in Serbia in recent years participates in GDP with about 6%, that according to the Statistical Office of the Republic of Serbia registered growth of employees in the Information and Communication Technology sector (hereafter: ICT sector) of 9.5% if we compare the data from 2020 and 2019, and that within this sector the fastest employment growth, of 20.6% was recorded by Information Service activities, i.e. that a slightly slower employment growth was registered in the entire Information and Communication Technology sector of 11.5% if the data from the third quarter of 2021 and 2020 are compared, and that within the same, the fastest employment rate of 17.5% was again recorded by Information Service activity, it could be concluded that this growth in employment was certainly influenced by changes in tax regulations in Serbia.

The truth is, the attitudes and opinions regarding the correlation between the higher tax rate, the introduction of tax reliefs and exemptions regarding IP assets and the increase in the volume of FDI and employment in the country that introduced them are not uniform. Mostly the authors agree and stand out *“that output-related tax incentives abroad can have both complementary and substituting effects on domestic activity, depending on whether they require and effectively enforce nexus through the co-location of reported income and its underlying real activity”*.⁵¹ In addition, many theorists and practitioners advocate and defend the thesis that there is an inverse correlation between IP and IPR tax rates and tax relief and exemptions related to these assets and rights, on the one hand, and between volume of investment, especially FDI and employment rates, on the other hand.⁵² The author of this paper is also inclined to believe that there is a negative but incomplete correlation between the effective tax rate and the volume of investments. This correlation is present especially in countries such as Republic of Srpska, in other words BiH, where investors make their investment decisions, primarily on the basis of the overall assessment of the legal-political and socio-economic situation, and not only on the basis of economic business conditions. However, it is important to point out that, although to date the main drivers of the economy of Republic of Srpska have been mainly manufacturing, trade, agriculture, forestry and fishing, which should certainly continue to be encouraged and improved, the economy of the Republic of Srpska should (more) turn to the creation of intellectual property within its national borders. In order

50 One of the sectors that is predominantly based on IP and iPR

51 More about cross-border effect of patent box regimes that reduce the tax rate on corporate income from, such as patents and other intangible asset see in Schwab, T. and Todtenhaupt, M., 2021, Thinking outside the box: The cross-border effect of tax cuts on R&D, *Journal of Public Economics*, Vol. 204.

52 More about this see in Harhoff, D., Narin, F. and Vopel, K., 1999, Citation Frequency and the Value of Patented Inventions, *Review of Economics and Statistics*, No. 81; Bohm, T., Karkinsky, T. and Riedel, N., 2012., *The impact of corporate taxes on R&D and patent holdings*.

to assume the overall potential of IP and IPR in the Republic of Srpska, perhaps the example of the ICT sector could be cited as an illustrative example, as stated for Serbia. Statistics show that the share of the ICT sector in the GDP of Republic of Srpska in 2020 was about 4.9%. It is estimated that with certain improvements, i.e. the creation of a more favorable business environment, business activity in the ICT sector would increase so that, in a relatively short period of time, the participation of this sector could be at least 10% of GDP.⁵³ Furthermore, investing in and strengthening the ICT sector would indirectly lead to a number of positive spillover effects on other sectors of the Republic of Srpska economy, which would make them, i.e. the entire economy of Republic of Srpska, stronger and more competitive. In addition, the average growth rate of the ICT sector in the period 2018–2020. was around 7.2%, while the real GDP growth rates of Republic of Srpska were 3.9%, 2.5% and –2.8% in 2018, 2019 and 2020, respectively, which indicates the resilience and adaptability of this sector even in the most challenging times, ie to much faster growth of ICT than the growth of the whole economy. Also, the average growth rate of employees in the ICT sector in the period 2018–2020 was 3.65%.⁵⁴

So, bearing in mind creation, development, acquisition, and sale and licensing of these intellectual property assets have significant tax consequences, and that Intellectual property is a key driver in the current developed economy, and that the same potential for job creation, in other words for collecting a significant amount of public revenues in developing countries such as Republic of Srpska, is to be expected in the near future tax authority of Republic of Srpska and Government of Republic of Srpska become more interested at seeking to create stimulative market environment, so they can to tax their optimal, but still fair share of value generated from intellectual property and intellectual property rights as well.

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53 Assessments of the Government of the Republic of Srpska and the Chamber of Commerce of the Republic of Srpska.

54 Freelancers from ICT who work additionally are not included in these statistics.

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Cover Design
Ivana Zoranović

Graphic Design
Irena Đaković

Preparation and Printing
Dosije studio, Belgrade

Circulation
100 copies

ISBN 978-86-7952-060-9

CIP – Каталогизација у публикацији
Народна библиотека Србије, Београд
347.22/.23(082)

INTERNATIONAL Scientific Conference Property Law-challenges
of the 21st Century (2020 ; Beograd)

Proceedings / International Scientific Conference Property law –
challenges of the 21st century, held on 9 October, 2020 in Belgrade, Serbia ;
editors Jelena Simić, Aleksa Radonjić. – Belgrade : Union University
School of Law, 2021 (Belgrade : Dosije studio). – 359 str. ; 24 cm

Tiraž 100. – Editor's Word: str. 7. – Str. 9–12: The Challenge of a
Common European Property Law / José Carlos de Medeiros Nóbrega. –
Napomene i bibliografske reference uz radove. – Bibliografija uz svaki rad.

ISBN 978-86-7952-060-9

а) Имовинско право – Зборници

COBISS.SR-ID 52676617



P
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C



ISBN 978-86-7952-060-9

