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I Panel: Property Law and Technology

Nasir Muftić*

TREATING PERSONAL DATA AS PROPERTY– HAS THE TIME ARRIVED?

In present times marked by increased level of technological developments, legal systems deal with increasingly commercialized use of personal data by providing certain rights to the data subjects and other subjects involved.
In the era of big data, value of personal data is likely to be even more emphasized in the upcoming process of digital transformation.
This paper addresses one of the most radical ideas in data privacy law – the introduction of right that would treat personal data as property. The idea itself is not new and scholarship has already been devoted to it. Despite public law protection it receives through various international and national legal instruments, personal data is increasingly treated as a commodity in transaction between private parties characterized by lack of control and protection of data subjects. Whereas the proper regulatory response to the current and forthcoming challenges arising out of changing technological landscape is still pending, the question of whether the next step is ripe for answering – the introduction of a property right that would ensure holistic treatment of personal data in private law.
In the first chapter, the paper presents the current treatment of personal data with the focus on civil law. The second chapter addresses the hitherto doctrinal treatment of personal data as property right as well as comparative law trends in this respect. It expounds on whether current treatment of personal data provides enough protection to data subjects as well as whether the separate property right would provide more control. The third chapter expounds on whether the prospect of great technological development entails propertization of personal data as a proper regulatory response.

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Alexandra Dal Molin*

HAS THE CONCEPT OF OWNERSHIP HAD ITS DAY?

With the constant development of new innovative technologies also new and very effective ways of sharing goods via the use of virtual platforms have emerged, which is commonly referred to as sharing economy. These platforms such as for instance the e-bike sharing platform "Smide" (www.smide.ch) act as connecting means to match owners with users. From an economic perspective this business model seems to be very efficient because it offers an effective way of deriving value of a piece of property by lending it to exactly those people who have a need for it in this very moment. Also form a legal point of view, the sharing economy gives rise to a variety of questions. It appears that the property law concept of ownership is increasingly being overlapped or even forced back by contractual concepts such as renting or loaning. In my research I am currently focusing on exactly this intersection between property law and contract law. Starting from my thesis, that in the sharing economy ownership rights (rights in rem) might be replaced by contractual rights (rights in personam), I will address the following questions in my PLC presentation:

1. Is the traditional concept of ownership as we know it de lege lata fit for the sharing economy or does it need adjustments de lege ferenda?
2. What are the legal consequences if rights in personam become the new rights in rem?
3. Can we make reference to right in rem-concepts such as for instance protection of possession to even out the gap between rights in personam and rights in rem?
4. Are there any frictions between contractual concepts such as rent or loan and the concept of ownership? If so, how can they be evened out?
5. Do we still need the concept of ownership at all?

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Giséle Lavita*

THE IMPLICATIONS OF PROPERTY LAW ON AIRBNB

Airbnb, the app that has taken the housing market by storm through allowing homeowners to become entrepreneurs by renting out their properties on a short-term basis. Currently there is no precedent for the legal position created by Airbnb. Consequently, Airbnb is regulated by municipal by-laws in South Africa. The lack of uniform regulation has caused much uncertainty for Airbnb users. There is a need for uniform regulation to protect owners, tenants and neighbors' rights. In recent years, an increase in the amount of Airbnb uses has resulted in the increase of housing affordability which questions the fair housing implications of Airbnb. This paper discusses the implications of Airbnb on neighbor law, and the law of land lords and tenants. I also discuss the remedies available to landlords, tenants and neighbors. A comparative analysis on South African and American regulation of Airbnb is done in order to gauge the gaps in South African law and provide suggestions for the proposed regulation of Airbnb in South Africa. This paper provides the legal position for current Airbnb users in South Africa, informing them of their relevant rights and remedies while providing suggestions for an improved uniform regulation of Airbnb.

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PLANNING FOR A DIGITAL DEATH

Today's world, in addition to the real world, includes the virtual one, which takes place online and is dominated by digital contents. Within this environment communication, business, trading, depositing of money, data storage etc. are made, so it is impossible to still reduce the property of a modern man to only the tangible one. 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 and its succession. A particular challenge for any legal order is the set of questions related to the inheritance of digital content - are these inheritable rights that can be freely disposed *mortis causa* by their holder? What rules apply in the case where the rights holder did not make any disposal *mortis causa*?

While planning for inheritance with respect to tangible assets is desirable but given the default rules on legal inheritance available in every legal order, 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 the gathering a list of digital content and a list of belonging access codes. And if the 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. It 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 content 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 (UK, Germany, Estonia, the Netherlands) in order to lay the foundations for further research in the field of digital inheritance in the region.

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Jovana Milović*

MODERN TECHNOLOGIES IN THE SPHERE OF THE TESTAMENTARY INHERITANCE

Modern technologies give us unlimited opportunities for communication, new knowledge and discoveries. The advantages of modern technologies raise the question of their use in the sphere of testamentary inheritance. The possibility of making a will via video, email or sms is often questioned in practice. In practice, individual states are already recognized as testaments by SMS or e-mail. The author tries to point out the need to review the use of modern technologies in the field of testamentary inheritance, and to propose solutions that should be included in the future Civil Code of Serbia.

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II Panel: Constitutional Property Law Issues

Pavlo V. Pushkar*

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

The countries of Eastern Europe and Russian Federation faced serious difficulties in transformation of their legal systems to ensure compliance of legislative and institutional framework with the requirements of the European Convention on Human Rights. Surely, the case-law of the Strasbourg Court played a paramount role in this transformation. The issue of compliance of the domestic regulations in these countries with the requirements of the Convention, institutional reaction of the legal systems, judiciary and the enforcement vis-à-vis notably property rights were the most problematic in this
transformation process. In countries, which under the communist era were not recognizing private property, it was and still remains difficult to provide full-fledge protection to property rights. One of such examples is the most recent judgments of the Court with regard to Ukraine, relating to the moratorium on the sale of agricultural land. The blanket ban, imposed de facto since the beginning of the independence of Ukraine, imposed on such sale was lifted only recently, in April 2020, as a measure in response to the demands of the IMF. One of the driving factors for such an annulment of the moratorium was the judgment of the European Court of Human Rights was the judgment in the case of Zelenchuk and Tsyutsyura v. Ukraine. It still remains under the supervision over execution with the Committee of Ministers of the Council of Europe. The Russian Federation faced specific difficulties in the area of property rights as result of large re-privatization of State-owned property. One of the examples of cases still pending execution before the Committee of Ministers is the judgment in the case of Yukos v. the Russian Federation. The case raised issues of constitutionality for the Constitutional Court of the Russian Federation and vivid discussions as to the international obligations of the state under Article 41 of the Convention. A number of other cases, which concern the countries of Eastern Europe, relate to the area of 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 to essentially social rights, nevertheless, recognizing that were 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 enforcement of such a right. Thus, 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. To summarise, both the Strasbourg Court and the Committee of Ministers, the Council of Europe, have strongly influenced and supported, transformation of the legal systems of the countries of Eastern Europe in their action with a view to security property rights. 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 have been expanded to incorporate the requirements of the case-law of the Court and to accommodate the requirements of the Convention and Article 1 of Protocol

No. 1, which see the notion of possessions as an "autonomous concept", guided by three distinct rules, interferences and limitations that are seen by this provision rather narrowly. Indeed, years of influence have undeniably transformed legal framework and institutional action with the view to protection of 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. To these ends, the actions of the domestic judiciary need to be also aligned with the case-law of the European Court of Human Rights. The process of execution of judgments can play an important role to correct anachronistic legal regulations and lift unlawful or arbitrary restrictions on exercise of property rights, as for instance the moratoriums on sale of land or as regards 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, are an important step to be taken, which should not be underestimated.

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Ana Vilfan-Vospernik*

RESTITUTION OF PROPERTY

It is argued that different issues related to the restitution of property taken during wars, conflicts and totalitarian regimes over the last century or so remain one of the challenges for the 21st century. It is acquired in the human-rights law that the current taking of property (deprivation), without payment of an amount reasonably related to its value, will normally constitute a breach and that a total lack of compensation can be considered justified only in exceptional circumstances (*Jahn and Others v. Germany* [GC], § 117).

A different approach has been taken in respect of restitution of property taken decades ago, as it will be shown by the contribution. Until the wave of restitution programs, adopted by democratic Parliaments and Governments in Central and Eastern Europe after the change of political regimes in 1990 in favour of victims – individual previous owners–, property claims after the end of wars or armed conflicts have generally been a part of peace negotiations or other types of negotiations between Governments. The resolution of such disputes over foreign property usually concerned lump-sum settlements, at valuation below the current value of assets. A parallel may be drawn between the individual restitution, where restitution in kind is not possible, and the inter-State settlements.

Although the obligation to return expropriated property to individuals has not, strictly speaking, become a part of the international law, there are tendencies of raising it to the level of obligation, at least in certain contexts, such as in respect of internally displaced persons. At the same time, the victims of previous regimes or mass violations of human rights are increasingly being granted the right to individualisation, even in inter-State context (for example, see the just satisfaction judgment in *Cyprus v. Turkey*, for the relatives of the missing persons and the enclaved residents).

The symbolic dimension should also not to be forgotten, for individual heirs, larger communities and nations. For instance the return of the cultural building *Narodni dom* in Trieste, burnt in 1920 and of significant importance for the Slovenian community in Italy, which is provided for by the Italian 2001 Act on the Legal Framework and Protection of the Slovenian Linguistic Minority in the region of Friuli – Venezia Giulia, is currently on the agenda in bilateral relations, hundred years after the events took place. That is a rarer occurrence given the time distance.

The contribution will try to show in which fields of international law the individual restitution has become an important legal and moral principle and analyse the impact of the case-law of international courts, in particular the European Court for Human Rights (the ECHR) in this field.

The abundance of its case-law shows the scale of this phenomenon in the member States from Central and Eastern Europe and also gives indication as to the importance of the point of time

when the property was taken. Member States which were previously members of the Soviet Union and where property was taken predominantly during the 1920's – the memory of heirs having faded –, did not in general undertake such obligation. As to the member States where the restitution has been chosen and despite the fact that there is no Convention obligation under Article 1 of Protocol No. 1 on the member States to return property which was transferred to them before they ratified the Convention, the ECHR has played an important role in this process after the end of the socialist/communist regimes.

Some authors have criticised the ECHR´s reluctant stance to consider the expropriations after the Second World War. However, that is the consequence of its temporal jurisdiction reflecting the general principle of international law on the non-retroactivity of treaties. The ECHR has thus held that takings which were lawful under the previous regime were in principle instantaneous acts, (*Preußische Treuhand GmbH & Co. KG a.A. v. Poland* (dec.), § 57), the doctrine of the continuing violation being applied to unlawful situations. *Vasilescu v. Romania*, § 49).

Another aspect is the potentially discriminatory scope (Article 14 of the Convention) of restitution laws. Given that the Court has granted a large margin of appreciation to member States, the exclusion of certain categories of former owners from entitlement has been accepted by the Court (*Gratzinger and Gratzingerova v. the Czech Republic* (dec.) [GC], §§ 70-74).

Given these restraints, 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 v. Poland* [GC], § 184).

In this respect, fair-trial guarantees under Article 6 of the Convention were of key importance, 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, resolution of disputes concerning the coexistence of two title deeds to the same property, etc. The shortcomings in the implementation stage have led to the adoption of pilot judgments (*Manushaqe Puto and Others v. Albania,* §§ 110-118, and *Maria Atanasiu and Others v. Romania*, §§ 215-218).

Little has been published on the return of property after 1990 in the region. The contribution for the conference will explore how the restitution processes have contributed to the rule of law as well as the economic well-being and what are 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 currently taking place or touching towards the end."

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Lerato Rudolph Ngwenyama*

USUFRUCT AND HABITABILITY: PERSPECTIVES FROM SOUTH AFRICA

This paper will deal with habitability in the context of usufructuaries. The first part of the paper will look at the meaning of habitability in this context. In addition to that, this part of the paper determines whether the owner can be expected to give usufructuaries other entitlements or rights in light of the requirement of habitability. The reason for this is to determine whether a minimum standard of habitability exists for usufructuaries. The second section of the paper then scrutinizes the impact of the Constitution of the Republic of South, 1996 on the standard of habitability for usufructuaries in light of constitutional rights such as section 26 (housing) and section 10 (human dignity). The third segment of the paper will explore on whom the obligation rests to ensure habitability, more specifically whether the obligation is on the owner who grants the usufruct or the state in the owner-usufructuary relationship. The remedies available to usufructuaries on failure by either the owner or the state to ensure habitability will also be touched on.

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III Panel: Classical Issues in the 21st Century

Meliha Povlakić*

THE TRADITIONAL PRINCIPLE *SUPERFICIES SOLO CEDIT* AND THE MODERN WORLD - PROPERTY RELATIONSHIPS ON WIND-PARKS, SOLAR POWER PLANTS, CABLE INFRASTRUCTURE ETC)

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 these principles. The private law codifications in the continental law countries almost without exceptions provide for the rules that the plot is main legal object and everything which is by nature or mechanically connected to it, belongs to the owner of the plot. A comparative overview shows that in Europe only a few countries do not have solutions whereby the buildings are generally part of the land and where the buildings are legally separated from the plot and constitute a separate object of the *rights in rem*. Without exception, these are some former socialistic countries (for example Russia, Lithuania, Ukraine, Romania, Bulgaria and Serbia). 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 (plot).

One of the most important reform moves in Bosnia and Herzegovina (hereafter: B&H) was the reintroduction of the principle *superficies solo cedit*, which also meant the denationalization of the building's plot in the cities and urban conglomerations. In this paper, the evolution of this principle in B&H will be addressed as well as the consequences of its reintroduction into the property law, especially into the mortgage law.

Although the principle *superficies solo cedit* plays a crucial role in the new property law in B&H, at the same time it represents an obstacle to some new needs and challenges caused by developments in the field of technic, technology and renewable energy. Generally, the wind turbine equipment, solar equipment, cable infrastructure etc. do not belong to the owner of the plot. An acquirement of the plot 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 plot. A vast range of the questions emerges here, followed by the numerous and very different solutions in comparative law. In certain legal orders, these equipment are considered as movable, in other they can be only part of the plot (there are no exceptions from the principle *superficies solo cedit*). In some countries the problem is circumvented through the

lease of the land and the registered lease can be encumbered i.e. the standard security rights can be granted over this registered lease.

The main research topic of this paper is the question: which 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 with the goal to find the best approach which could be solution for B&H. The dogmatic question of whether these buildings and equipment are movable or immovable arises here. This dogmatic questions has important practical implications in the field of the credit and mortgage law. This paper addresses whether loan for financing solar equipment, wind turbine equipment which is installed on plot (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?

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Katarina Jovičić,*Slobodan Vukadinović**

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

Although there is a tendency towards substantive unification of contract law, the conflict-of-law approach still proves to be necessary. Tendencies in Europe during the late 20th and 21st centuries show a continuance of the commitment to build a unique European legal area, which includes the substantive unification of contract law. A significant obstacle or rather a challenge is 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 development of rules regarding this issue in Europe, where there is still two different basic systems of passing of property: the French system, by which the final preferred purpose and effects of the legal transaction are achieved by conclusion of the contract itself and, on the other hand, the German system, which implies that by concluding the contract, the contract parties accept the obligation to transfer ownership rights in the next step. The authors conducted research whether these two systems are irreconcilable. Further, the paper analyses whether it is possible and necessary to reach a unique solution where this question would be universally regulated in European legal area. Finding reasons in 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 in the area of 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 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 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 authors explain, relativize and reduce the practical legal importance of the primary differences.

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IV Panel: Post-Yugoslavian Challenges in Property Law

Dušanka Komnenić*
Dragoljub Popović**

PROPERTY OF FROZEN ASSETS IN EX-YUGOSLAV BANKS IN THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

The federal government of 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 towards the end 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 former Yugoslavia by giving rulings in two types of cases. In one of them the applicants were the nationals of successor states, while in the other they were non-nationals i.e. foreigners.

As regards the first type of cases the ECtHR sustained the restrictions on the enjoyment of property, finding no violation of human rights. On the contrary, in the second class 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.

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Duško Čelić*

CHALLENGES OF REGULATING REAL ESTATE RIGHTS IN KOSOVO AND METOHIA

Following the cessation of NATO's unlawful aggression against the Federal Republic of Yugoslavia, based on the United Nations Security Council Resolution no. 1244 of 10 June 1999, a United Nations Interim Administration (UNMIK) was established on the territory of the Autonomous Province of Kosovo and Metohia. Acting on the contrary to the letter and spirit of RSBOUN no. 1244, UNMIK did not respect the existing legal order in Kosovo and Metohia, both generally and in the area of property rights in Kosovo and Metohija, but by a series of quasi-legal interventions ("regulations"), established a legal order independent from the rest of the Federal Republic Yugoslavia, or the Republic of Serbia. *''On the law applicable in Kosovo''*, established on December 12, 1999 and implemented on June 10, 1999, UNMIK has proclaimed that in Kosovo and Metohija will be applied "the law in force in Kosovo on March 22, 1989"!?! In the area of real relations, this quasi-legislative policy of UNMIK has resulted in the transformation of already existing particular, subordinated, unsystematized and non-codified law in the field of real property relations in the territory of the Republic of Serbia (and thus into Autonomous Province of Kosovo and Metohia) into the "legal chaos", of mutually inconsistent and contradictory legal norms, contained in even more numerous sources than was the case until 10 June 1999. In particular, the paper will analyze quasi-legislative activities in the area of real estate rights regulation by de facto authorities following the unilateral declaration of independence of ''Kosovo'' on February 17, 2008, and will look at the possible consequences of such decisions on the survival and protection of these rights, especially of persons that were forcible displaced from Kosovo and Metohia after 10. June 1999.

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Jelena Belović*

(NON) AGREEMENT ON SUCCESSION ISSUES OF FORMER SFRJ

The Agreement on succession issues between former Yugoslav republics was signed in Vienna on 29 June 2001 by five respective former republics-legal successors. Although the Agreement has been ratified in all respective countries, its application raised many misunderstandings in its interpretation. This leads to the conclusion that succession is complicated both legal and a political issue. The legal consequences of country's disappearance in international arena, as well as appearing of new ones, are the subjects of different interpretations neglecting the fundamental legal civilization heritage formulated in following principles: pacta sunt servanda and protection of property. The property protection is directly connected to the person as a right holder and it has been considered as one of fundamental human rights that belongs to the individuals regardless their local, national or any other belonging. Having in mind that succession asks for different legal approach concerning this right, it should be stressed that this would cause no doubts concerning the core of the right in question.

The article analysis Annex G of the Agreement guarantying property rights of the citizens and legal persons. The former republics have committed themselves to recognize, protect and return the private property rights. From the beginning of this year there are many requests focused on reconsidering the Law on recognizing the Agreement of succession issues from 2002, having in mind that recent decision of ECHR declare that the Agreement cannot be applied directly, but only through bilateral agreements on property issues.

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Strahinja D. Miljković,*Igor Simić**

LEGAL FRAMEWORKS AND METHODS OF PRIVATIZATION OF SOCIALLY-OWNED AND PUBLICLY-OWNED ENTERPRISES IN THE REPUBLIC OF SERBIA ON THE TERRITORY OF AUTONOMOUS PROVINCE KOSOVO AND METOHIJA FROM 1999 TO 2008

With the adoption of Resolution 1244, the United Nations Interim Administration in Kosovo (UNMIK) gains 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 with the force of law, UNMIK, or the Special Representative of the Secretary General (SRSG) unilaterally abrogates the retroactively existing legal system, creating conditions for the establishment of a quasi-legal system independent of the legal system of Serbia. UNMIK regulation 1999/24 results in the reincarnation of SFRY-era legal acts. Regulation no. 1999/24 is a guideline in further legal normalization and design of a quasi-legal system in the area of the AP of Kosovo and Metohija. The regulation's recognizes 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) creates the conditions for changing the ownership regime of Socially-owned and Publicly-owned Enterprises of Serbia in the territory of the AP Kosovo and Metohija. The law authorized the KTA to manage Socially- owned and Publicly-owned Enterprises, as well as 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 author pays special attention to the Regulations on the Kosovo Trust Agency (KTA) and spin-off method.

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V Panel: Expropriation

Jelena Jerinić*

WHO SHOULD BE THE JUDGE OF THE COMMON GOOD? POSSIBILITIES FOR JUDICIAL REVIEW OF PUBLIC INTEREST DETERMINATION IN EXPROPRIATION CASES – THE EXAMPLE OF SERBIA

Expropriation, as a permissible limitation of personal property rights in the public interest exists, in all probability, in most legal systems in the world. It is also recognized as such in the caselaw of the European Court of Human Rights. Another, mostly undisputed issue concerning expropriation is that it should be subject to just compensation.

However, the procedure in which the public interest for expropriation is determined differs across legislatures and, understandably, situations might arise in which the very determination of public interest could be called into question or, in the legal sense, reviewed as a result of adequate remedies.

Serbian expropriation law envisages that public interest for expropriation can be determined by law, as an act of Parliament, or by an act of the Government. The law limits areas in which Government can determine the public interest, while its determination by law is, apparently under no such limitation, other than the general constitutional provision on possibility to restrict property rights in public interest. During the last decade, several laws were passed determining the public interest for expropriation in case of roads and pipeline construction, as well as a commercial and residential complex in the center of Belgrade, some of them also bringing about derogations from general planning and construction legislation.

On the other hand, possibilities to question both the Government's, but even more, the Parliament's judgment of the common good remain rather limited – particularly in relation to standing of those whose property rights are to be affected by the expropriation. Individual acts of the Government can be disputed before the Administrative Court, with limited standing, while when confronted by an act of Parliament, an ordinary citizen could only submit an initiative for review of its constitutionality before the Constitutional Court. Issues relating to accessibility and effectiveness of these legal remedies are the central topic of the proposed article. Besides analysis of relevant Serbian legislation and case law, it will look into comparable norms in other legislatures (primarily, European ones), as well as caselaw of the European Court of Human Rights.

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VI Panel: Environmental and Social Challenges

Maša Marochini Zrinski*

PRINCIPLES IN THE SERVICE OF CONCEPTION AND PROTECTION OF THE RIGHT TO LIFE IN A HEALTHY ENVIRONMENT- (IN)CONSISTENCY IN THE COURT'S CASE-LAW

During the last two decades the Court has increasingly examined complaints in which individuals have argued that a breach of their Convention rights has resulted from adverse environmental factors. Due to the fact that 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 concerning the right to private and family life, home and correspondence, but also under Article 1 of Protocol 1 that protects property. Therefore, Conventional practice in the protection of these rights, that would in traditional proprietary law seek protection from immisions or from the disturbance of property has thus been given a new, Conventional dimension. However, in those cases the Court did not set out clear standards or guidelines, thus possibly contributing to states' uncertainty regarding their obligations under the Convention, as well as to Court's inconsistency ultimately threatening its legitimacy. The Court is not bound by its precedents as the courts in a common law system are, but for the reasons of legal certainty and orderly development of the Convention's case law, it is necessary for the Court to be consistent and follow its precedents. Although there are grounds for justification for overruling the Court's previous case law, the problem arises when the Court's does so without providing good reasoning. This paper will look at the Court's environmental cases and analyse its (in)consistency when delivering judgments concerning the right to a healthy environment.

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Frederik Rudolph van Dyk*

ADAPTING THE TENETS OF LAND REFORM IN SOUTH AFRICA TO SUIT CONSTITUTIONAL IMPERATIVES FOR ENVIRONMENTAL PROTECTION: A COMPARATIVE LEGAL ANALYSIS

As South Africa enters a new era of shifts and adjustments to land reform programs, how can environmental legal obligations and rights link up to prospective land reform law, and what can South African property lawyers learn from other jurisdictions in this regard?

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, including Bills introduced into Parliament as late as 2013. A more promising yet indirect example is the Spatial Planning and Land Use Management Act, which cites 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.

Alongside this policy-based evaluation, an investigation is conducted into environmental litigation as an active mechanism to bring land reform policies in line with environmental law and the relationship that this approach has to land reform in other jurisdictions.

In conclusion, an argument is made for *future-oriented* land reform with a focus on Ethiopian, Brazilian, Scottish and Welsh 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 and environmental litigation as an active mechanism to protect tenancy, to direct redistributive policy efforts and to enforce environmentally-sound land-use planning.

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Sameera Mahomedy*

INVESTIGATING THE ROLE OF PARTICIPATION IN UPGRADING INFORMAL SETTLEMENTS: IDENTIFYING CHALLENGES AND OPPORTUNITIES

The advent of the Constitution of the Republic of South Africa 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, government has shifted its attention from conventional housing programmes, which focussed on the incremental provision of subsidised housing, 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.

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Nyaradzo D.T Karubwa*

TENURE SECURITY IN RELATION TO FARMLAND IN THE CONTEXT OF OCCUPIERS

In the face of possible constitutional amendments to allow for expropriation of land with nil compensation, the need for secure tenure rights for farmland occupiers becomes increasingly important. Following the proposed amendment, the potential impact of land expropriation on the right to security of tenure for occupiers cannot be forgotten. The right to security of tenure is embodied in section 25 (6) of the Constitution of the Republic of South Africa. Having this provision in the Constitution shows the importance placed on the right. The importance of the right to security of tenure and the impact that expropriation may have on this right makes it essential to revisit the fundamental aspects of the right in the context of occupiers. Against this background, questions of interest for this presentation may include the following: What does the right to tenure security entail? What does the right to tenure security mean to farmland occupiers? Do occupiers currently have legally secure tenure rights? What obstacles are standing in the way of the full exercise of the right to security of tenure? Therefore, this presentation aims to provide a brief historical analysis of the South African land holding policy prior to the proposed amendment to trace how occupiers' right to tenure security has evolved over the years. The presentation also provides an overview of the right to tenure security to figure out if occupiers currently have legally secure tenure. In this light, recommendations that could solve the current tenure insecurity challenges for occupiers are made.

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