

**Expropriation Procedure**  
**with Emphasis on Aspects of Compensation and**  
**Balancing between Public Interest and Private Interest**  
*Comparison of principles set forth in German, Serbian and ECtHR system*

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## ABSTRACT

*The Thesis uses comparative analysis of German and Serbian regulations on one hand and provisions set forth under Convention in order to elaborate key aspects of compensation and balancing between public and private interest, as most controversial and problematic matters of expropriation. In addition to the main focus, the Thesis also provides, in comparison manner, general overview of the property clauses (established in Jurisdictions) under which expropriation is placed, as well as general information on all other institutes that should be distinguished from the measure of expropriation. On the basis of such comparative analysis the Thesis shows to the reader positive and negative sides of regulations on expropriation adopted and applied within Jurisdictions.*

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## DEFINITIONS

For the purpose of this Thesis the following terms shall have the following meaning:

- Annual Report for 2011** - means: A. Gromitsaris, ‘Expropriation, Takings, Annual Report 2011 Germany’, (Ius Publicum, 2011) available at [http://www.ius-publicum.com/repository/uploads/21\\_03\\_2012\\_12\\_05\\_Gromitsaris\\_Expropriation.pdf](http://www.ius-publicum.com/repository/uploads/21_03_2012_12_05_Gromitsaris_Expropriation.pdf);
- Basic Law** - means Basic Law of Federal Republic of Germany, available at <http://www.iuscomp.org/gla/statutes/GG.htm>;
- Convention or ECHR** - means Convention for the Protection of Human Rights and Fundamental Freedoms, available at [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf);
- ECtHR** - means European Court of Human Rights (*Cour européenne des droits de l’homme*) located in Strasbourg, France.;
- Jurisdictions** - means German jurisdiction, Serbian jurisdiction and jurisdiction of ECtHR;
- Serbian Constitution** - means Official translation of the Constitution of Republic of Serbia, available at [http://www.srbija.gov.rs/cinjenice\\_o\\_srbiji/ustav\\_odredbe.php?id=218](http://www.srbija.gov.rs/cinjenice_o_srbiji/ustav_odredbe.php?id=218);
- Thesis** - means this thesis.

## INTRODUCTION

Expropriation is viewed as grave intrusion to private property. Specific nature of this institute makes it interesting for analysis, especially given that different principles and conditions for performing lawful expropriation are envisaged on national levels and international level.

The word expropriation comes from Latin words “*ex*” which means “out of” and “*proprius*” which means “owner”.<sup>1</sup> The common understanding of the institute is that expropriation represents taking/limiting of property, which is in private ownership by the state/government, in order to use such property for the benefit of the public.<sup>2</sup> Many countries but not all prescribe that expropriation has to be followed by adequate and timely compensation to the party involved (i.e. to the prior owner of expropriated property).<sup>3</sup>

Based on the definition of expropriation it can be concluded that full expropriation does not represent termination of the ownership right based on the will of holder of ownership title. The expropriation is, on the contrary, forced act of the state. Expropriation represents one type of transfer of ownership right, the termination of ownership for the individual holder represents the beginning of ownership for the beneficiary of expropriation.<sup>4</sup>

The fact that intrusion into property right disrupts the principle that ownership is absolute and inviolable right, qualifies such intrusion as an important issue that has to be specified in detail in the highest acts of the state.<sup>5</sup>

The Thesis tends to elaborate main problems arising out of different regulations of compensation and mechanisms envisaged for balancing between public and private interest, as

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<sup>1</sup> Prof. dr. Tomislav Vinš, *Journal of the Law Faculty in Pristina*, 'Meaning of Expropriation', [*Zbornik radova pravnog fakulteta u Prištini*, 'Pojam eksproprijacije'], (1997) no. 11-12, 100.

<sup>2</sup> Definition taken from the following website accessed on 27 February 2014  
<<http://www.investopedia.com/terms/e/expropriation.asp>>.

<sup>3</sup> *ibid.*

<sup>4</sup> Rajko Jelić, *Expropriation*, [*Eksproprijacija*], (Intermex 2009) 132-133.

<sup>5</sup> *ibid* 133.

conditions for lawful expropriation. The Thesis uses a comparative method by analyzing conditions prescribed under German Constitution, Serbian Constitution and European Convention of Human Rights for lawful expropriation. The purpose of the comparative method is to illustrate to the reader (i) which are the main problems that occur in the Jurisdictions when it comes to compensation and mechanisms for balancing between public and private interest, as conditions for lawful expropriation, and (ii) which one of three Jurisdictions provides better solution for the problem detected. Additionally goal of the Thesis, is to (i) familiar the reader with the property clause envisaged in Jurisdictions as starting point for regulating expropriation, (ii) familiar the reader with other institutes which clearly have to be distinguished from expropriation, and (iii) make the reader think about further possibilities of harmonization of expropriation regulations in Jurisdictions.

Serbian and German jurisdiction, are chosen as examples in this Thesis in order to provide better insight to the reader in views and principles regarding compensation and public interest, as crucial elements of expropriation. The ECtHR will describe a review of constitutional protection of German and Serbian jurisdiction, from the prospective of the Convention. The reader will be able to compare how the lawful expropriation is regulated on constitutional level and in which cases lawful expropriation is allowed under the Convention.

This Thesis is limited in the several aspects. Namely, first of all Thesis only elaborates the regulations of expropriation in the Jurisdictions. Furthermore, the Thesis specifically focuses on the comparison of the issues and regulations with respect to compensation and determination of public interest, and only in general on other conditions of lawful expropriation. On the other hand, the Thesis is not analyzing the possibility and regulation of the expropriation under investment treaties. Moreover, even though the particular institutes are mentioned in the Thesis, the Thesis will not elaborate the issues of partial expropriation and institutes similar to expropriation. Finally, the Thesis does not focus on the matter whether the compensation for

expropriated property should be provided as a replacement with another property with the same characteristics and quality or should it be monetary compensation.

Chapter I will show structure of property clauses in Germany, Serbia and in the European Convention of Human Rights. Main principles of protection and position of expropriation within the property clauses will be outlined as key aspects of Chapter I. Chapter II will disclose main problems that occur in Germany and Serbia with respect of distinguishing the measure of expropriation with the other measures that can be imposed by the state but are not that severe as expropriation. Furthermore, the conditions required for lawful expropriation will be addressed. Chapter III will be focused on one of the elements of expropriation which is very important and that is achieving public interest. The Chapter III will show how the states have resolved or did not resolve the issue of balancing between public and private interest, and which position the ECtHR took in this respect. Chapter IV will address the compensation as an important element of lawful expropriation. Two main standards will be compared, i.e. market value standard and fair value standard, and the ECtHR will be shown as protector of balance between these two types of compensation.

## CHAPTER I – COMPOSITION OF PROPERTY CLAUSE

Property is important right which has to be guaranteed by the highest norms in the legal system of the countries. Intrusion into property right disrupts the principles that ownership is absolute and inviolable right, therefore such intrusion, as well as guarantees for protecting right to property, have to be envisaged in the highest acts of the state.<sup>6</sup>

This Chapter will elaborate in comparison manner structure of property clause envisaged under German Constitution, Convention and Serbian Constitution, as well as the protection guaranteed thereof. The goal is to provide an overview of the main principles (in all three Jurisdictions three main principles are established):

- (i) recognition of peaceful enjoyment;
- (ii) limitations to property; and
- (iii) conditions for state intrusion, incorporated into the guaranteed right to property and to explain position of the expropriation within the property clause.

The Chapter will start with German system of protection of right to property (section 1.1) and will describe establishment of the main three principles of property right. The section will outline the dual function of property, i.e. private and social function, incorporated under the German law which differs from the nature of property established in Serbia, where social function is not explicitly envisaged within the property clause.

Further in second section 1.2 the ECtHR protection of property under the Convention will be described, outlining the main principles of protection in comparison manner with the German system. At the end in section 1.3 Serbian system will be elaborated in order to show main

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<sup>6</sup> Jelić, *Expropriation* (n 4) 133.



differences from the German system and ECtHR approach. The section 1.4 will outline the conclusion of comparison.

### **1.1. German Constitutional Guarantees of Protecting Right to Property**

Peculiarities of German system in regulating and protecting the property right represent its specific dual nature. According to Gregory S. Alexander<sup>7</sup>, property, as constitutional right, has two different functions. First important function of property is personal (private) function. The purpose of this function is to provide security for the individual's monopoly over his/her economic activities. Meaning that individual is authorized to freely make economic decisions relating to property, without prior consulting the state. On the other hand, as opposing function of the property there is a social (public) function. The purpose of this function is to serve public good, i.e. to advance the existing good of society.<sup>8</sup>

Gregory S. Alexander further notices that property clause clearly distinguishes existence of two types of limitation of property, social obligation and expropriation, however there is no clear guidelines how to distinguish them in terms of content, i.e. which state action would represent non-compensable social obligation (i.e. determining content and limits of the property right) and which will fall within the scope of compensable taking of property (expropriation). The interpretation and classification of the aforementioned state actions is left for courts to decide, therefore, in order to determine whether the constitutional right has been violated, i.e. whether the authorizations of the state to intrude are exceeded, the German courts have to balance between public and private interest.<sup>9</sup>

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<sup>7</sup>Jean McLean (ed.), *Property and the Constitution*, Gregory S. Alexander, 'Constitutionalizing Property: Two Experiences, Two Dilemmas', (Oxford, England; Portland, OR: Hart Publishing, 1999) 89 -103.

<sup>8</sup> The idea of this paragraph is taken from - McLean, Alexander, (n 7) 89 -103; D.P. Currie, "*The Constitution of the Federal Republic of Germany*", (Chicago, University of Chicago Press, 1994) 294-299.

<sup>9</sup> McLean, Alexander, (n 7) 89 -103.

By analyzing provisions of Article 14 of the German Basic Law which reads as follows:

*“(1) Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws. (2) Property entails obligations. Its use shall also serve the public good. (3) Expropriation shall only be permissible for the public good. It may only be ordered by or pursuant to a law that determines the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute respecting the amount of compensation, recourse may be had to the ordinary courts.”<sup>10</sup>*

we may see that German constitutional norms clearly reflect both dimensions of the property. The structure of the provision may be divided in three section (main principles), first section regulates enjoyment of property, second section establishes social dimension of the property and third section establishes the possibility for intrusion into private property for the purpose of expropriation. The provisions display parallel between two functions. Private property is established as legitimate and guaranteed right under the Basic Law, on the other hand such property right creates an obligation for the holder of ownership, given that Basic Law undoubtedly prescribes that the *“use of the property will also serve the public good”*<sup>11</sup>.

The provision further shows how the private dimension of property is juxtaposed to social dimension and state intrusions. Such intrusions to guaranteed property right are manifested through imposition of limitations over the use of property (social obligation) and through deprivation of property (expropriation). Even though property clause sets certain conditions for implementation of expropriation, which will be discussed in Chapter II below, the property clause does not provide clear differentiation between the qualities and characteristics which state action should possess in order to be treated as expropriation or as social obligation.<sup>12</sup> The test used by German courts<sup>13</sup> for differentiation will be discussed in the Chapter II below. It is

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<sup>10</sup>Basic Law for the Federal Republic of Germany 1949 [*Grundgesetz für die Bundesrepublik Deutschland*] accessed on 1 February 2014 <<http://www.iuscomp.org/gla/statutes/GG.htm>> (Basic Law).

<sup>11</sup> *ibid.*

<sup>12</sup> McLean, Alexander (n 7) 89 -103.

<sup>13</sup> Please note that the competence of the courts in Germany is divided with respect to the expropriation. However, both courts have to cooperate and adjust standards of review – Donald P. Kommers, *The constitutional*

worth mentioning that there is a division of court competence with respect of expropriation. Namely, the administrative court decides and performs judicial review for the administrative measures and actions of expropriation and the ordinary civil court performs judicial review regarding the amount of the expropriation. However both courts still have to take care the violations of fundamental rights.<sup>14</sup>

As concerns expropriation, Article 14 (3) of Basic Law explicitly prescribes that expropriation can be performed only for the purpose of public good. One of the characteristic of expropriation is that expropriation exists if the property is taken from the owner or the owner is totally disabled to use his/her property (real estate). Bearing this in mind, it is required to determine the type and characteristic of the property right of the owner before evaluating the lawfulness of expropriation. The owner has to possess certain authorizations and quality of right over the property, and in order to determine the scope of property right one has to examine all provisions of the applicable law that regulate property.<sup>15</sup> This further means that scope of individual right to property cannot be determined exclusively based on the civil law, but other parts of law such as public law have to be taken into account. Namely, public law may impose certain restriction to the private property (for example, may envisage provisions which regulate exclusion of use on the land and etc.) or it may happen that public law regulates use of certain property for the future, but such regulation may result in the restriction on the property at present case.<sup>16</sup> Therefore, all the above mentioned characteristics of property, have to be taken into consideration, when establishing the content of individual's property right. But, it is important

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*jurisprudence of the Federal Republic of Germany*, (Durham : Duke University Press, second edition c1997) 253.

<sup>14</sup> *ibid.*

<sup>15</sup> Sabine Michalowski and Lorna Woods, *The German Constitutional Law, the protection of civil liberties*, (Ashgate/Dartmouth 1999) 327.

<sup>16</sup> *ibid.*

to note that principle of no retroactivity is applicable for this case, i.e. by introducing limitations/exclusions in the future legislator cannot constitute expropriation at present.<sup>17</sup>

## **1.2. European Convention of Human Rights – Protection of Right to Property**

Property right is protected under Article 1 of Protocol 1 of the Convention and reads as follows:

*“(1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. (2) The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”<sup>18</sup>*

By analyzing the above stated provision we may conclude that property clause envisaged under the Convention, also like German system, contains three rules. Namely, first rule regulates peaceful enjoyment of property, second describes deprivation for the purpose of public interest and third establishes states’ power to enforce necessary law which will enable states to control the use of property and adjust such use to the general interest.

According to ECtHR practice, in order to evaluate whether property right has been violated in terms of the Convention through restriction placed to the individual (applicant) by the state, the following test is applied, i.e. ECtHR examines whether: (i) the restriction is provided by the law (principle of lawfulness); (ii) restriction pursue legitimate aim in public interest [actions which constitute public interest are not listed in the convention, therefore have to be evaluated each time]; (iii) restriction imposed is proportionate to the aim pursued (fair balance); and (iv) restriction is necessary in democratic society.<sup>19</sup> In other words, an interference with the

<sup>17</sup> Michalowski and Woods (n 15) 328.

<sup>18</sup> Article 1 of Protocol 1 of Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, (1950, 1952, 1963, 1966) accessed on 20 February 2014 <[http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf)> (Convention or ECHR).

<sup>19</sup> The idea for this paragraph is taken from: Aida Grgić, Zvonimir Mataga, Matija Longar and Anal Vilfan, *The Right to Property under the European Convention on Human Rights*, (Council of Europe, 1st edition, 2007), 12, accessed on 5 March 2014, <[http://www.coe.int/t/dgi/publications/hrhandbooks/HRHAND-10\(2007\)\\_en.pdf](http://www.coe.int/t/dgi/publications/hrhandbooks/HRHAND-10(2007)_en.pdf)>.

property right will constitute a violation of Article 1 of Protocol 1 of the Convention unless the three step test is met (i) the intrusion has legal certainty; (ii) the intrusion has public interest; (iii) the reasonable proportionality exists between the intrusion and the aim, and reasonable proportionality exists between public and individual interest.<sup>20</sup> All these requirements have to be met cumulatively. In case some of the requirements are not met, there will be a violation of Article 1 of Protocol 1 of the Convention.

Finally, we may see that the term expropriation is not explicitly mentioned like in German system.<sup>21</sup> The practice of ECtHR is not only looking at formal expropriations but also in *de facto* expropriations [*Weber v. Germany*<sup>22</sup>].

### 1.3. Serbian Constitutional Guarantees of Protecting Right to Property

Right to property is guaranteed under Article 58 of Serbian Constitution, which reads as follows:

*“(1) Peaceful tenure of a person’s own property and other property rights acquired by the law shall be guaranteed. (2) Right of property may be revoked or restricted only in public interest established by the law and with compensation which can not be less than market value. (3) The law may restrict the manner of using the property. (4) Seizure or restriction of property to collect taxes and other levies or fines shall be permitted only in accordance with the law.”*<sup>23</sup>

By analyzing the provisions of Article 58 of Serbian Constitution, it is also obvious that the pattern of three rules like in Germany and under ECtHR exist. First - peaceful enjoyment of property is guaranteed. Second - the property may be taken from the owner for the purpose of public interest based on the law and against adequate compensation which cannot be less than

<sup>20</sup>Mark W. Janis, Richard S. Kay, Anthony Wilfred Bradley, *European Human Rights Law, text and materials*, (third edition, Oxford University Press, 2008) 525.

<sup>21</sup> Janis, Kay, and Bradley, (n 20) 540.

<sup>22</sup> Susanne Weber v Germany, App no. 55878/00 (ECtHR, Chamber, 23 October 2006).

<sup>23</sup>Official translation of the Constitution of Republic of Serbia, Article 58, [*Ustav Republike Srbije*] (2006), accessed 15 March 2014 <[http://www.srbija.gov.rs/cinjenice\\_o\\_srbiji/ustav\\_odredbe.php?id=218](http://www.srbija.gov.rs/cinjenice_o_srbiji/ustav_odredbe.php?id=218)> (Serbian Constitution).

market value, and third - state can through laws restrict and regulate the manner of use of property.

In Serbian system, expropriation is regulated by the specific law – Law on Expropriation<sup>24</sup> which specifically prescribes the procedure and details with respect of expropriation and *inter alia*, compensation. However, public interest as one of the elements of expropriation can be determined by other laws which do not even mention expropriation, but just establish public interest. On contrary, in Germany, laws on expropriation are adopted on state level, those laws regulate procedure of expropriation, compensation and etc., however other laws that establish the legal base for expropriation have to mention the issue of compensation.<sup>25</sup>

#### 1.4. Conclusion of Comparison

There are many differences and similarities between the property clauses listed herein. In all three jurisdictions right to property is placed together with the right of the state to deprive property in return for compensation. However, only in German system additional limitation to property is added and that is social obligation. This limitation is not present in current Serbian system nor in the system of protection under the Convention.

Other difference which can be detected is that only German property clause explicitly mentions the term “expropriation”. In other two systems expropriation is comprised within the explanation of limitations and possible deprivations.

Furthermore, it can be seen that all three jurisdictions mention that deprivation / expropriation / state intrusion can be justified if it is against compensation, but there are differences in

<sup>24</sup>Law on Expropriation [*Zakon o eksproprijaciji*] („Official Gazette of Republic of Serbia”, no 53/95, "Official Gazette of SR Y", no. 16/2001, "Official Gazette of Republic of Serbia", no. 23/2001, 20/2009, 55/2013 (Decision of Constitutional Court)), accessed on 2 March 2014 <[http://www.paragraf.rs/propisi/zakon\\_o\\_eksproprijaciji.html](http://www.paragraf.rs/propisi/zakon_o_eksproprijaciji.html)> (Law on Expropriation).

<sup>25</sup>For example please see, Articles 18-21 of the Bavarian Law for the Protection and Preservation of Monuments (Monument Protection Law) from 25th June 1973 (BayRS 2242-1-K), last revised 27th July 2009 (GVBl 2009 p. 385, 390 f.) accessed on 10 March 2014 <[http://www.blfd.bayern.de/medien/dsg\\_eng\\_2009.pdf](http://www.blfd.bayern.de/medien/dsg_eng_2009.pdf)>.

prescribing of minimal amount that can be assigned as compensation. The issue of compensation will be further elaborated in Chapter IV.

## CHAPTER II – CONDITIONS FOR LAWFUL EXPROPRIATION

The previous Chapter I positioned expropriation within the property clause. This Chapter II will elaborate in more details how to distinguish measure of expropriation from other measures that can be imposed to the property but which do not represent total cessation of ownership right as in the case of expropriation. The distinction between other measures and expropriations is important in national level (i.e. in German and Serbian system) given that different conditions for evaluating constitutionality and justifiability apply depending on the type of measure.

On the other hand ECtHR is not mainly concerned whether the accurate type of measure has been imposed to the property, given that ECtHR provides wide margin of appreciation to the states in this respect.<sup>26</sup> However, the ECtHR will be concerned whether the imposition of limitation passed the prescribed ECtHR test (as explained in Chapter I above section 1.2). The only situation in which ECtHR will pay attention to the type of measure is in the case where such measure is obviously improper.<sup>27</sup>

The other matter that will be addressed in this Chapter will be conditions that have to be met in order to have lawful expropriation.

The Chapter is made in comparison manner and will outline the main differences regarding the conditions for lawful expropriation between the Germany, Serbia and ECtHR. The chapter will start with the Germany (section 2.1) then will explain ECtHR point of view (section 2.2) and then how the conditions are prescribed in Serbian system (section 2.3).

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<sup>26</sup> Prof. dr. Jacques Sluysmans & R.L. de Graaff, 'Land reform in the case law of the European Court of Human Rights. Lessons for South-Africa?' (Conference on 'Land Divided: Land and South African Society in 2013, in Comparative Perspective', University of Cape Town, 24 – 27 March 2013), 8, accessed on 10 March 2014 <<http://www.landdivided2013.org.za/sites/default/files/sluysmans%20european%20court%20of%20human%20rights.pdf>>.

<sup>27</sup> *ibid.*



## 2.1. Lawful Expropriation in Germany

In Germany it is important to distinguish measure of expropriation envisaged under Article 14(3) of the Basic Law and measure of determining content and limits to the property envisaged under Article 14(1) of the Basic Law, given that different conditions for evaluating constitutionality of the measures apply. Section 2.1.1. will elaborate the test for distinguishing these two measures that can be imposed by the state to the property and the owner.

Section 2.1.2. will explain the conditions for lawful expropriation under the German law.

### 2.1.1. *Expropriation v. Determining Content and Limits to Property*

It is important to make a distinction between (i) the measure of expropriation and (ii) determining content and limits of property right. As already mentioned above in Chapter I section 1.1. German framer did not make clear distinction between these two terms. However, German courts made an interpretation of the property clause:

*„if the burden of a regulation falls heavily on an individual owner, depriving him of the use of his property, and if all benefits of the regulation are claimed by the public, the state is then obliged to compensate the owner. On the other hand, no compensation is due if uniformly imposed regulation confers benefits on all owners while exacting limited cost from all for the sake of the common good“.*<sup>28</sup>

The courts took position that the difference between expropriation and determination of content and limit should be determined based on the following criteria:

- (i) expropriation is a concrete measure as opposed to determination of content and limit which is abstract;
- (ii) expropriation effect is individual (i.e. it affects concrete individual) and the effect of determination of content and limit is general (i.e. the class of people); and

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<sup>28</sup> Kommers, (n 13) 253.

- (iii) expropriation takes the land from the owner definitely (either through termination of ownership, either by disabling the use of the land in total), as opposite to determination of limit and content which leaves the property to the owner and just limits pure use.<sup>29</sup>

The leading case for determining the difference between these two intrusions to property was decision made in *Gravel Mining (Nassauskiesung) decision*<sup>30</sup>.

When analyzing the provisions of Article 14 of the Basic Law we may also distinguish between paragraphs 14(1) and 14(2) which are more focused on protecting property as object, i.e. guaranteeing the protection of the object of property, on one hand, from the paragraph 14(3) which expresses the property as a value, i.e. guarantees that in the exchange for the expropriated property fair value of such property will be paid to the owner, on the other hand. This shows the basis for claiming that the expropriation is only lawful against compensation, and determining content and limits are not compensable measures.

Theories used by the courts for distinguishing the difference between expropriation and determining of limits and content were (i) the theory of sacrifice; (ii) theory of gravity of impact; and (iii) theory of socially bound property.<sup>31</sup> These approaches are now used only for determination of the limits and content of the property, and the new approach which is narrowly tailored is used for expropriation.<sup>32</sup> The main elements for expropriation which are used as a test to distinguish expropriation from the determination of limits and content are (i) it has to be through legal measure, (ii) it has to be in public interest and (iii) it has to take the title over the

<sup>29</sup> Ulrich Karpen (ed.), *The Constitution of the Federal Republic of Germany, Essays on the Basic Rights and Principles of the Basic Law with a Translation of the Basic Law*, Gunnar Folke Schuppert, University of Augsburg, 'The right to property' (Baden-Baden : Nomos, 1988), 113.

<sup>30</sup> *Gravel Mining decision*, BVerfG 1981, 58 BVerfGE 300 (F.R.G.).

<sup>31</sup> Karpen, Schuppert (n 29) 116-117.

<sup>32</sup> A. Gromitsaris, 'Expropriation, Takings, Annual Report 2011 Germany', (Ius Publicum, 2011) 43-45, accessed on 10 February 2014 <[http://www.ius-publicum.com/repository/uploads/21\\_03\\_2012\\_12\\_05\\_Gromitsaris\\_Expropriation.pdf](http://www.ius-publicum.com/repository/uploads/21_03_2012_12_05_Gromitsaris_Expropriation.pdf)>.

property from the owner/or disable the owner to economically use the land in total [*de facto* expropriation].<sup>33</sup> However, even though these theories for distinction exist, courts still have difficulties in determining which state action can be deemed as *de facto* expropriation and which state action represents only defining content and limits to the property.

It is important to note that determining the content and limits of the property (under Article 14 (2)) cannot trigger the expropriation and result in compensation obligation.<sup>34</sup>

In section 2.3.1. of this Chapter II the reader can see that in Serbia similar problem of distinguishing measure of expropriation with other measures that can be imposed by the state for limiting the use of certain property. The reader will also be able to conclude that Serbian and German courts use similar principles in interpretation of the provisions regarding these two measures.

In addition, it is also important to distinguish other interferences of the state which have to be compensated from the measure of expropriation. There are two types of these acts: (i) quasi expropriation – illegal – unintended interference, administration did not have the intention to act illegally (causing forest fire by artillery shooting<sup>35</sup>); and (ii) expropriating interferences – legal, but it is unintended side-effect occurred by the administrative action which had a totally different purpose (“encroachment on a piece of land through a pipe burst of the municipal water supply”<sup>36</sup> or “devastation of farmland by mews and crows, attracted by municipal dumping ground”<sup>37</sup>).<sup>38</sup>

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<sup>33</sup> Gromitsaris (n 32) 43-45.

<sup>34</sup> Kommers, (n 13) 328; *Gravel* (n 30).

<sup>35</sup> Karpen, Schuppert (n 29) 118.

<sup>36</sup> *ibid.*

<sup>37</sup> *ibid.*

<sup>38</sup> *ibid.*

### 2.1.2. *Conditions for Lawful Expropriation*

As already mentioned in the introductory part of this section, in Germany exists a four step test which each expropriation has to meet in order to be lawful:

- (i) it has to be explicitly envisaged by the law;
- (ii) it has to be made through appropriate means;
- (iii) it has to be necessary and the measure of last resort for achieving the public goal;  
and
- (iv) the public interest has to outweigh private interest.<sup>39</sup>

More specifically, according to the Annual Report for 2011 and the Article 14(3) of the Basic Law lawful expropriations must be prescribed by the law which simultaneously regulates the issue of compensation (the second sentence in Article 14(3) of the Basic Law, constitutes a linking clause), and it must be performed for the public interest. If the statute which authorizes expropriation does not regulate the compensation explicitly, such statute is unconstitutional, because the court cannot redeem the lack of compensation clause with interpretation, therefore the existence of linking clause guarantees that expropriation will not take place unintended and will be regulated by the law.<sup>40</sup> This is not the case in Serbia and is not a rule envisaged by the Convention.

The legislator has to determine the type of compensation, basis for assessment and applicable standards, by taking in consideration the balance between community and personal interest, not the court or administration [*Hamburg Dyke Order Act Case*<sup>41</sup>, in this case the court made material remarks with respect of the protection of property].<sup>42</sup> The purpose of compensation is

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<sup>39</sup> 'Expropriation in Europe 2013, Land Expropriation in Europe, legal memorandum', January 2013, 7, accessed on 14. February 2014 <<http://www.mreza-mira.net/wp-content/uploads/Expropriation-in-Europe-Jan-2013.pdf>> (Expropriation in Europe 2013).

<sup>40</sup> Gromitsaris (n 32) 45-47.

<sup>41</sup> BVerfGE 24,367 (Federal Constitutional Court, 1968).

<sup>42</sup> Michalowski and Woods, (n 15) 331.

to reconcile two interests of community and person concerned. It has to be decided by balancing in each particular case and in each particular time when expropriation is about to happen, because the main goal is to come to the level of compensation which is fair for that specific expropriation in that specific moment.<sup>43</sup> The compensation will be addressed in Chapter IV below.

Article 14 of Basic law explicitly envisages that expropriation has to be explicitly envisaged by the law, in Germany expropriation is allowed through many different laws (at the national level and federal level). Part with respect of compensation is mentioned in the act which determines the public interest however the procedure for calculating the value of compensation is determined in a special act (each federal state passed this act – expropriation act).<sup>44</sup>

The other condition, besides compensation, is that expropriation has to be performed in public interest. The matter of public interest will be discussed in Chapter III below.

Next condition is that the expropriation is used as measure of last resort. Namely, in the event that the public interest can be achieved with the same quality through other means, i.e. purchase on open market under the reasonable price, or restriction can be imposed to the land which will not deprive the title of ownership in total, expropriation will not be allowed.<sup>45</sup> Meaning that this measure will be triggered only if none of the other measures can apply.

Finally, in order to have lawful expropriation, certain procedure has to be respected. If certain property is required for the public interest, there are several steps that should be followed by the public officials: (i) public officials have to try to negotiate with the owner in order to have

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<sup>43</sup> *ibid.*

<sup>44</sup> 'Regulation of expropriation Germany - Compulsory Purchase in Poland, Norway and Germany', Part Germany (Winrich VOSS, Germany, paper for XXIV FIG International Congress 2010 Facing the Challenges – Building the Capacity, Sydney, Australia, 11-16 April 2010), 3, accessed on 2 March 2014 <[http://www.fig.net/pub/fig2010/papers/ts03f%5Cts03f\\_voss\\_4220.pdf](http://www.fig.net/pub/fig2010/papers/ts03f%5Cts03f_voss_4220.pdf)> (Regulation of expropriation in Germany).

<sup>45</sup> Gromitsaris, (n 32) 48.

voluntary transfer of the property by presenting the reasonable offer to the owner; (ii) in case that the owner does not accept the offer public officials may initiate a normal procedure for reaching the voluntary agreement through hearings of parties involved as a second attempt; (iii) if this attempt also does not work and the negotiations fail, public officials may require an expropriation from the competent expropriation authority, which is competent to decide about expropriation and the amount of expropriation.<sup>46</sup>

The expropriation is executed by the special agencies determined by the law which are authorized to expropriate property rights when all specified conditions for expropriation along with the general condition, i.e. public interest are met.<sup>47</sup> The individuals may appeal the decision to the ordinary court, however in case they do not receive any kind of compensation then the entire expropriation should be challenged as unconstitutional rather than changing the decision which envisaged no compensation.<sup>48</sup>

## **2.2. Position of ECtHR on Conditions for Lawful Expropriation**

ECHR does not mention the term “expropriation” in property clause (oppositely to other two jurisdictions). Expropriation is encompassed by deprivation. As already discussed in Chapter I, among other conditions, deprivation (and thereby expropriation) has to be envisaged by the national law, and not just any law, but the law which possesses qualities, that can be deemed as foreseeable and therefore with certain procedural guarantees as boundaries for deprivation.<sup>49</sup> According to the Convention, like in Germany (but maybe not that strictly because of the margin of appreciation), expropriation is seen as a measure of last resort, therefore the standpoint is that it should not be easily accessible.

<sup>46</sup> Expropriation in Europe 2013 (n 39) 16.

<sup>47</sup> Christian Starck (ed.), *Rights, Institutions and Impact of International Law according to the German Basic Law*, Otto Kimminich ‘The Property Rights’, (Baden-Baden : Nomos, c1987) 89.

<sup>48</sup> Expropriation in Europe 2013 (n 39) 7.

<sup>49</sup> Sluysmans and de Graaff (n 26) 8.

The ECtHR provides wide margin of appreciation for the states in choosing the suitable measure to pursue the legitimate aim. Given that the state is in a better position to evaluate which type of a deprivation measure will be optimal for the situation at hand, the ECtHR will not hold that the measure is unjust just because there are other possible alternatives.<sup>50</sup> This further means that in case of expropriation, the ECtHR will not find that the measure is unjust just because the same goal could be achieved through other means, as long as this state decision to pursue the legitimate aim through expropriation is within the States' margin of appreciation. The ECtHR is using reasonableness test<sup>51</sup> in determining whether certain action of the state falls within its discretion.<sup>52</sup> In the event when the conformity of margin of appreciation with the proportionality is questionable the ECtHR is using the following guidelines, the ECtHR is considering the significance of the right, objective of the restriction and whether the consensus among the states exist on the matters (in case such consensus exist, it will be applied as a minimum standard of protection for the right concerned).<sup>53</sup>

In deciding whether the expropriation is the violation of Article 1 of Protocol 1 of the Convention, the ECtHR is also taking in consideration other circumstances besides the compensation, such as establishing whether the deprivation of property at hand is the *de facto* expropriation, i.e. whether due to the activity of the state the holder of the certain right lost his right not just in its substance but in its entirety.<sup>54</sup>

<sup>50</sup> Sluysmans and de Graaff (n 26) 11.

<sup>51</sup> Reasonableness test established established for the first time in the case of *Marckx v Belgium*, App. No 6833/74, (ECtHR, 1979); case of *Sunday Times v. The United Kingdom*, App No. 6538/74 (ECtHR 26 April 1979).

<sup>52</sup> Stefan Kirchner and Katarzyna GelerNoch, *Compensation Under the European Convention on Human Rights for Expropriations Enforced prior to the Applicability of the Convention* [Kompensacijos Pagal Europos Žmogaus Teisių Konvenciją Dėl Turto Konfiskavimo, Įvykdyto Iki Konvencijos Įsigaliojimo] (JURISPRUDENCE 19, no. 1 2012) 21–29.

<sup>53</sup> Council of Europe, The Margin of appreciation, accessed on 18 March 2014  
<[http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2\\_en.asp](http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp)>.

<sup>54</sup> Sluysmans and de Graaff (n 26) 7.

## 2.3. Lawful Expropriation in Serbia

This section will explain how to distinguish expropriation with other measures of limitation that can be imposed to the property under the Serbian law and the conditions that have to be met in order to perform lawful expropriation.

The chapter will show in comparison manner what the main similarities with the German system are. Both of the jurisdictions, had difficulties in creating criteria for distinguishing expropriation from other measures that can be imposed to the owner and the property. Additionally, both jurisdictions prescribe number of requirements regarding the procedural matters of expropriation.

The main difference is that Serbian property clause is not conditioning that law used as a legal basis for expropriation has to simultaneously regulate the compensation, which is the case in Germany.

On the other hand the chapter will describe the inconsistencies with the ECtHR practice and problems which may occur with respect of complying with the Convention.

### 2.3.1. *Expropriation v. Other Measures*

In Serbia, like in Germany, it is required to make a distinction between expropriation and other limiting measures imposed by state to certain property and ownership right, given that different conditions apply in evaluating constitutionality of the measure. Namely, there are several criteria for distinguishing these two institutes:

- (i) first of all, expropriation is individual administrative act against a natural or legal person or group of natural or legal persons that can be determined (i.e. distinguished from others) and other limiting measures are more generally determined;



- (ii) secondly, the expropriation beneficiary can be public owned entity or state organ (even in cases of joint venture with the private entity, the majority shareholder of the company established as a special purpose vehicle for the purpose of expropriation must be the state) and for the other measures beneficiary can also be private entity/person;
- (iii) thirdly, private interest has to exist which is determined in a special procedure;
- (iv) fourthly, compensation is one of the requirements for the expropriation, this is not necessary for the other measures; and
- (v) finally, with expropriation the ownership ceases, meaning that expropriation is severe intrusion into property rights, and with other limiting measures cessation of property right is not a rule.<sup>55</sup>

Here we can see that the Serbian court uses similar principles as German court in distinguishing measure of expropriation and other limitations on the land.

### ***2.3.2. Conditions for Lawful Expropriation***

Conditions prescribed in the property clause, i.e. Article 58 of the Serbian Constitution, provide that in order to have lawful expropriation such measure has to be taken in public interest and against adequate compensation which cannot be determined below the market value.<sup>56</sup> It is important to note that the Serbian property clause does not envisage that the compensation has

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<sup>55</sup>The idea for the distinction between measure of expropriation and other measures that can be imposed by the state to the property and the holder of the title is taken from: Jelić, *Expropriation* (n 4) 136.

<sup>56</sup> Article 58 of Serbian Constitution.

to be determined by the same law which is used as a legal base for expropriation as explicitly conditioned in Germany.

As in Germany, in Serbia also exist the procedural aspect which as to be followed in order to implement lawful expropriation (the procedure for implementation is described in Chapter IV section 4.3. below).

On the other hand when comparing with the ECtHR and the Convention, the structure of the Serbian property clause and the conditions set therein are in compliance with the ECtHR standards for limiting the peaceful enjoyment of property.<sup>57</sup> But, Serbian Law on Expropriation still has some inconsistencies with the ECtHR standards. Namely, it was not envisaged for the state to take in consideration the interest of the owner in order to balance that interest with the public interest.<sup>58</sup> The issue of public interest will be further elaborated in Chapter III. Furthermore, the beneficiary of expropriation is required to make registration in the Land Register based on the proposal for expropriation.<sup>59</sup> Even though this does not trigger the process of expropriation, thus expropriation itself can take place years later, the requirement of registration creates problem for the current owner of the property, given that such annotation decreases the value of the property.<sup>60</sup>

Bearing in mind the issues emphasized above, one may wonder whether Serbian Law on Expropriation actually reflects all principles of the Convention and standards determined by the ECtHR. The answer to that questions is that in some parts it does not. According to UN-HABITAT's report<sup>61</sup>, Serbian Law on Expropriations still does not reflect the all principles mentioned in the Convention. Basically the Law on Expropriation still has to be amended in

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<sup>57</sup>United Nations Human Settlements Programme, *Housing and Property Rights, Bosnia and Herzegovina, Croatia and Serbia and Montenegro*, (UN-HABITAT 2005) 118.

<sup>58</sup> *ibid.*

<sup>59</sup> Article 32 of Law on Expropriation.

<sup>60</sup> United Nations Human Settlements Programme (n 57) 118.

<sup>61</sup> *ibid.*

light of protection of the owner. The principle of “*fair hearing within reasonable time*” set forth in the Article 6 paragraph 1 of the Convention has to be improved. In addition the availability of information and disclosure of government’s reasons for balancing in favor of public interest over private interest should be elaborated in more details.<sup>62</sup>

Further, one may see that ECtHR is not intruding into sovereignty of the states, instead it is leaving to the states to decide with respect of the measures which they want to impose to the property or the owner in order to control the use of property. Additionally, ECtHR leaves to the states to determine the meaning of public interest, since the state is more familiar with the potential specifics of its system, applicable regimes, political and social conditions.

## **2.4. Conclusion**

This Chapter II showed us (i) which are the main conditions for performing lawful expropriation under German and Serbian law, (ii) how the ECtHR evaluates justifiability of the expropriation conditions prescribed on national levels, and (iii) based on which principles one should distinguish measure of expropriation and other measures that can limit content or use of the property. Next Chapter III will focus more on one particular condition of expropriation and that is public interest.

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<sup>62</sup> United Nations Human Settlements Programme, (n 57) 117-119.

## CHAPTER III – INDIVIDUAL INTEREST V. PUBLIC INTEREST

The purpose of this chapter is to outline principles used in Germany, by the ECtHR and in Serbia for balancing between individual and private interest, in expropriation cases. The Chapter will start with German approach (section 4.1) showing how the practice of the courts introduced standards for determining public interest. The next section 4.2 will describe how ECtHR observes the requirement of public interest. And the last but not the least section 4.3 will elaborate the how the public interest is determined in Serbia and on what grounds, this section will also provide comparison with the German system and ECtHR approach.

### 3.1. German Approach

According to the German law, expropriation can only take place if it is, beside other conditions already mentioned in Chapter II, performed in public interest. The public interests that are usually justified for expropriation are infrastructure measures (e.g. new national roads, pipelines, airports, railways, monument protection, flood prevention, urban planning, protection of water resources).<sup>63</sup>

The Article 14 (3) of the Basic Law, explicitly prescribes that the “[...] *such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected.*[...]”<sup>64</sup>. It can be noticed that framer explicitly envisaged balancing between private and public interest as a component which should be taken into consideration when defining compensation for expropriation. This represents one of the specificities of German system, given that in (some) other countries (for example Serbia) balancing is not explicitly included into structure of property clause (please see section 3.2 of this Chapter).

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<sup>63</sup> Regulation of expropriation in Germany, (n 44) 3.

<sup>64</sup> Article 14 (3) of the Basic Law.

Another specificity of German system with respect of public interest is that, in case the conditions explained below are met, it is allowed to determine private entity as beneficiary of expropriation. This is not common in other jurisdictions. Namely, the standpoint of the court regarding this question is that, it is not decisive whether the company [beneficiary of the expropriation] is the organized by the public or private law (i.e. whether is privately or publicly owned) but whether the purpose of expropriation is performing specific public interest.<sup>65</sup> Leading case in this respect is *Boxberg*<sup>66</sup> decision. In this decision Federal Constitutional Court held that private entity can even perform indirect public interest (creating jobs) however this should be specifically indicated when determining common good and public interest for the expropriation as a legal basis.<sup>67</sup> Additionally, Federal Constitutional Court held that in case the private entity is beneficiary of the expropriation, strict control over the implementation and realization of the public interest should be determined, i.e. the safeguard mechanisms have to be envisaged in order to ensure accomplishment of the public interest in the future.<sup>68</sup> The safeguard mechanism is important, because it ensures the application of the mandatory norms German law and it preserves public order. Safeguard mechanism prevents circumvention of applicable law and prevents expropriation in prevailing private interest.

### 3.2. ECtHR Approach

The ECtHR provides wide margin of appreciation to the states when assessing public interest. This occurs due to the fact that public interest is not a defined term therefore ECtHR holds that states are in a better position than international court, to evaluate whether implemented

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<sup>65</sup>Michalowski and Woods, (n 15) 319-333; E. Cornelius, *The Justificatory Requirements For The Third Party Expropriations For Economic Development Purposes: 'A Comparative Analysis,'* 57-59, accessed on 20 March 2014

<[http://www.nwu.ac.za/sites/www.nwu.ac.za/files/files/p-nwuslr/documents/2013%281%29/E\\_Cornelius.pdf](http://www.nwu.ac.za/sites/www.nwu.ac.za/files/files/p-nwuslr/documents/2013%281%29/E_Cornelius.pdf)>.

<sup>66</sup> BVerfGE 74, 264 (Boxberg) 1986 (Federal Republic of Germany).

<sup>67</sup> Michalowski and Woods, (n 15) 330.

<sup>68</sup> *Boxberg* (n 66) 286.

measures pursued public interest or not.<sup>69</sup> If the state is considering to enact the law which will be legal base for expropriation, the state will take in consideration political, economic and social matters and issues.<sup>70</sup> Bearing in mind that each state has its own political, social and economic issues which are specific, it is correct to deem that domestic court is in a better position than the international court to evaluate whether, taking all in consideration, public interest is achieved. In this respect the ECtHR generally respects evaluation made by legislature and judgment made by the domestic court concerning public interest, save for the cases where is obvious foundation for claiming the public interest does not exist.<sup>71</sup> Having this in mind, it is unlikely that the ECtHR will challenge public interest determined according to the German or Serbian conditions.

When observing public interest, the ECtHR evaluates time passed between authorizing the expropriation and actual performance of expropriation. As indicated in the cases of *Sporrong and Lönnroth v. Sweden*<sup>72</sup> the ECtHR ruled in favor of private interest and peaceful enjoyment of property and against public interest and deprivation of property.<sup>73</sup> The applicants did not challenge the state measure of intrusion but the time which was granted (and prolonged for nearly 25 years) for the municipalities to execute the expropriations of marked properties against fixed compensation.<sup>74</sup> Due to the long period of time the owners of the land which was dedicated for the expropriation could not invest, sell, or mortgage property. Those restrictions were taken into account, during the assessment whether the deprivation of property was disproportionate to the aim pursued. These decisions are emphasizing property (peaceful

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<sup>69</sup> Grgić, Mataga, Longar and Vilfan (n 19) 14.

<sup>70</sup> Sluysmans and de Graaff (n 26) 11.

<sup>71</sup> *ibid.*

<sup>72</sup> *Sporrong and Lönnroth v. Sweden*, App No. 7151/75; 7152/75 (ECtHR 23 September 1982) accessed on 10 March 2014 <[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57580#{"itemid":\["001-57580"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57580#{)>.

<sup>73</sup> Howard Charles Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, (Dordrecht : M. Nijhoff, c1996) 140-158.

<sup>74</sup> *ibid.*

enjoyment of property) as important freedom guaranteed by the Convention.<sup>75</sup> The above mentioned case was leading case in which ECtHR for the first time discussed three rules of the property clause (regarding peaceful enjoyment and state intrusion into private ownership) and set standards for interpretation of “fair balance”.

Later on, ECtHR developed the standards for evaluating fair balance. In this respect the ECtHR especially takes in consideration two particular matters:

- (i) protection from making arbitrary decisions and whether the authorities disclosed relevant information to the parties concerned, or whether authorities ensured the parties concerned regarding the possibility that their property is affected; and
- (ii) compensation in financial terms.<sup>76</sup>

In the matter indicated under letter (i) in the preceding paragraph, the ECtHR is reviewing whether defects during the process of decision making have resulted in uncertainty which can be qualified as considerable and prolonged (as in *Sporrong*<sup>77</sup>) for the owner (applicant), and therefore placed disproportionate burden to the owner (applicant).<sup>78</sup> When it comes to the financial terms, in case of *James and others v. United Kingdom*<sup>79</sup> the Court set the standard that interference with the property by the state (not only expropriation) should be compensated in order to achieve fair balancing. But what is important, the ECtHR held that the failure to pay compensation would, in normal circumstances create misbalance between the intrusion and the individual property interest, however the exceptional cases which allow lack of compensation in return for the intrusion exist.<sup>80</sup>

<sup>75</sup> *ibid.*

<sup>76</sup> Janis, Kay, and Bradley, (n 20) 554.

<sup>77</sup> *Sporrong*, (n 72).

<sup>78</sup> Janis, Kay, and Bradley, (n 20) 554-555.

<sup>79</sup> *James and others v. United Kingdom*, App No. 8793/79, (EctHR 21 February 1986) accessed on 10 March 2014 <[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57507#{"itemid":\["001-57507"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57507#{)>.

<sup>80</sup> Janis, Kay, and Bradley, (n 20) 555.

### 3.3. Serbian Approach

According to the Serbian law on expropriation public interest has to be determined by the law or based on the decision of the government in accordance with the law.<sup>81</sup> This means that the government is authorized to issue a decision which will determine the public interest. The possibility to determine legal base for expropriation by the governments act is not explicitly envisaged under the German law.

Usually the public interest is determined for the purpose of education, culture, sport, energetic or communal infrastructure, mineral exploitation and etc.<sup>82</sup> Even in the case that the government issues the decision on determination of public interest, it is important to note that this decision is not expropriation decision, but just one of the conditions required for implementation of the same.<sup>83</sup> This is the same like in Germany.

According to Article 8 of the Law on Expropriation, the beneficiary of expropriation can be Republic of Serbia, autonomous provinces, local municipalities, public entities and etc.<sup>84</sup> This means that private entity cannot be beneficiary of expropriation, and that expropriation cannot be made for the purpose of private interest. The conditions prescribed by this clause have similarities and differences with the conditions envisaged by the German law. Namely, as described above in section 4.1 German court practice allows that private person can be beneficiary of the expropriation as long as it acts in public interest and with prescribed safeguard measures. In my opinion German law has developed good practice by allowing private entities to be beneficiary of expropriation if they are acting in public interest. The effect of this is facilitation of requirements for performing useful activities in public interest. Namely,

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<sup>81</sup>Article 2 of Serbian Law on Expropriation.

<sup>82</sup>Article 20 of Serbian Law on Expropriation.

<sup>83</sup> Decision of Constitutional Court dated 23 May 2013, available in Serbian language, accessed on 10 March 2014  
[<http://www.ustavni.sud.rs/page/view/sr-Latn-CS/80-101831/saopstenje-sa-17-sednice-ustavnog-suda-odrzane-23-maja-2013-godine-kojom-je-predsedavao-dr-dragisa-slijepcevic-predsednik-ustavnog-suda>.](http://www.ustavni.sud.rs/page/view/sr-Latn-CS/80-101831/saopstenje-sa-17-sednice-ustavnog-suda-odrzane-23-maja-2013-godine-kojom-je-predsedavao-dr-dragisa-slijepcevic-predsednik-ustavnog-suda)

<sup>84</sup>Article 8 of Serbian Law on Expropriation.



according to Serbian law, foreign investor through its Serbian subsidiary, cannot be engaged to act in public interest and become beneficiary of expropriation. Instead, in order to become a beneficiary of expropriated property, such foreign investor is to establish *joint venture* with the state, where Republic of Serbia will be majority shareholder. This is not the case in Germany, given that the courts clearly in *Boxberg*<sup>85</sup> held that private person can be determined as beneficiary as long as it performs activities in public interest and with additional safeguards. I think that German approach is business oriented and that other countries should also accept this approach.

Before the adoption of current Law on expropriation, it was not easy to define public interest. Currently valid law provides guidelines on what can be used as public interest and who is authorized to define the public interest.<sup>86</sup> In this respect the task of the courts in interpreting the provisions regarding public interest is facilitated. However, there is another issue that should be resolved. Namely, as mentioned in Chapter III, the law does not explicitly prescribe that the state has to balance between public and private interest. Therefore, one may ask the question, *how the government determines that the public interest in the case at hand is more important than the individual interest?* This issue will require further amending of the law, and the imposing obligation to the government to elaborate why in the case at hand public interest outweighed private interest, which will be especially important in the case where those interests are almost equal.<sup>87</sup>

In Serbia, the law on expropriation or the Article 58 of the constitution does not require for the government to elaborate the manner how they came to the conclusion that the public interest should outweigh the private interest. In my opinion this is very disputable issue, given that it

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<sup>85</sup> *Boxberg* (n 66).

<sup>86</sup> Rajko Jelić, *Legal Informer*, 'Amendments and supplements in the expropriation procedure', [*Pravni informator*, 'Izmene i dopine u postupku eksproprijacije'], (2009) 22-23.

<sup>87</sup> United Nations Human Settlements Programme (n 57) 118.

lacks transparency. Such grave intrusion into property should be transparent in order to prevent circumvent of the provisions prescribed by the law. The issue of system not being enough transparent can trigger violation of the right to be informed about the proceeding against him/her, right to approach the court, right to fair hearing, right to proper remedy of the persons involved. In addition lack of transparency may be seen as an issue from the perspective of complying with the ECtHR standards. Therefore, Serbian Law on Expropriation has to be amended in order to provide better security for the parties involved. For example the transparency issue may be resolved by implementing the obligation for the government to elaborate their position on balancing, i.e. to explain why they held that public interest outweigh private interest.<sup>88</sup>

The second issue which may be detected is that in Serbia, according to the article 32 of the Law on Expropriation, beneficiary has to make annotation in the land registry, upon submission of the proposal for expropriation to the competent authority. This annotation may cause similar problems described in section 4.2 in the case of *Sporrong*<sup>89</sup>. Namely, upon submission of the proposal there is a time period for the competent authority to decide regarding the expropriation, and even upon issuance of decision on allowing expropriation, the mere expropriation does not have to happen immediately. Therefore, it may lead to negative effect with respect to the economic interest of the owner of the property. I would support the standpoint of the ECtHR in that respect. Namely, in determining whether the public interest can outweigh private interest, the time elapsed between issuance of the decision on expropriation and actual expropriation should be considered. Additionally, Serbian system should amend or regulate more the section regarding registration of annotation in land register.

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<sup>88</sup> United Nations Human Settlements Programme (n 57) 118.

<sup>89</sup> *Sporrong*, (n 72).

## CHAPTER IV – COMPENSATION - FAIR VALUE V. MARKET VALUE

This Chapter IV describes in detail the principles adopted with respect to the compensation as a condition for lawful expropriation. Namely, according to the property clauses described in this Thesis, the expropriation should be made against adequate compensation. However, there is a difference between legal systems in setting standards for the minimal amount of compensation. In German system the standard is **fair value** oppositely to Serbian system where the amount of compensation cannot be determined below the **market value** (market value is a minimum standard). As a balance to these two different approaches the Chapter will elaborate the standards set forth by the ECtHR. Moreover, the positive and negative sides of both standards set in Germany and Serbia will be described and will be compared with the ECtHR practice.

The Chapter will start by explaining the fair value compensation incorporated in German system (in section 4.1) then in section 4.2 the ECtHR standard of review will be elaborated. ECtHR is not automatically applying market value standard like Serbia, nor is automatically applying mandatory fair compensation like Germany. The ECtHR, in this respect, establishes specific conditions and types of compensation for specific types of expropriation. In the section 4.3 Serbian model of market value will be elaborated.

At the end section 4.4 will show in comparison manner, outline of the key differences and similarities between all three jurisdictions.

### 4.1. Germany - Representative of Fair Value Compensation

Basic Law does not recognize market value compensation for expropriated property. This is not the case in Serbia (and in ECHR, although market value is a standard, it is not prescribed anywhere). The idea implemented in the Basic Law and held by the Federal Constitutional Court when interpreting the provisions of the Basic Law is that it is not just to automatically

assign the amount which is equal to full market value of expropriated property to prior owner, but such value should be determined based on the circumstances of the case at hand.<sup>90</sup> This means that the amount of compensation will not be formed according to the market conditions but will be subject to evaluation based on the specific circumstances of each case, therefore it can result in less than the value which would be determined on the market. The main reasoning of the above elaborated is exactly the social component of property, which one may say is implemented in the provision by envisaging the fair value of compensation instead of market value.<sup>91</sup> According to the interpretation of the Federal Constitutional Court the fairness requirement observes both sides of the property, i.e. side of private interest as well as side of the opposed community interest.<sup>92</sup> It is up to the legislator to provide guidelines on balancing between these two interests, and the conditions based on which administrative body can decide when to assign compensation that equals market value and when to assign compensation which is less than the market value.<sup>93</sup>

The Article 14 (3) of the Basic Law, envisages that compensation which is calculated by the independent experts should represent “equitable balance between the public interest and the interests of those affected”<sup>94</sup>. The goal is to provide the owner with the compensation which will be equal to the value required for the purchase of the new property of the same quality and characteristics as expropriated one.<sup>95</sup> It is important to note that, German system does not in any case recognize set of circumstances which would justify expropriation without compensation. In case compensation is not assigned the expropriation will not be valid, and the act which authorizes such compensation will be held unconstitutional.

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<sup>90</sup> The idea taken from: Michalowski and Woods, (n 15) 319-333.

<sup>91</sup> *ibid* 332.

<sup>92</sup> *ibid*.

<sup>93</sup> *ibid*.

<sup>94</sup> Article 14, Basic Law.

<sup>95</sup> Expropriation in Europe 2013 (n 39) 17.

## 4.2. ECtHR – Protector of Balance

This Chapter will discuss how ECtHR reviews institution of compensation in terms of expropriation. First the position of ECtHR regarding the minimal amount of compensation will be addressed (subsection 4.2.1), second the position of ECtHR with respect of calculating method used for expropriation will be discussed (subsection 4.2.2), and third the example of ECtHR judgment regarding the expropriation without compensation will be elaborated (subsection 4.2.3).

### 4.2.1. Which standard to apply?

The ECtHR, unlike Serbia and Germany, does not mention explicitly any type of compensation. Therefore, one may ask the question which amount of compensation ECtHR accepts. According to some scholars it is said that the ECtHR upholds full compensation (market value) as a standard for compensation in expropriation cases, however ECtHR makes distinction when it comes to cases which occurred due to the land reform.<sup>96</sup> In these cases (land reform cases), the ECtHR holds that, market value is not a standard and compensation should be determined based on a fair value.<sup>97</sup> This may result in determining compensation with the value amounting less than the market value of expropriated property. Further, in exceptional cases, it can even result, that no compensation is assigned for the expropriated property and that such expropriation does not constitute violation of the Article 1 of Protocol 1 of the Convention [relevant case *Zvolský and Zvolská v. the Czech Republic*<sup>98</sup>].<sup>99</sup> This situation cannot be justified according to German and Serbian law.

<sup>96</sup> Sluysmans and de Graaff (n 26) 19.

<sup>97</sup> *ibid.*

<sup>98</sup> *Zvolský and Zvolská v. the Czech Republic*, app no. 46129/99 (ECHR 12 November 2002) accessed on 20 February 2014 <<http://echr.ketse.com/doc/46129.99-en-20021112/view/>>.

<sup>99</sup> Sluysmans and de Graaff (n 26) 19.

#### 4.2.2. Calculation method

The ECtHR, provides large margin of appreciation to the states, for choosing the method based on which the calculation of compensation for expropriation will be made.

As explained in subsection 4.2.1 above, the position of the Court is that full market value compensation is general principle, save for the land reform cases where value can be determined as fair value (amounting less than market value), and exceptional cases that usually are also land reform cases where the expropriation without compensation is allowed. This means that an individual cannot complain on the calculation method and cannot claim that his/her compensation for expropriated property should be calculated based on specific calculation method. Notwithstanding large margin of appreciation, Court still reviews everything else which does not fall within the boundaries of the State's discretion (such as obvious negligence of the state – length of the proceedings [relevant decision *Malama v. Greece*<sup>100</sup>] or actual condition of the expropriated building [relevant decision *Platakou v. Greece*<sup>101</sup>]) for the purpose of determining whether the violation of Article 1 of Protocol 1 of the Convention exists.<sup>102</sup>

#### 4.2.3. Expropriation Without Compensation – Clash of German and ECtHR Standards (*Jahn and others v. Germany*)

The ECtHR held for the first time that the expropriation without any kind of compensation is not automatically violation of Article 1 of Protocol 1 of the Convention, in the case of *Zvolsky*<sup>103</sup>.<sup>104</sup> This is further elaborated in the case of *Jahn and others v. Germany*<sup>105</sup>.

<sup>100</sup> *Malama v. Greece*, App No. 43622/98, (ECtHR 1 March 2001) accessed on 9 March 2014 <<http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials/cases/regionalcases/europeancourtsofhumanrights/nr/575>>.

<sup>101</sup> *Platakou v. Greece*, App No. 38460/97, (ECtHR 6 January 2001) accessed on 9 March 2014 <[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59125#{"itemid":\["001-59125"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59125#{)>.

<sup>102</sup> Sluysmans and de Graaff (n 26), 13.

<sup>103</sup> *Zvolsky*, (n 98).

<sup>104</sup> Sluysmans and de Graaff (n 26), 16.

<sup>105</sup> *Jahn and others v. Germany*, App nos. 46720/99, 72203/01 and 72552/01 (ECtHR 30 June 2005), accessed on 15 February 2014 <[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-69560#{"itemid":\["001-69560"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-69560#{)>.

This case is very interesting since it outlines different conclusion reached by the Chamber of ECtHR on one side and the conclusion reached by Grand Chamber of ECtHR (which confirmed the position of the Federal Constitutional Court of Germany) on the other side.

In this case we can see how the criteria of legal uncertainty results in favor of public interest. Namely, according to the facts of the case, the applicants acquired the ownership title automatically based on the Modrow law<sup>106</sup>, however given that the type of this law was transitional, the title they have received was uncertain, therefore this law did not create the certain expectation that the state of property will remain the same in the future.<sup>107</sup> The deprivation was made for the benefit of tax authorities.

The ECtHR Chamber reached the judgment which was founded on the basis of the wide margin of appreciation left for the state to regulate conditions for expropriation. Namely, German Basic Law in Article 14(3), prescribes that lawful expropriation can only be implemented if such expropriation is prescribed by the law which at the same time regulates compensation issue. From the facts of the case we may see that this requirement was not accomplished, i.e. the law which allowed expropriation (Property Rights Amendment Act<sup>108</sup>) did not mention any kind of compensation. In this respect ECtHR Chamber held that the balancing was violated by not envisaging compensation. Therefore it reached the judgment that the Property Rights

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<sup>106</sup> *Jahn* (n 105), paras. 98, 100, 105-106: Modrow law is transitional law (negotiated between the German States and four former occupying powers), adopted in 1990 (Modrow law). The law was adopted by none democratic parliament. According to the Land Reform Directive (adopted in 1945) [*Jahn, n (105), para. 100*] and Change Possession Directive (adopted 1951) the heirs' land were to be converted into state owned land without compensation in the event the heirs were not farming themselves [*Jahn (n 105) para. 98*]. The Modrow law, lifted restrictions that existed for disposal with the land which was acquired on the basis of land reform and therefore enabled holders (that automatically included heirs) of such land to acquire full ownership title. The Modrow law contained unjust loopholes and was unclear (for example did not address the question of heirs which were not farming). In this respect the Property Rights Amendment Act had to be adopted [*Jahn (n 105) para. 105-106*].

<sup>107</sup> *Jahn*, (n 105).

<sup>108</sup> *Jahn*, (n 105), paras 107-108: Property Rights Amendment Act (*Vermögensrechtsänderungsgesetz*) was adopted on 14 July 1992 (Property Rights Amendment Act). The purpose of the law was to remedy loopholes made by Modrow law and to „place all heirs of land acquired under the land reform in the position they would have been in if those principles had been properly applied at the time“- [*Jahn (n 105) para. 108*].

Amendment Act violated guarantees prescribed by the Article 1 of Protocol 1 of the Convention.

However, Grand Chamber had different position and founded its decision on the exceptional case principle and uncertainty of the heirs and social justice. Namely, the Grand Chamber decided that expropriation without compensation was not violation of the Article 1 of Protocol 1 of the Convention because of the three main reasons. Firstly, court evaluated the circumstances with respect of adoption of the Modrow law during the transition between two regimes (communism to democracy). In this respect the court held that this law contained lot of uncertainties (especially because it was transitional law) and therefore, no individual could take the regulation with certainty (i.e. could not hold that the adopted legislation would be maintained in future regime). Second important circumstance that was taken in consideration was the adoption of the second Property Rights Amendment Act which remedied loopholes made by the Modrow law (with respect of the acquisition of the ownership title) in short period of two years upon German reunification (to correct unjust situations created by the adoption of Modrow law). In this respect, the claim that the uncertainty remained a long period of time therefore was expected that the regulation would stay as they are, could not be brought, and third, the court considered aspect of social justice.<sup>109</sup> Based on those grounds court overturned the conclusion of the Chamber [the judgment was based on the wide margin of appreciation given to the states, the Chamber held that there was a violation of Article 1 of Protocol 1 of the Convention given that the requirement of compensation is explicitly envisaged as a condition for expropriation], and held that the above described situation constitutes a “unique” situation,

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<sup>109</sup> All three reasons are taken from the reasoning of the Grand Chamber in the decision reached in *Jahn* case (n 105) also the idea of the entire paragraph can be seen in: Ulrike Deutsch, ‘Expropriation without Compensation the European Court of Human Rights sanctions German Legislation expropriating the Heirs of “New Farmers”’, (German law journal, vol. 6 no. 10) 1376-1380, accessed on 5 March 2014 <[http://www.germanlawjournal.com/pdfs/Vol06No10/PDF\\_Vol\\_06\\_No\\_10\\_1367-1380\\_Developments\\_Deutsch.pdf](http://www.germanlawjournal.com/pdfs/Vol06No10/PDF_Vol_06_No_10_1367-1380_Developments_Deutsch.pdf)>.



and therefore can be qualified as an exceptional case under the Convention which justifies expropriation without any kind of compensation.<sup>110</sup>

### 4.3. Serbia Representative of Market Value Compensation

As explained in the introductory part of this Chapter IV, Serbian Constitution in Article 58, explicitly envisages minimum of market value for the expropriation compensation. The compensation is determined by the ordinary court in the extraordinary procedure if the owner and the beneficiary of the expropriated property have not reached an agreement on the compensation within two months as of the date when the expropriation decision became final and binding.<sup>111</sup> In case the compensation is not determined based on the market value standard, such compensation can be challenged.

The compensation for expropriation is tailored in a way that it can be connected to the compensation of damages in civil law. This is created through the fact that ownership represents property right which object can be expressed in monetary value. Therefore, the compensation for expropriation contains principles of damages compensation.<sup>112</sup>

Other characteristic of compensation in Serbia is that the monetary compensation is a rule, unless otherwise is prescribed by the law.<sup>113</sup> Bearing in mind the unstable situation on the Serbian market of real estate, this may create a disadvantage for the owner.<sup>114</sup>

As in German system the expropriation is executed through certain procedure. Firstly, proposal for expropriation has to be submitted, then parties are required to give statements about the

<sup>110</sup> *Jahn* (n 105); *Deutsch* (n 108) 1376-1380.

<sup>111</sup> Articles 56-62, Law on Expropriation.

<sup>112</sup> The comparison of compensation with damages described in this paragraph is taken from Rajko Jelić, *Developments in the legal system of Serbia and harmonization with the EU: Contributions Project 2011: a collective monograph*, 'Certain aspects of compensation in expropriation proceeding', [*Razvoj pravnog sistema Srbije i harmonizacija sa pravom EU: prilozi Projektu 2011 : kolektivna monografija*, 'Neki aspekti naknade u postupku eksproprijacije'] (2012) 282-286.

<sup>113</sup> Article 11 of Law on Expropriation.

<sup>114</sup> United Nations Human Settlements Programme (n 57) 118.

condition of the property (all relevant data). Based on those data the decision on expropriation is rendered by the municipality administration. Upon the decision the expropriation beneficiary submits the offer with the amount of the compensation (market value of the property). This market value is determined by the local tax administration (at the place where is property located) based on the criteria prescribed by the law. In the event where the owner does not accept this offer, the court will decide in extraordinary proceeding whether the offered price was in accordance with the market value.<sup>115</sup>

#### 4.4. Conclusion of Comparison

The main difference between the German approach and ECtHR approach with respect of the expropriation is that in Germany, according to the linking clause of Article 14 (3) of the Basic Law in order to have lawful expropriation it is required that the compensation is already determined (in all cases). On the other hand in ECtHR the proportionality test is applied, meaning that depending on the circumstances of the case total lack of the compensation would not automatically mean that the expropriation is unlawful. According to the practice of the Court expropriation without compensation is justifiable “only in exceptional circumstances”<sup>116</sup>.

ECtHR ruled that in case of the economic reform which are made in order to achieve social justice, compensation which is not the full market value is acceptable.<sup>117</sup> This is also the case in Germany. Especially since the Germany recognizes the social side of the property. However, this is not the case in Serbia, as explained above in section 1.3. of Chapter I, Serbian Constitution explicitly mentions determination of market value of the property for compensation.

<sup>115</sup> Articles 132-140, Law on Extraordinary Proceedings [*Zakon o vanparničnom postupku*], (“Official Gazette of Republic of Serbia” nos. 25/82, 48/88, 46/95, 18/2005, 85/2012 and 45/2013) accessed on 20 March 2014 <[http://www.paragraf.rs/propisi/zakon\\_o\\_vanparnicnom\\_postupku.html](http://www.paragraf.rs/propisi/zakon_o_vanparnicnom_postupku.html)>.

<sup>116</sup> The idea for the paragraph is taken from the – Gromitsaris, (n 32), 74; *James*, (n 79).

<sup>117</sup> *ibid*.

In most of the constitutional property regimes full (market value) compensation represents precondition for power of state to expropriate private property.<sup>118</sup>

The full market value compensation represents the following:

*„Full compensation is often necessary in order to address the concern that public officials are under-responsive to private costs unless those costs are properly internalized: where the injured party is part of the non-organized public (an ‘occasional individual’) or of a marginal group with minor political clout, under-responsiveness is a genuine danger that in many cases can only be mitigated by compensation.“<sup>119</sup>*

Partial compensation for expropriation can be justified by public interest. However, since there has to be balance between public and private interest (which in certain cases can be deemed as violated in partial compensation) public interest for partial expropriation can be determined only in deliberative distributive expropriation.<sup>120</sup> Meaning that in order to justify the partial compensation, such compensation has to be envisaged like clear rule or like informative standard.<sup>121</sup> Purpose of this compensation is to make an obstacle for the government to impose the burden which should be borne by all public to the particular individual.<sup>122</sup> In addition to justify partial compensation usually used argument is that compensation has to be adjusted to each specific case. As argued by Van der Walt:

*„all the relevant circumstances (including the [factors] mentioned in [the Constitution] but not restricted to them) should be considered together in deciding whether it should be just and equitable to pay no compensation (or [partial] compensation ...) in a specific case.“<sup>123</sup>*

<sup>118</sup>Hanoch Dagan, 'Expropriatory Compensation, Distributive Justice, and The Rule of Law' (Tel Aviv University Law Faculty Papers, 2013), 2, accessed on 17 March 2014 <<http://law.bepress.com/cgi/viewcontent.cgi?article=1186&context=taulwps>>.

<sup>119</sup>Dagan, (n 118) 9.

<sup>120</sup>ibid 2.

<sup>121</sup>ibid 3.

<sup>122</sup>ibid 4.

<sup>123</sup>ibid 5.

The partial compensation can be justified if the reference to all relevant circumstances point that public interest should prevail over the individual.<sup>124</sup> In this respect partial compensation should be used only within the measures which are very restrictive.<sup>125</sup>

According to my views and understandings, automatic application of mandatory minimum of market value like prescribed in Serbian system or envisaging mandatory compensation like in Germany may lead to opposite effect then the effect which was supposed to occur. Namely, the main idea of authorized state intrusion is balancing between public and private interest and compensation is prescribed in order to enable such balance. However, by imposing definite limits to compensation such as “*mandatory minimum of market value*” (Serbian standard) or “*mandatory fair compensation*” (German standard) I believe that it may turn out that one is limiting the balancing mechanism by going in favor of one of two interests depending on the situation. Namely, if applying the norm automatically, it may happen that facts of the case are structured like that they don’t require compensation for expropriation (for example *Jahn*<sup>126</sup> which is explained in detail in section 4.2. above), on the other hand it may happen that the expropriating authority does not take in consideration all relevant facts and just automatically apply full market value like in case. By setting ending limits to the amount of compensation one is potentially disturbing balancing between private and public interest. In this respect I agree more with the ECtHR standards applied. Namely, I agree that there should be different types of compensation determined for different types of expropriation. There should be standard compensation for the standard cases which can be determined as minimum market value, but in certain cases depending on the circumstances compensation could be determined as less then market value, and in the exceptional cases (very restricted) no compensation for the expropriation should be allowed.

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<sup>124</sup> Dagan (n 118), 5.

<sup>125</sup> *ibid* 8.

<sup>126</sup> *Jahn* (n 105).

## CONCLUSION

The Thesis outlined the main problems of expropriation in relation to the process of determining compensation and process of balancing between public and private interest in Germany, Serbia and under the Convention. It further showed that even though the institution of expropriation is very old and present for a long time in legal systems, it still needs adjustments and improvements in regulation. Especially with the development of the protection of human rights under the Convention, new light was placed on the standards and conditions envisaged for lawful expropriation.

The reader saw that it is not easy for the courts to evaluate and analyze the conditions of implemented expropriation, because often the cases concerned are not that strait forward, and the court is required to interpreted all circumstances of the case at hand, provisions prescribed by the law and the main purpose and the intention of the law. Sometimes lot of skills and practice are required for reaching the right judgment, as shown in the case of *Jahn*<sup>127</sup>.

Full expropriation as the highest level of state intrusion, is very delicate matter. The conditions for its lawful accomplishment are closely examined and prescribed in detail in highest state acts.

The Thesis analyzed how the state authorities interpret the condition of public interest. On one hand it showed how in balancing mechanism is emphasized in Germany, and how oppositely in Serbia such balance is not explicitly prescribed as a condition for determining public interest in the expropriation (even though balancing mechanism is used in Serbia).<sup>128</sup> On the other hand

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<sup>127</sup> *Jahn*, (n 105).

<sup>128</sup> Article 14(3) of Basic Law explicitly envisages balancing mechanism unlike Article 58 of Serbian Constitution.

it showed how ECtHR provides wide margin of appreciation to the states in determining public interest (Chapter III section 3.2).

The Thesis then led the reader to the issue of compensation and different standards that can be applied for determining the actual value of expropriation compensation. In Chapter IV, the reader was able to review main characteristics and reasoning behind the principle of market value compensation and fair value compensation. By inducing the ECtHR practice, the Thesis showed to the reader, the good and bad sides of both standards, and introduced, under my opinion, good solution as compromise of both standards.

Bearing all this in mind the Thesis achieved its goal but still opened readers mind to think about further developments and possible harmonization between the systems set forth in the Jurisdictions.

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