



RIGA
GRADUATE
SCHOOL OF
LAW

Expropriation for public purposes: Balancing public and individual interests

BACHELOR THESIS

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DECLARATION OF HONOUR:

I declare that this thesis is my own work, and that all references to, or quotations from, the work of others are fully and correctly cited.

(Signed)

RIGA, 2018

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1. INTRODUCTION

The bachelor thesis will begin with matter of a property and rights attached to it which belongs to the owner of a specific property. Consequently, these property rights are protected from the third parties by the constitution and other international legal acts. Although, the constitutions and European Convention on Human Rights protects private property rights from third parties, it also places the private property to subject to restrictions, the strictest restriction – expropriation.

Both, individual and state, have strong argumentation for the necessity of a specific property. State has intent for serving public interest, but individual has his private interests. Therefore, the courts have a difficult task to balance the interests of both parties. Indeed, it has identified many problems and ambiguity within the process of expropriation since the property rights determined by the state's constitution are being violated in most severe way. But expropriation for public purposes plays significant role in a development of state's infrastructure as it is necessary for fulfillment of the needs of society.

In regard to individuals, the right to a property is one of the fundamental rights which must be ensured by the state. Rights to property give to the individual the liberty and independence from others, also serving matter of welfare within the society. It is necessary to identify that something belongs to one and cannot be used without his/her permission. These rights have to be secured by the state to sustain the public order.

On the other hand, it has been acknowledged that there are necessities for the public interest in order for its development. Because of the development of infrastructure, it is necessary even more often to restrict or violate rights to property by expropriating them for public purposes. Current Constitution of Republic of Latvia adopted on 15 February 1922 has been drafted after Proclamation of Republic of Latvia on 18 November 1918. Property rights has been determined and secured by the constitution, but, at the same time, identifying that the rights can be limited according to law, or can even be taken away by the use of compulsory expropriation for public purposes. In order to execute the expropriation, the institute which is applying for it must satisfy certain requirements for the process to become legitimate.

One of the necessary requirements for expropriation to be successful is fair compensation. The purpose of compensation is to put the individual at the same welfare position after the expropriation, as if it did not even take place. The state has to take into account many details in order to balance the interests of both parties. Fair compensation is one of the attributes that can balance the interests, the burden put upon the individual. The aim of this paper is therefore to determine how fair compensation is calculated in the process of expropriation for public purposes. The research question of the thesis is: how the courts by using principle of proportionality determines fair compensation for property expropriation?

Thesis examines the ability for compensation to balance the interests of both parties. The main task of the analysis is to examine assessment methods compensation for public purposes. As the research is a legal analysis, the tasks have been carried out by comparative exploration of different sources. Comparative analysis is going to include three different constitutions, including from both, civil law and common law countries. Also, analysis of European Convention on Human rights regarding property protection and regulation of

expropriation. For theoretical issues, legal text books and scholarly articles have been used. The most significant primary sources are legal acts and international documents, particularly those which affect the rights to property. Another important source of information is formed by judgements, particularly the decisions of the Constitutional Court of Republic of Latvia, Federal Court of Republic of Germany, Constitutional Court of The United States of America and European Court of Human Rights.

The main focus of the thesis lies upon the legal issues regarding state's interference with property rights and balance between interests in Latvia. Hence, these issues are important and common for any other state and also any private individuals, since at some point any member of the society can become subject to expropriation.

2. RIGHT TO PROPERTY

To better understand the main subject of the thesis, which is property, this section is going to place focus upon property itself and rights and duties attached to it. Property rights are going to be overlapped by two different legal philosophies, respectively, natural law theory and legal positivism. Further, three different constitutions and European Convention on Human are going to be discussed with regard to property protection.

2.1. Nature of property

John E. Cribbet as America's one of the foremost scholars says that the question "what is property?" is unanswerable.¹ The complicity of the term "property" rises since the legal meaning of "property" considers it as rights, whereas, the common meaning of the term is regarded as things.²

'Property':

The right to possess, use, and employ a determinate thing (either a track of land or a chattel); the right of ownership <the institution of private property is protected from undue governmental interference>. Also termed *bundle of rights*.³

Any external thing over which the rights of possession, use, and employment are exercised <the airport is city property>.⁴

Most part of the society assumes property as a thing that you can own. Meaning of Latin root *proprietas*, which means ownership, has been taken for the English word "property". The distinction begins with ordinary people who routinely assumes property as thing but legal professionals as a right in a relation to thing.⁵ By the opinion of Bruce Ackerman the ordinary concept of property is based on the understanding of ordinary people regarding the use and control of possessions, things in a relation to others. Ordinary people believe that a specific thing is owned by them when they can use it in more ways than others without negative social sanctions and others could use it only with their permission.⁶ If a computer is a thing and a person acquired its possession by the act of purchase then the person assumes the computer as its property. The law describes property as rights that computer owner is allowed to fully enjoy among other people and the law prevents others from using specifically that computer. Therefore, legal definition of the property has two parts – (1) rights among people (2) that concern things.⁷ In the civil law tradition the Latin root serves the same meaning, ownership,

¹ Sprankling, J.G., *Understanding Property Law*, LEXIS Publishing, 2000.

² Ibid

³ Garner, B.A. (ed.), *Black's Law Dictionary*, 9th edition, Thomson Reuters, 2009.

⁴ Ibid

⁵ Sprankling, J.G., *The International Law of property*, Oxford University Press, 2014.

⁶ Allen, T., *The Right to Property in Commonwealth Constitutions*, Cambridge University Press, 2000.

⁷ Sprankling, J.G., *Understanding Property Law*, LEXIS Publishing, 2000.

that is – comprehensive rights to things. The most precise definition of property endorsed by the French Civil Code was developed by writers of the Sixteenth Century: the Spanish Jesuit Vasquez and the French jurists François Hotman and Hugues Donneau. The definition they developed determined that the property as the right to keep a good, to use it, to benefit from its yields, to exclude everybody else from its use, to alienate it, and to even destroy it. The French Civil Code defines *propriété* as “the right to enjoy and dispose of things in the most absolute manner, provided they are not used in a way prohibited by statutes or regulations.”⁸ The concept of the property that refers to rights into things are widespread and commonly understood in civil law systems.⁹ Bruce Ackerman argues that the choice of ‘property’ meaning affects how judges analyse constitutional property cases, therefore by choosing broader legal meaning the judge puts more emphasis on the object of rights or the totality of rights. Hereof, any restricting act of the state or attempt to extinguish these rights is a taking of property.¹⁰

Aristotle had contrary thoughts to Plato’s regarding right to property, who gave preference to common property, whereas Aristotle gave preference to private property, that the private property encourage people to focus on their private matters and not on matters of others.¹¹ Aristotle believed that the private preference is placed by nature and the respect for private property impart in itself the virtue of liberty.¹²

“The labor theory” is one of the most famous theories with respect to natural right to property associated with John Locke, who stated that “every man has a property in his own person” and in “the labor of his body and the work of his hands”.¹³ Locke also claimed that things can initiate beneficial grounds to mankind only upon private property.¹⁴

Natural law theory on the contrary to the legal positivism states that the rights arise from the fundamental justice and independent of government. John Locke believed that “the Law of Nature stands as an Eternal Rule to all Men, Legislators as well as other”¹⁵ and the role of government is not to make new laws but to enforce natural law. Government’s existence should ensure the security to the unalienable rights of life, liberty and the pursuit of happiness which were given by their creator.¹⁶ The United States of America Constitution lead the American legal system towards legal positivism and after Supreme court’s ruling in *Johnson v. M’Intosh* case clearly diminished the influence of natural law theory.¹⁷ The scholars today

⁸ Art 544 French civil code

⁹ Sprankling, J.G., *The International Law of property*, Oxford University Press, 2014.

¹⁰ Allen, T., *The Right to Property in Commonwealth Constitutions*, Cambridge University Press, 2000.

¹¹ Schauer, F., *The Philosophy of Law*, Oxford University Press, New York, 1996.

¹² *ibid*

¹³ *ibid*

¹⁴ *ibid*

¹⁵ Sprankling, J.G., *Understanding Property Law*, LEXIS Publishing, 2000.

¹⁶ *Ibid*

mainly base their comprehension of property, which is defined by positive law rather than on natural law.

Jeremy Bentham most likely had made the stongest offensive against natural right theory stating:

“Right...is the child of law; from real laws com real rights; from imaginary laws, from laws of nature, fancied and invented by poets, rhetoricians, and dealers in moral and intellectual poisons, come imaginary rights, a bastard brood of monsters... Natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense – nonsense upon stilts.”¹⁸

Legal positivism envisage that property rights only exists if they are recognised by the legal system. Jeremy Bentham observed that: ”Property and law are born together, and die together, before laws were made there was no property; take away law, and property ceases.”¹⁹ Legal positivism believes that rights, including property rights are established by the government.²⁰

William Blackstone during the nineteenth century had made the dominant understanding of property that: “sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.”²¹ Rights in rem is one of the main elements, which consist within the expressed formulation made by Blackstone.

Nevertheless, Wesley Hohfeld by the beginning of twentieth century strived to render the legal thought more coherent by clarifying the basic conceptsof law and treatment of property rights.²² Hohfeld emphasises that legal concept of property along with rights contain with priveleges and powers and this statement is considered as the “bundle of rights”, which constitutes a property relationship.²³

A.M. Honoré took part in modifying the “bundle of rights” into ownership stating that:

“Ownership comprises the right to possess, the right to use, the right to manage, the right to the income of the thing, the right to the capital, the right to security, the rights or incidents of transmissibility and absence of term, the prohibition of harmful use, liability to execution.”²⁴

Thomas Grey pointed that:

“We have gone...in less than two centuries from a world in which property was a central idea mirroring a clearly understood institution to one in which it is no longer coherent or crucial

¹⁷ Johnson v. M’Intosh case; Sprankling, J.G., *Understanding Property Law*, LEXIS Publishing, 2000.

¹⁸ Lagal positivism, Jeremy Bentham

¹⁹ Sprankling, J.G., *Understanding Property Law*, LEXIS Publishing, 2000.

²⁰ Sprankling, J.G., *Understanding Property Law*, LEXIS Publishing, 2000.

²¹ Schauer, F., *The Philosophy of Law*, Oxford University Press, New York, 1996.

²² *Ibid*

²³ *Ibid 21*

²⁴ *Ibid 21*

category in our conceptional scheme. The concept of property and the institution of property have disintegrated...

The substitution of a bundle of rights for a thing-ownership conception of property has the ultimate consequence that property ceases to be an important category in legal and political theory.”²⁵

2.2. Property concept under European Convention on Human Rights

Article 1 of Protocol No. 1 provides the guarantee of the right to property:

*“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.”*²⁶

By Article 1 of Protocol No.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) it can be assumed that the right to property is formulated as “peaceful enjoyment of possessions”. In the *Marckx* case the European Court of Human Rights (“ECHR”) emphasized that the Article 1 of Protocol No.1 in its essence guarantees the right to property.²⁷ According to Application No. 11716/85, *S. v. the United Kingdom* (1986) case it is necessary property to be recognized by domestic law in order to initiate the Article 1 of Protocol No.1 of The Convention.²⁸ Running a business also qualifies as “possession” together with ownership of immovable and movable property, rights arising from shares, intellectual property rights, arbitrational awards, established entitlement to a rent and entitlement to a pension according to the meaning of Article 1 of Protocol No.1.²⁹ In the *Gasus Dosier* case the ECtHR ruled that:

“the notion “possession”...is certainly not limited to ownership of physical goods: certain other rights and interests constituting assets can also be regarded as “property rights” and thus as “possession”.”³⁰

²⁵ Schauer, F., *The Philosophy of Law*, Oxford University Press, New York, 1996.

²⁶ Carss-Frisk M, *The Right to Property: A Guide to the Implementation of Article 1 of Protocol No 1 to the European Convention on Human Rights* (2001) 27; Rook D *Property Law and Human Rights* (2001) 35-37;

²⁷ *Marckx v. Belgium*, 13 June 1979, Judgment of the ECtHR, app. no. 6833/74, para. 63.

²⁸ A. Grgić *et al.*, *The right to property under the European Convention on Human Rights, A guide to the implementation of the European Convention on Human Rights and its protocols*, Human rights handbooks, No.10, Council of Europe, 2007.

²⁹ Sermet, L., *The European Convention on Human Rights and property rights*, Human rights files, No 11 rev., Council of Europe, 1999. p. 11

³⁰ *Gasus Dosier- und Födertechnik GmbH v. the Netherlands*, 23 February 1995, Judgment of the EurCtHR, app. no. 15375/89, para. 53.

According to the meaning of the Article 1 of Protocol No.1 of the Convention any kind of economic interest can be constituted as possession resulting from relations between individuals.

In case of *Saghinadze and Others v Georgia* the ECHR by stating that the concept of “possessions” can be substantive from the domestic law extended the definition of the concept.³¹ By taking into consideration the economic value of a right or asset it can be determined whether a “possession” is related to Article 1 of Protocol No.1 of the Convention; therefore, “possessions” are not limited to physical possessions.³²

2.3. Protection of property rights under European Convention on Human Rights

The case law of ECHR argues that Article 1 of Protocol No.1 of the Convention contain of three different rules and the statement of these rules first were mentioned in *Sporrong and Lönnroth v. Sweden* case that is considered as very important decision in relation to the Article 1.³³

Article 1 of Protocol No.1 of the Convention does not protect the right to acquire property but protects only existing property, as the ECHR determined that expectation of inheritance does not qualify as “possession”.³⁴ Although, in the case when the property owner providing inheritance has died, the inheritor takes over the rights to the property which according to the court’s ruling constitutes as “possession”.³⁵ The *X v. Germany* case gives example that expectations do not qualify as “possessions”, specifically in the case - notaries expected fees.³⁶ Formulation of these three rules:

*“[t]he first rule, which is of the general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognizes that the States are entitled, among other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph”*³⁷

³¹ *Saghinadze and Others v Georgia* 18768/05 27 May 2010.

³² *Supra* 29

³³ A. Grgić *et al.*, *The right to property under the European Convention on Human Rights, A guide to the implementation of the European Convention on Human Rights and its protocols*, Human rights handbooks, No.10, Council of Europe, 2007. p. 7

³⁴ *Marckx v. Belgium*.

³⁵ *Inze v. Austria*, 28 October 1987, Judgment of the ECtHR, app.no. 8695/79, para. 38.

³⁶ *X v. the Federal Republic of Germany*, 13 December 1979, Admissibility Decision of the EComHR, app. no. 8410/78.

³⁷ *Sporrong and Lönnroth v. Sweden*, para. 61.

According to the practice of ECHR at the beginning of complain consideration it examines the existence of property rights in the scope of Article 1 of Protocol No.1 of the Convention. Further, the court examines whether there has been interference with property right and the manner of interference – which of the above mentioned rules applies. ECHR three step test is necessary to determine that the interference with the property do not constitute a violation of the Article 1 of Protocol No.1 of the Convention:

- 1) the interference with property is provided by law;
- 2) the interference with property has public interest;
- 3) the interference with property is proportionate to the aim pursued and proportionality exists between public and individual interests.³⁸

All the above mentioned requirements have to be met cumulatively in order not to violate the Article 1 of Protocol No.1 of the Convention.

2.4. Protection of property rights under the Constitution of Republic of Latvia

The first sentence of Article 105 of the Constitution of the Republic of Latvia states that everyone has the right to property, which means that every citizen of the Republic of Latvia or non-citizen have a right to purchase or acquire property in the territory of Latvia within the order determined by special regulations and civil law.³⁹ The person by acquiring the property implements its property rights within the amount determined by law: “Ownership is the full right of control over property, i.e., the right to possess and use it, obtain all possible benefit from it, dispose of it and, in accordance with prescribed procedures, claim its return from any third person by way of an ownership action.”⁴⁰ Ownership is the most comprehensive right which is recognised by Latvian legal system and it confers to the owner the most extensive operational possibility of the property. This right can only be restricted for public purposes or deprived by laws and if the amount or nature of any restriction is not specifically determined then it must be regarded in favour of property.⁴¹

The second sentence of Article 105 of the Constitution of the Republic of Latvia states that property shall not be used contrary to the interests of the public, which already indirectly restricts the property and owners scope of use of the property.⁴² “The interests of the public” contains that the property itself and the actions of the owner will not harm other individuals and their property. Also “the interests of the public” includes states interference with the

³⁸ Sermet, L., *The European Convention on Human Rights and property rights*, Human rights files, No 11 rev., Council of Europe, 1999. p. 14

³⁹ Article 105 of The Constitution of Republic of Latvia

⁴⁰ Article 927 of The Civil law of Republic of Latvia

⁴¹ Grūtups A., Kalniņš E. *Civillikuma komentāri. Trešā daļa. Lietu tiesības. Īpašums. Otrais papildinātais izdevums.* – Rīga: Tiesu nama aģentūra, 2002, 17.lpp.

⁴² Article 105 of The Constitution of Republic of Latvia

property and power of expropriation for the interests of the public, namely the expropriated property cannot be used against the public interest. The expropriated property has to serve great public interest and cannot be giving any benefit to private party.

The third sentence of Article 105 of the Constitution of the Republic of Latvia states that the property rights can be restricted in accordance with law.⁴³ Some of these restrictions (servitudes, other encumbrances) are determined already by Civil Law, also other special regulations which are intended for specific property expropriations. Although this sentence of the Constitution is in contradiction since the property can be restricted also by the judgement of the court and by testament in favour for other property or another person.

The fourth sentence of Article 105 of the Constitution of the Republic of Latvia states that expropriation of property for public purpose shall be allowed only in exceptional cases on the basis of a specific law and in return for fair compensation.⁴⁴ Further it will be discussed that German law has similar approach towards expropriation for public use in return of compensation that is due. According to this rule the state has taken monetary responsibility for expropriation for public purpose if it is executed according to law.

2.5. Protection of property rights under the Basic Law for Federal Republic of Germany

Article 14 of the Basic Law states that:

Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws.

Property entails obligations. Its use shall also serve public good.

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 effected. In case of dispute respecting the amount of compensation, recourse may be had to the ordinary courts.⁴⁵

The objective of Article 14 is to preserve individual liberty, not the property, since the liberty allows the individual to take part in the improvement of social, legal and political order within the society. The article 14.3 determines the requirements for legitimate expropriation, that it has to be authorised by valid law, the property must serve the intended purpose of which it is supposed to be expropriated, in relation with public interest and compensation has to be paid according to law under which the extent of it is also determined.⁴⁶ The power of expropriation is determined by this article that limits the state's power to expropriate, but in case of expropriation it requests for authorisation of law, must be for public purpose and require

⁴³ Ibid

⁴⁴ Ibid

⁴⁵ Article 14 of The Basic Law for the Federal Republic of Germany.

⁴⁶ Article 14.3 of the Basic Law for the Federal Republic of Germany

compensation for it. The German courts has interpreted that public needs can only be satisfied with the requirement of public purpose and they very strictly apply the public purpose requirement. If the property which has been expropriated by the state does not serve the purpose under which it was expropriated then by the German law the expropriation becomes invalid thereby the property may have to be returned. (*Rückenteignung*).⁴⁷

2.6. Protection of property rights under United States of America Constitution

Property rights in the United States of America are ensured by the Fifth and Fourteenth Amendments for the Constitution of the United States of America. The Fifth Amendment which was embodied into the United States of America Constitution in 1781 known as “takings clause” states that:⁴⁸

“No person shall be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.”⁴⁹.

The Fourteenth Amendment for the United States of America Constitution known as “due process clause” was incorporated in 1868 and states that:⁵⁰

“No state shall deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”⁵¹.

⁴⁷ BVerfGE 38, 175 (*Rückenteignung*) 1979

⁴⁸ Sprankling, J.G., *Understanding Property Law*, LEXIS Publishing, 2000.

⁴⁹ Fifth amendment for the us constitution

⁵⁰ Allen, T., *The Right to Property in Commonwealth Constitutions*, Cambridge University Press, 2000.

⁵¹ fourteenth amendment for the us constitution

3. REGULATION OF EXPROPRIATION

In this section the the concept of expropriation is going to be introduced together with necessary requirements in order for it to be legitimate. The matter of expropriation is going to be discussed within previously mentioned legal frameworks.

3.1. European Convention on Human Rights

It is determined by the Article 1 of Protocol No.1 of the Convention that “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” and that this “shall not in any way impair the right of the state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”⁵²

The ECHR in the *James v United Kingdom* case states that: “[...] the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property [...].”⁵³ According to the previous statement made by ECHR it is necessary to determine the term of “general nature” and in the case of *Sporrong and Lönnroth v Sweden* considering term the court puts emphasis on the principle of “fair balance”, that the general principle is to find fair balance between general interest and private interest.⁵⁴

The second rule of the Article 1 of Protocol No.1 of the Convention governs deprivation of possessions. Although, the presence of compensation is no determined within concerned article the ECHR has set that the compensation is necessary to ensure “fair balance” between public and individual interest groups.⁵⁵

⁵² Van der Walt AJ, *Constitutional Property Clauses: A Comparative Analysis*, (1999). p.105-114; Carss-Frisk M, *The Right to Property: A Guide to the Implementation of Article 1 of Protocol No 1 to the European Convention on Human Rights*, (2001). p. 21- 25; Grgić A, Mataga Z, Longar M & Vilfan, A *The Right to Property under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights and its Protocols*, (2007). p.10-12.

⁵³ *James v United Kingdom* (1986) 8 EHRR 123 Para 37.

⁵⁴ *Sporrong and Lönnroth v Sweden*, (1983) 5 EHRR 35 Para 69; Van der Walt AJ, *Constitutional Property Clauses: A Comparative Analysis* (1999) p.118; Carss-Frisk M *The Right to Property: A Guide to the Implementation of Article 1 of Protocol No 1 to the European Convention on Human Rights* (2001) p.31; Grgić A, Mataga Z, Longar M & Vilfan A, *The Right to Property under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights and its Protocols* (2007) p.14.

⁵⁵ Van der Walt AJ, *Constitutional Property Clauses: A Comparative Analysis*, (1999). p.115-116; Carss-Frisk M, *The Right to Property: A Guide to the Implementation of Article 1 of Protocol No 1 to the European Convention on Human Rights* (2001) p.37-40; Grgić A, Mataga Z, Longar M & Vilfan A *The Right to Property under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights and its Protocols* (2007) p.5-6;

In order for expropriation to legitimate the Article 1 of Protocol No.1 of the Convention requires that: the process is provided by law; in the interests of public; and must serve fair balance between interests of involved parties in the process according to principle of proportionality.⁵⁶

Concerning expropriation in relation with public interests the international judge cannot make objective evaluation what is necessary for Contracting state's interests, therefore makes wide margin of appreciation towards Contracting state to determine their general interests:

“Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment as to the existence of a problem of public concern warranting measures of deprivation of property. Here, as in other fields to which the safeguards of the Convention extend, the national authorities accordingly enjoy a certain margin of appreciation. Furthermore, the notion of ‘public interest’ is necessarily extensive. In particular, the decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues. The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature’s judgment as to what is ‘in the public interest’ unless that judgment is manifestly without reasonable foundation.”⁵⁷

3.2. Latvia

Expropriation for public purpose is one of limitations against property rights. According to Article 105 of the Constitution of the Republic of Latvia the state has the authority to expropriate private property for public purposes by executing all of the requirements set by the Article.⁵⁸ The individual whose property is subject to expropriation loses its property rights within full amount or partially. The Article 105 of the Constitution contains with four necessary requirements which has to be fulfilled in order for successful and legitimate expropriation. The expropriation is permissible if it has occurred fulfilling following requirements:

on the basis of separate law,

obtaining public purpose,

in exceptional cases,

against fair compensation.⁵⁹

⁵⁶ Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) p.113; Carss-Frisk M *The Right to Property: A Guide to the Implementation of Article 1 of Protocol No 1 to the European Convention on Human Rights* (2001) p.26 and 40; Grgić A, Mataga Z, Longar M & Vilfan A *The Right to Property under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights and its Protocols* (2007) p.12;

⁵⁷ *Vistiņš and Perepjolkins v Latvia* [GC] 71243/01 25 October 2012 para 106.

⁵⁸ Satversmes tiesas spriedums Nr.2005-12-0103. p.22.

⁵⁹ Satversmes tiesas spriedums Nr.2009-01-01. p.10.

Mostly expropriation for public purpose occurs in cases when the state or local government requires a specific property owned by an individual for the purpose of publicly important object construction. Terms upon the expropriation order have been defined by “Property expropriation for the interests of the public law” (“Sabiedrības vajadzībām nepieciešamā nekustamā īpašuma atsavināšanas likums”), that regulates not only coercive expropriation but also expropriation upon agreement. Because of this law, it is not necessary to determine in particular the requirements and the procedure of expropriation within separate law. The Constitutional Court of Republic of Latvia has cleared the necessity of separate law for expropriation in order to be successful. Adoption of separate law, it includes the concept “separate” in itself, which means that the case or occasion will be administered exclusively therefore taking into account every detail of the specific case and whether the requirements of Article 105 can be fulfilled.

It is necessary to understand whether the restriction is indispensable for democratic society, it has to be evaluated by whether the violation of individual rights is comparable with common benefit for society. Restrictions are necessary in democratic society if they are socially necessary and proportionate. Every restriction must comply with the principle of proportionality. Principle of proportionality determines that the purpose set by the state and restrictions implied upon individual must be coherent by their value, grade, importance, quality and intensity. According to “exceptional case” requirement under the Article 105 it is necessary for the state to be ascertain that the only way reaching the purpose is by violating the private property rights. This requirement can be met by applying the principle of proportionality.

To clarify that the concept of proportionality has been taken into account the Constitutional court has to consider whether:

the contested act (regulation, law) is suitable for achieving the legitimate target (public purpose)

the legitimate target (public purpose) cannot be otherwise reached than by violating the private property rights

the benefit for the public by violating property rights will be greater than the damage done to the individual.⁶⁰

Another proportionality test which is similar to the above mentioned but more precise must meet four principles:

“Julian Rivers outlines a four-stage test as:

1. Legitimacy: Does the act (decision, rule policy etc) under review pursue a legitimate general aim in the context of the right in question?
2. Suitability: Is the act capable of achieving that aim?

⁶⁰ Satversmes tiesas spriedums Nr.2009-01-01. 13.

3. Necessity: Is the act the least intrusive means of achieving the desired level of realisation of the aim?

4. Fair balance or proportionality in narrow sense: Does that act represent a net gain, when the reduction in enjoyment of rights is weighted against the level of realisation of the aim?"⁶¹

Evaluation of proportionality principle is closely directed to the state policy and overall state development tendencies. To a large extent evaluation of proportionality principle is dependent from interpretations of acts and from each case individually. Often proportionality is the decisive criteria for the case solution and also in some cases the proportionality can

3.3. Germany

The Federal Constitutional Court has made clear that the requirements of the Article 14.3 have to be met in case of valid expropriation. Any other offences towards limitation of private property rights which have similar outcome as expropriation does not classify as it since they have not met the requirements of Article 14.3 and the unfair burden which is carried by the individual can be equalised by a payment (compensation which does not refer to expropriation) or invalidity of regulation.

Article 14.3 consists of three requirements which have to be fulfilled in case of valid expropriation – authorised by valid law, must be executed for the public purpose and altogether with compensation which amount has been based on law.

The German courts distinguish constitutional expropriation and other limits that creates deprivation. The state has the permission to set limits to the private property without compensation (deprivation), at the same time if the state expropriates the property it must do so in the terms of law that determines the procedure, allocates the compensation and amount of it.⁶² Expropriation (Enteignung) is only referred to the situations when the process of expropriation have met the requirements of Article 14.3.⁶³ The expropriation-like procedure (Enteignungsgleiche Eingriffe) is an institute of the German state liability law, where legislation unintentionally violates private property rights with regulations. Expropriation can be assumed valid only when the legislation which give permission for expropriation itself also clarify the amount and manner of the compensation (*Junktim-Klausel*). The clause guarantees for the individual that only inclusion of compensation into legislation, which has been adopted by democratically elected members of government, can validate the expropriation. At situations when the regulation restricts the private property rights but does not assign any compensation for it then the validity of the regulation has to be questioned instead of lack of compensation. Expropriation must be empowered by legislation which includes compensation for it as binding requirements and if the legislation does not provide for compensation then it

⁶¹ Rivers, J., *Proportionality and Variable Intensity of Review*, The Cambridge Law Journal, Vol. 65, No. 1, pp. 174-207, 2006.

⁶² Rosenfeld, M., *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, United Kingdom, 2012.

⁶³ BVerfGE 58, 300 (1981) (Naßauskiesung)

is not regarded as expropriation but action with expropriatory effect which has to equalise the unfair burden by invalidating the regulation or equalisation payment may save the invalidation of regulation. Because of linking clause (*Junktin-Klausel*) the expropriation must be previously predicted and must fulfil the binding requirements of Article 14.3, if the requirements are not met then the expropriation is not valid and restrictions may be invalidated or either necessity of equalisation payments may rise. In *Naßauskiesung* case the court ruled that it cannot transform deprivation into expropriation since the legislation authorises the expropriation and provides the compensation. *Junktin-Klausel* makes clear distinction between deprivation and expropriation since for valid expropriation the compensation and amount of it is a pre-requisite.⁶⁴ There have been cases where reimbursement have been paid not for expropriation but for expropriation-like procedures, but it has to be taken into account that those are not compensations for expropriation but payments with intention to reduce the burden which the individual should not carry in favour of public interest. The balance between individual and public interest is decreased by this equalisation payment according to proportionality, and the payment is calculated by the suffered loss not the value of the property.

Compensation for expropriation can be addressed only at the point, when all requirements of Article 14.3 have been met. According to Article 14.3 the expropriation is related with partial or full taking of a private property by the state to serve some specific public interest.

*Naßauskiesung*⁶⁵ case shows perfect example when created regulations by legislation determined to limit the private property rights. State adopted The Federal Water Resources Act that determined for the persons which were involved in activities that can influence the quantity or quality of groundwater to acquire special permit. The purpose of the regulation was to reduce the pollution and waste into underground water and did not involve any expropriations or compensations. An individual which had been excavating gravel from his land already for certain period of time had received denial upon his request for the permit, therefore suffered loss, since he was not able to excavate any more. The Federal Constitutional Court stated that requirements of Article 14.3 have to be met to consider the action as expropriation and since those requirements have not been met then it cannot be regarded as expropriation and compensation is not under question. The court made a statement that the law has to be questioned in cases when the regulation influence the private property with expropriatory effect and not the absence of compensation. The court stated that the compensation paid for expropriatory effect is not according to Article 14.3 and expropriation but it is regarded as equalisation payment. The Basic Law within the means of property system comprehend fair approach to both public and individual interests of property.⁶⁶

In *Denkmalschutz*⁶⁷ case within the adoption of the Monument Protection Act of Rhineland-Palatinate the constitutionality of it was questions. The act determined limitations specific

⁶⁴ Sprankling, J.G., *Understanding Property Law*, LEXIS Publishing, 2000.

⁶⁵ BVerfGE 58, 300 (1981) (*Naßauskiesung*)

⁶⁶ Sprankling, J.G., *Understanding Property Law*, LEXIS Publishing, 2000.

⁶⁷ BVerfGE 100, 226 (1999) (*Denkmalschutz*)

kind of properties that were under protection of the state. An individual that owned this kind of specific property (villa) was prohibited to use it for apartment or non-residential purposes and at the point where it got financially difficult to maintain status of the property, the state denied persons request for demolishing the building. Based on the *Naßauskiesung* case stated that the limitations had to be regarded as regulations and not expropriation, hence the only remedy possible to the individual would amount to invalidation of the act. The court stated that the act is invalid since no meaningful use of property was left.⁶⁸

The above-mentioned cases show that in German law the legislative acts with expropriatory effect does not amount to expropriation. Payments which serve for equalisation of unfair burden provoked by regulations does not turn it into expropriation and will still remain as regulation. The form of which the unfair burden is equalised can also consist of other components than financial payments (compensation which does not refer to expropriation).

3.4. United States of America

The government's power of eminent domain is superior to property rights and is not part of constitutional provisions but is restricted by the Constitution and legislation.⁶⁹ It is argued that the governments duty is to serve common and general welfare, therefore, this attribute of sovereignty is granted.⁷⁰ The Constitution serves as security for property rights of individuals that limits the power of eminent domain, otherwise, the power would be absolute.⁷¹ Any legislation that is issued concerning eminent domain should be in conformity with the constitutional principles ensuring property rights for individuals.

Identification of "property" should be the first step whether there actually is anything to expropriate. In the case of *Penn Central Transportation co v City of New York*⁷² the court regarded the property as physical object, hence in the case of *United States v General Motors Corp*⁷³ the court regarded property as the rights recognised by law which were related to the physical property.

Both amendments have been established to protect the individuals from the state interference with rights of those individuals that any interference is supposed to be carried out with due process and any "takings" has to be compensated. At the same time, there may be a situation when the property is taken for violation of property in the public interest (police power)⁷⁴ and

⁶⁸ *ibid*

⁶⁹ *Maryland Plaza Redevelopment Corporation v Greenberg* (1979)

⁷⁰ *Lake v Lake County* (1957)

⁷¹ Allen, T., *The Right to Property in Commonwealth Constitutions*, Cambridge University Press, 2000.

⁷² *Penn Central Transportation co v City of New York* (1982)

⁷³ *United States v General Motors Corp* (1945)

⁷⁴ Sprankling, J.G., *Understanding Property Law*, LEXIS Publishing, 2000.

the compensation is not accommodated, but the same as the use of eminent domain power (expropriation for public purpose) both has to be decided upon due process.⁷⁵

Compensation is paid for expropriation, or taking, referred to the power of eminent domain, but there is completely different source of power in case of deprivation of property that refers to the state's police or regulatory power under which the compensation is not paid⁷⁶

The property owner by himself can initiate inverse condemnation proceedings against the government in case when regulation leads to taking of property and request compensation for the denial of owners economically viable use of his land.⁷⁷

Eminent domain requires three requirements in case of expropriation, that the taking must be for public purpose and due process, also that compensation must be made.

⁷⁵ Van der Walt, AJ., *Constitutional Property Clauses*, Kluwer Law International, 1999.

⁷⁶ Rosenfeld, M., *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, United Kingdom, 2012.

⁷⁷ *Lingle v Chevron USA inc* (2005)

4. PUBLIC PURPOSE (PUBLIC INTEREST)

According to previous section the “public interest” is one of the requirements in order for expropriation to be legitimate. Each legal framework mentioned above include the component of “public interest” and is necessary for expropriation to succeed. “Public interest” is also one of the requirements which is necessary to balance, namely, make interest balance between public interests and property owner interests.

4.1. European Convention on Human Rights

The second sentence of the Article 1 Protocol No.1 states that ““no one shall be deprived of his possessions except in the public interest [...]”. By this it is understood that any interference with property must be serving public or general interest in order to be justified.⁷⁸ General interest is determined expressively in third sentence but whichever rule is applied the interference with the property must satisfy the public interest objective⁷⁹ The ECHR within examination of public purpose gives a wide “margin of appreciation” to the states but will pay more attention on whether the public purpose was legitimately involved and properly authorized.⁸⁰

In the *James v United Kingdom* the applicant argued that “[...]”public interest” test in the deprivation rule is satisfied only if the property is taken for a public purpose of benefit to the community generally and that, as a corollary, the transfer of property from one person to another for the latter’s private benefit alone can never be “in the public interest”. The ECHR agreed with applicants that “[...] a deprivation of property effected for no reason other than to confer a private benefit on a private party cannot be “in the public interest”.”⁸¹ Although the court also stated that “[...] the compulsory transfer of property from one individual to another may, depending upon the circumstances, constitute a legitimate means for promoting the public interest.”⁸²

The ECHR also highlights that no common concept “for the public use” can be found in the constitutions, legislation or case law of Contracting States, therefore it is not possible to outlaw compulsory transfer between private individuals on the basis of notion of public purpose.⁸³

⁷⁸ A. Grgić *et al.*, *The right to property under the European Convention on Human Rights, A guide to the implementation of the European Convention on Human Rights and its protocols*, Human rights handbooks, No.10, Council of Europe, 2007. p. 26

⁷⁹ *Ibid*

⁸⁰ Sermet, L., *The European Convention on Human Rights and property rights*, Human rights files, No 11 rev., Council of Europe, 1999. p. 25

⁸¹ *James v United Kingdom* (1986) 8 EHRR 123 Para 40

⁸² *Ibid*

⁸³ *Ibid*81

As previously mentioned the ECHR gives wide margin of appreciation to the Contracting states determining the public purpose in relation to expropriation, therefore court determines that:

“Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is ‘in the public interest’. Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment both of the existence of a problem of public concern warranting measures of deprivation of property and of the remedial action to be taken [...]. Here, as in other fields to which the safeguards of the Convention extend, the national authorities accordingly enjoy a certain margin of appreciation. Furthermore, the notion of ‘public interest’ is necessarily extensive. In particular, as the Commission noted, the decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues on which opinions within a democratic society may reasonably differ widely. The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature’s judgment as to what is ‘in the public interest’ unless that judgment be manifestly without reasonable foundation. In other words, although the Court cannot substitute its own assessment for that of the national authorities, it is bound to review the contested measures under Article 1 of Protocol No. 1 (P1-1) and, in so doing, to make an inquiry into the facts with reference to which the national authorities acted.”⁸⁴

4.2. Latvia

In case of restriction of fundamental rights, it is necessary to highlight the purpose and that at specific circumstances the restriction of rights is inevitable. According to Article 105 of the Constitution of the Republic of Latvia only concept of “public purpose” serves as a legitimate objective for expropriation and restriction of fundamental right – property right.⁸⁵

The expropriation for public purposes is authorised only for purposes which are in conformity with common public interests as development of public transportation, security, etc., but an expanded explanation for common or overall public interests has not been determined by law.⁸⁶ Few deputy of Saeima⁸⁷ have stated their opinion upon matter of public interest or public purpose:

⁸⁴ *James v United Kingdom* (1986) 8 EHRR 123 Para 46; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) p.106,113; Carss-Frisk M *The Right to Property: A Guide to the Implementation of Article 1 of Protocol No 1 to the European Convention on Human Rights* (2001) p.27; Grgić A, Mataga Z, Longar M & Vilfan A *The Right to Property under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights and its Protocols* (2007) p.14.

⁸⁵ Plakane I. Pamattiesību ierobežošana satversmē. <http://www.juristavards.lv/doc/73558-pamattiesibu-ierobezosana-satversme/>.

⁸⁶ Satversmes tiesas spriedums Nr.2009-01-01. 12.1.

⁸⁷ Chapter II of The Constitution of the Republic of Latvia

Egons Knops indicated that the concept of public purpose can lead to disgraceful use of law in order for property expropriation since the concept is not strictly determined. However, the deputy highlights that private party have to recede in favour of state interests in case if private rights face the public interests.⁸⁸

Pēteris Laķis stated that it is necessary to determine the explanation of the public purpose or the empirical list of purposes will be useless.⁸⁹

Leonīds Alksnis has contrary opinion regarding necessity to determine the public purpose concept highlighting that it is not possible to foresee or predict every possible occasion to which it will be necessary to execute the power of expropriation.⁹⁰

Article 105 of the Constitution awards the legislator with wide freedom to determine the necessary public purposes in order to reach some specific target.

4.3. Germany

According to Article 14 the obligations for public wealth must reach higher priority that individual in case of restricting the private property rights. The Federal Constitutional Court has ruled over disputes regarding expropriation which it seems to serve public purpose putting emphasis on promoting economic growth but also promoting private interests as well.

In *Dürkheimer Gondelbahn*⁹¹ case the local government together with an individual established a company which tried to purchase necessary land from individuals in order to build roads according to the development plan but unsuccessfully. The local government issued expropriation for the necessary land by arguing that the expropriated land would serve public transportation interests. The main judgement by Dr Benda state that the expropriation was invalid since the legislation relating to the public road system did not permit expropriation within the terms of State building legislation.⁹² At the same case judge Dr Böhmer gave his valuation of public interest within the case. Judge argues that the expropriation must not serve neither to state nor any private individual but public as whole, and the granted power to expropriate by itself cannot permit expropriation. Dr Böhmer argued that the expropriation would serve for the economic development of the individual. If the adopted legislation is not in accordance with public interest then it is unconstitutional since it is contravening with the Basic Law.⁹³ The public purpose requirement is flexible since the court is able to be more restrict or more extend but the concept cannot be modified or amended by legislation or any other acts.

⁸⁸ Satversmes tiesas spriedums Nr.2005-12-0103. 22.1.

⁸⁹ Satversmes tiesas spriedums Nr.2005-12-0103. 22.1.

⁹⁰ Satversmes tiesas spriedums Nr.2005-12-0103. 22.1.

⁹¹ BVerfGE 56, 249 (1981) (*Dürkheimer Gondelbahn*)

⁹² BVerfGE 56, 249 (*Dürkheimer Gondelbahn*) 1981

⁹³ BVerfGE 56, 249 (*Dürkheimer Gondelbahn*) 1981

In *Boxberg* case permission of expropriation was granted to private company by local government according to federal planning legislation by arguing that the established infrastructure would develop economic growth in the area. The court ruled that the basis of public purpose was not sufficient enough for expropriation. The expropriation was not invalid just because it involved interest of a private individual who in some sort fulfilled the public purpose, but the court decided that the public benefit was not enough for expropriation according to requirements of Article 14.3 of the Basic law.

The individual is expected to devote his property rights inly in case of public purpose, therefore it limits the state's power and respects the interests of an individual. The expropriation will be approved only as last possibility and prohibited if there can be less harmful outcome serving public interest. Public purpose is seriously considered by the courts and expropriation cannot be approved for unsuitable purposes and for benefit of the third party. Although, courts sometimes decide favourably for private individuals but in cases if the state is not able to do it by itself and two important criteria must be met: (1) guarantee that the land will become in possessory by specific private entity, (2) part of the whole purpose must serve public purpose. In a case where expropriation was requested and granted for private company served the public purpose by establishing private school. The court approved the expropriation since the state had the legitimate power to expropriate and closely supervised this process which served great benefit for the public.⁹⁴

In cases when the private property is expropriated for public purpose but not executed for it then the process must be reversed.⁹⁵

4.4. United States of America

The Fifth Amendment of The Constitution of United States of America guarantees the protection of private property rights unless criteria of public use have been met together with just compensation.⁹⁶ If we look at the term “public use” it includes the definition in itself – “used by public”. Acquiring the land for public use is believed in the sense of building schools, roads, parks and other public facilities.

The term “public use” has not been accurately defined but the emphasis is put to what the government has planned to do with the property after acquisition and that the action differs from what current owner is doing. The term does not make distinction between homes and other kinds of property and home owners are not specially protected from expropriation for public purposes. The government is able to justify that almost any kind of criteria that serves for public safety, health or any other convenience could be subject to public use.⁹⁷

⁹⁴ BVerf, 1 BvR 1367/88

⁹⁵ BVerfGE 38, 175 (Rückenteignung) 1979

⁹⁶ the fifth amendment for the us constitution

⁹⁷ Allen, T., *The Right to Property in Commonwealth Constitutions*, Cambridge University Press, 2000.

In *New York city Housing Authority v Muller* case it was authorised to expropriate property on the basis of public purpose to get rid of slums and to build low-income housing. The dispute in this case rises since a private property would be expropriated, so that other private individuals could take over the new housing, so serving other private interests. The court decided in favour of the state by arguing that the by removing slums out of the area would decrease the crime and disorder and promote the welfare of the society serving public use.⁹⁸

Serious problem in relation to expropriation has always been when a third party benefits from the process, it was necessary to make broader definition for public use, since the United States of America became more industrialised.⁹⁹ The case *Berman v Parker*¹⁰⁰ was the beginning of less strict public use requirement and emergence of question whether expropriation that is for private benefit could serve for public use. The court did not decide upon this action as unconstitutional since it enclosed liberal meaning to the public use concept.¹⁰¹ US Supreme Court stated that if the local or state legislature determined that specific action serves the public use then the courts will not so easily confront the public use.¹⁰²

In the case of *Hawaii Housing Authority v Midkiff* The Supreme Court ruled based on *Berman v Parker* case that the government's action was legitimate by willing to end Hawaii's feudal land system. Government's action implied that the 72 land owners should sell the land to the lessees, thereby actually the beneficiaries would be private individuals but argued it was according to the concept of public use.¹⁰³ This shows that courts will rule expropriation unconstitutional only if the concept of public purpose is impossible, therefore the public use requirement is supposed to satisfy only minimum amount of rationality.

The case *Kelo v the City of New London* serves as good example and has been publicly criticized a lot because of the decision which breached private property rights by the use of expropriation for public purposes.¹⁰⁴ The City of New London had delegated the power of eminent domain to specific corporation with purpose to revitalise certain area, which would create new jobs, would generate more tax revenue and much wealthier people would move there. Ms Kelo was one of the land owners who had refused any amount of money as compensation for expropriation. The Supreme court ruled in favour of the City of New London arguing that the economic development of area is regarded for public use.¹⁰⁵

Kevin Gray strongly states that: "The *Kelo* case brought together many of features of the enduring American paradox. It concerns the limits of coercive state power in the land of the

⁹⁸ *New York city Housing Authority v Muller* 1936

⁹⁹ Allen, T., *The Right to Property in Commonwealth Constitutions*, Cambridge University Press, 2000.

¹⁰⁰ *Berman v Parker* 1954

¹⁰¹ *Ibid*

¹⁰² *Ibid*

¹⁰³ *Hawaii Housing Authority v Midkiff*

¹⁰⁴ *Kelo v the City of New London*

¹⁰⁵ Gray, K., "There is no place like home!", *J. South Pac. Law*, Vol.11, I.1, p.73-88, 2007.

free. It exposes the unresolved tension between the sanctity of private property and the power of the mighty dollar. It highlights a confrontation between little people and big business, between individual claims of personal privacy and the collective American dream of wealth and prosperity.”¹⁰⁶

Public use changes with changing economic conditions of society and that the right of the public to receive and enjoy the benefit of the determines whether the use is public or private.¹⁰⁷ The above-mentioned decisions show how local or state government can exercise the power of eminent domain contrary to the interests to private property owners. It can easily be seen that the requirement of public use, which is one of the criteria in The Fifth Amendment of the United States of America Constitution securing property rights of the individuals can serve for the interests of third parties and is does not restrict the government power of executing the power of eminent domain. Obviously, the economic development contravenes the small individual prsoperty, particularly offending home interest which deserves special protection.¹⁰⁸

George W Bush, the former President of the United States of America, in 2006 issued an executive order on the protection of private property regarding takings that does not serve the purposes of public use, and the section 1 of the order states that:

“it is the policy of the United States to protect the rights of Americans to their private property, including limiting the taking of private property by Federal Government to situations in which the taking is for public use, with just compensation, and for the purpose of benefiting the general public and not merely for the purpose of advancing the economic interest of private parties to be given ownership of use of the property taken.”¹⁰⁹

It has to be taken into account that the order, which is supposed to be implemented compatible with the applicable law, applies only federal level, therefore only limited influence on the state level. After the *Kelo* decision, by July 2007, 42 states introduced new legislation, 21 of which currently proscribe expropriation for public use serving economic development, but the rest has implemented more definite limits to regarding to execution of the power of eminent domain in a relation to economic development.¹¹⁰

¹⁰⁶ Gray, K., “*There is no place like home!*”, J. South Pac. Law, Vol.11, I.1, p.73-88, 2007. at 77

¹⁰⁷ *Poletown v City of Detroit* 304 Nw 2d 455 (Mich 1981) at 457

¹⁰⁸ Irwin E. Leiter, *Eminent Domain*, 51 Chi.-Kent. L. Rev. 645 (1974).

¹⁰⁹ <https://georgewbush-whitehouse.archives.gov/news/releases/2006/06/20060623-10.html>. Last visited at 15 of April 2018.

¹¹⁰ Cohen, C.E., *EMINENT DOMAIN AFTER KELO V. CITY OF NEW LONDON: AN ARGUMENT FOR BANNING ECONOMIC DEVELOPMENT TAKINGS*, 29 Harv. J.L. & Pub. Pol'y 491 (2005-2006).

5. COMPENSATION

This section is going to analyse how compensation for expropriation is measured. All of the above mentioned constitutions require compensation for expropriation, hence within the regulation of European Convention on Human Rights compensation has not been mentioned, but the section below will uncover how the compensation is justified.

5.1. European Convention on Human Rights

Article 1 of Protocol No.1 of the Convention does not consist of compensation requirement for deprivation of property in the scope of expropriation. Although, ECHR highlights that mostly requirement of compensation for property expropriation is necessary to satisfy on the basis of principle of proportionality.¹¹¹ In the *Sporrong and Lönnroth v Sweden* case the ECHR stated that in order to turn the interference with property for unlimited period of time legitimate it is necessary to reduce the time or assign compensation for interference.¹¹² ECHR in the *James v United Kingdom* case placed principles regarding compensation:

Article 1 impliedly requires the payment of compensation as a necessary condition for the expropriation of property;¹¹³

Expropriation without compensation is only permissible in certain exceptional circumstances of property;¹¹⁴

Compensation terms are material to the assessment whether the contested legislation respects a fair balance between the various interests at stake;¹¹⁵

Article 1 does not, however, guarantee a right to full compensation in all circumstances - Legitimate objectives of "public interest" may call for less than reimbursement of the full market value;¹¹⁶

the taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which could not be considered justifiable under Article 1¹¹⁷

¹¹¹ *Sporrong and Lönnroth v Sweden* (1983) 5 EHRR 35; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 115-116; Grgić A, Mataga Z, Longar M & Vilfan A *The Right to Property under the European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights and its Protocols* (2007) 5-6

¹¹² *Sporrong and Lönnroth v Sweden* (1983) 5 EHRR 35; Tom Allen, Compensation for Property Under the European Convention on Human Rights, 28 Mich. J. Int'l L. 287 (2007) p.294

¹¹³ *James v United Kingdom* (1986) 8 EHRR 123 Para 54.; Tom Allen, Compensation for Property Under the European Convention on Human Rights, 28 Mich. J. Int'l L. 287 (2007) p.293

¹¹⁴ *Ibid*

¹¹⁵ *Ibid* 100

¹¹⁶ *Ibid* 100

Property expropriation is one of the most severe forms of restricting property rights. In the *Vistins and Perepjolkins v. Latvia* case the ECHR analyzed expropriation conditions in order to examine whether the state's action can be justified. The ECHR applies their three step test to examine the state's legitimate action of using power of expropriation: (1) analyzed whether the interference with property is provided by law; (2) analyzed the interference with property has public interest; (3) the interference with property is proportionate to the aim pursued and proportionality exists between public and individual interests.¹¹⁸ By the analysis the ECHR highlighted the state's action conformity with first two steps of the test but lacked proportionality with the amount compensation placing disproportionate burden upon the individual.¹¹⁹ Therefore, by upsetting the "fair balance" court stated that it qualifies as violation of Article 1 of Protocol No.1.

5.2. Latvia

The third sentence of Article 92 of the Constitution of Republic of Latvia states that everyone, where his or her rights are violated without basis, has a right to commensurate compensation.¹²⁰ We can make a comparison with statement of "fair compensation" in the Article 105 and "commensurate compensation" (proportionate compensation) in Article 92, therefore we can derive that in case of violation of rights respectively proportionate compensation is comparable with fair compensation. The Constitutional laws that have the highest legal power is the basis for the state to execute their public authority but also the adopted laws are required to be in accordance with The Constitution.¹²¹

Since subject to expropriation for public purpose can relate to very wide range of property types it is not possible to determine mathematically precise and generally applicable criteria for calculation of compensation. According to Article 105 one of the criteria determining the compensation is that it is supposed to be fair.¹²² The compensation is paid in monetary form, unless it has been agreed with the owner to receive the compensation in a different form (real estate), but equivalent to expropriated property. The Constitutional court has stated that to determine fair compensation in case of expropriation for public purpose the state has to take into account the use of the property (residential or non-residential) and other specific characteristics. Most importantly the compensation should be determined according to the market value or close to it, but also the individual suffering the expropriation damage should not get any benefit from the transaction. According to Article 21 of "Property expropriation

¹¹⁷ *Ibid* 100

¹¹⁸ Carss-Frisk M, *The Right to Property: A Guide to the Implementation of Article 1 of Protocol No 1 to the European Convention on Human Rights* (2001) 27; Rook D *Property Law and Human Rights* (2001) 35-37;

¹¹⁹ *Vistins and Perepjolkins v. Latvia*, ECHR judgment of 25 October 2012, 131

¹²⁰ Article 92 of The Constitution of Republic of Latvia

¹²¹ Rosenfeld, M., *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, United Kingdom, 2012.

¹²² Satversmes tiesas spriedums Nr.2005-12-0103. p.23.3.3.

for the interests of the public law” (“Sabiedrības vajadzībām nepieciešamā nekustamā īpašuma atsavināšanas likums”) states that the determined compensation for expropriation must ensure that it will not change the welfare conditions for owner whose property is subject to expropriation.

5.3. Germany

The purpose of compensation is to position the expropriatee in a position as if the expropriation had never happened. Article 14.3 determines that the compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected.¹²³ The requirement of balance in this relation makes possible that in certain situation with specific aspects the compensation may be fair even below the market value of it.¹²⁴ The main requirement of calculation of compensation is to make sure that the balance which is found between the interests does not strive in favour to either of sides. In *Hamburgisches Deichordnungsgesetz* case the court stated that not always compensation is supposed to amount to full value of expropriated property since the legislature is able to adopt regulations which could permit compensation below market value. Calculation procedure upon compensation is mentioned in of The Federal Building Code (Baugesetzbuch, BauGB) and §93.1 states that in case of expropriation the compensation is due.¹²⁵ Compensation is provided for rights forfeited as a result of expropriation and for property loss of other kinds arising from expropriation.¹²⁶ Calculation of compensation takes place on the date when expropriatory institution applies for the expropriation or when the state actually takes possession of the property.¹²⁷ The essence of determining compensation includes market value and §194 of the Federal Building Code states that: “The standardised market value is defined as the price which would be achieved in an ordinary transaction at the time when the assessment is made, taking into account the existing legal circumstances and the actual characteristics, general condition and location of the property or other object of assessment, without consideration being given to any extraordinary or personal circumstances.”¹²⁸ The Section 96 considers compensation for other property losses arising from the process of expropriation.¹²⁹

5.4. The United States of America

¹²³ Article 14.3 Basic Law for Federal Republic of Germany

¹²⁴ BVerfGE 24, 367 (*Hamburgisches Deichordnungsgesetz*) 1968

¹²⁵ Article 93.1 of The Federal Building Code (Baugesetzbuch, BauGB)

¹²⁶ Article 93.2 of The Federal Building Code (Baugesetzbuch, BauGB)

¹²⁷ Article 93.4 of The Federal Building Code (Baugesetzbuch, BauGB)

¹²⁸ Article 194 of The Federal Building Code (Baugesetzbuch, BauGB)

¹²⁹ Article 96 of The Federal Building Code (Baugesetzbuch, BauGB)

Just compensation requirement plays important role of providing adequate protection to the private property owner in case of expropriation for public purposes. It cannot be anticipated that the individual would cover some kind of burden solely by himself for the benefit of public. The purpose of just compensation is to fully reimburse the damage for the property loss.¹³⁰ “Fairness and justice” demand in the Penn Central Transportation Co v City of New York case that the damages caused by public action should be covered by the government, thereby the individual should not cover the loss by himself for the benefit of the public.¹³¹

Just compensation is purely the value of the land taken or the damage caused to the land not taken. The Fifth Amendment of The United States of America Constitution require the concept of just compensation in case of expropriation for public purposes, nevertheless the just compensation cannot be derived to one specific formula but it must be valued and considered in each case. However, the Model Act gives guidelines how to measure just compensation in case of ordinary expropriations.¹³²

If the government has planned to build a new streets or highways through any private property (land plots) which is necessary for expropriation then the government is supposed to cover just compensation to those individuals, who were the owners. In this kind of cases the courts regularly maintained the necessity for just compensation in case of expropriation for public use. In other case, no compensation is needed when the government prohibits any kind of business continuation or prohibits the use of land for specific purpose which would give an economic value.¹³³

Mainly, the compensation is induced not by losses caused by regulation but specifically by “taking” property. Case of *Mitgeler v. Kansas* is a great example of when regulations issued by the government directly influence the property but the court has decided that the compensation is not appropriate.¹³⁴ The property in that case, namely the factory, is only capable of beer production and the government issues regulatory prohibition on the production and trade of intoxicating liquors but the case is ruled by not involving principles of eminent domain.¹³⁵ It was argued that the regulation by itself does not involve expropriation of property for public purposes, but simply restricts the use of property that would be harmful for the society. Hence, the question is whether the just compensation is fundamentally designed to secure the economic values of individuals and by Courts rulings it seems that the security of private economic values is not the priority.¹³⁶

¹³⁰ United state v Miller 1943

¹³¹ Penn Central Transportation Co v City of New York

¹³² Allen, T., *The Right to Property in Commonwealth Constitutions*, Cambridge University Press, 2000.

¹³³ Berman v. Parker (police power)

¹³⁴ Mitgler v. Kansas

¹³⁵ Sprankling, J.G., *Understanding Property Law*, LEXIS Publishing, 2000.

¹³⁶ Ibid

The origin of the just compensation could be traced back till the literature of early academics as Grotius, who said that:

“A king may two ways deprive his subjects of their right, either by way of punishment or by virtue of the eminent power. But if he does it the last way, it must be for some public advantage, and then the subject ought to receive, if possible, a just satisfaction for the loss suffers, out of the common stock.”¹³⁷

Uniform Eminent Domain Code was adopted at 1974 by The National Commission on Uniform State Law but was changed to a Model Act in 1984. The Model Eminent Domain Code is seen as procedural guideline to the process of expropriation and also determining the value of just compensation.¹³⁸

Determination of just compensation is stated in the Article X of the Model Eminent Domain Code. §1001 if the code states that the property owner is entitled to the compensation in case of expropriation.¹³⁹ The market value of the expropriated property is the primary criteria of measuring the compensation which is stated in §1002(a).¹⁴⁰ There is no accurate way of how to measure just compensation but the fair market value is a valid standard¹⁴¹. §1002(b) states that in case of partial taking that just compensation is considered by measuring the difference between the fair market value before the expropriation without taking into account the expropriation and the fair market value after the expropriation taking the expropriation into account.¹⁴² The term “fair market value” is considered in §1004 and §1004(a)¹⁴³ states that the fair market value is determined as a price that would be discussed in an ordinary property sales agreement. Fair market value is not supposed to place either of sides in more favourable place within the process of expropriation.

The emphasis when determining just compensation is put to the property not the person and not on what is owned but what is lost.¹⁴⁴ The owner receives the compensation with respect to all rights that are related to the property and the compensation is considered as damages substituting the taken land. The compensation mainly is determined by the value of money unless the parties have agreed on different subject regarding compensation.¹⁴⁵ Most common option of determining compensation is market data approach since it is most reliable source of evidence of property value and most appropriate form of valuation.

¹³⁷ Schauer, F., *The Philosophy of Law*, Oxford University Press, New York, 1996.

¹³⁸ §102 of the Model Eminent Domain Code.

¹³⁹ §1001 of the Model Eminent Domain Code.

¹⁴⁰ §1002(a) of the Model Eminent Domain Code.

¹⁴¹ *Kimball Laundry Co v United States* 1949

¹⁴² §1002(b) of the Model Eminent Domain Code.

¹⁴³ §1004(a) of the Model Eminent Domain Code.

¹⁴⁴ *United States v 50 Acres of Land* (1984)

¹⁴⁵ Rosenfeld, M., *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, United Kingdom, 2012.

6. CONCLUSIONS

The thesis uncovered that the state has been granted by the power of expropriation, ability to restrict the private property in the most severe way to serve public interest. Since property rights are one of fundamental rights belonging to individual it is necessary to find balance so that the individual would not carry the burden in favor for whole society all alone. The author would like to provide basic arguments how courts balance interests between both parties, state and individual to draw an overall position of the issue.

According to the analysis above it can be seen that the ECHR uses deferent approach to the Contracting states towards determining the public purpose, although the court will not defer the determination of public purpose to the Contracting state authorities if the court will not find a reasonable justification. It can be seen that the ECHR use similar approach as US Supreme Court using deferent approach, hence the ECHR defers the to the national authorities, but US Supreme Court defers to the legislation in relation of determining public interests. By the analysis it was carried out that courts very rarely tend to object the legitimacy of public purpose or interest since there is not one common definition for doctrine of public interest. The public interests for the state ar developing therefore it is not possible to determine specifically the necessary public interests. Mostly the amount of compensation can balance the burden so that both parties can be assumed to be at even situation.

The German approach towards procedure of compensation is the most secured since the regulation includes requirement of binding clause, namely that only at the point when compensation has been assessed, placed, and agreed upon the process of expropriation can be initiated. The amount of compensation is either calculated at the point when the property were supposed to be trasfered. Since Latvia is also a civil law country the procedure can be asimlated with German approach. The necessity for separate law upon expropriation gives more security to the private individual. The United States of America approach gives more freedom to the government determining public purpose, for example for economic development. United States of America. Although, the ECHR does not determine the requirement of compensation in case of expropriation, hence it justifies by principle of proportionality and balancing interests of both parties.

The compensation requirement protects private property owners from the governmental power . Compensation is one of the attributes how to protect the interests of the individual. Purpose of the compensation is to equalize and balance the interests between public and private interests. Therefore compensation is required in the basis of the proportionality , to proportionate Mostly the courts determine compensation as fair which means not necessarily compensation has to be paid in full amount. The amount of compensation vary from each case and has to be considered exclusively. Market value of the property plays important role in determining the compensation, the compensation can be below the market value but mostly it was mentioned that the compensation should be within the amount of market value or close to it. Compensation os one of the ways how to provide that collective interest and the interest of an individual are balanced.

To sum up, the amount of compensation cannot be determined by one formula, each case has to be examined exclusively. The point of compensation is to balance both interests and not to put any of parties more in favor than other.

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