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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 treaties[3] 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/arhslgl-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; Koelemaij, 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 интерес*); 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 cases[27] 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 consultation[32] (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 bodies[35] 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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