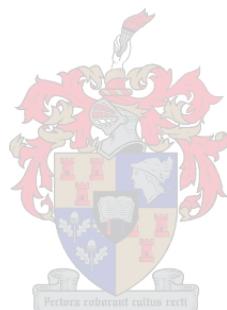


# **Constitutional property law in Central Eastern European jurisdictions: A comparative analysis**

Jan – Harm Swanepoel



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the Faculty of Law at Stellenbosch University*

Promoter: Prof ZT Boggenpoel

Co-Promoter: Prof AJ van der Walt

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## **Declaration**

By submitting this dissertation electronically, I declare that the entirety of the work contained therein is my own, original work, that I am the authorship owner thereof (unless to the extent explicitly otherwise stated) and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

Jan – Harm Swanepoel

December 2016, Stellenbosch

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## Summary

This dissertation investigates three areas of constitutional property law doctrine, namely the concept of property for constitutional purposes, the distinction between deprivation and expropriation and the application of the proportionality principle as a means of determining the legitimacy of interferences with property. More specifically, it is determined how these three doctrinal areas are approached in the established constitutional democracies of Germany, the United States of America, the principles developed by the European Court of Human Rights, as well as relatively young constitutional democracies in Central Eastern Europe and South Africa.

The respective German and US law approaches to the three doctrinal areas differ in certain aspects. Interestingly, while their points of departure differ, they reach similar conclusions in some instances. These two jurisdictions are presented as two points on a continuum of approaches to the three doctrinal areas, with the aim of determining whether the constitutional democracies in Central Eastern Europe and in South Africa resemble an approach closer to German or US law. The principles of the European Court of Human Rights regarding the three doctrinal areas are also investigated because they represent an alternative framework that influences the development of constitutional property law in the younger constitutional democracies, particularly in Central Eastern Europe because of their links to the European Union.

Generally speaking, in relation to the three doctrinal areas, the dissertation concludes that on the continuum between German and US law, the constitutional democracies in Central Eastern Europe and South Africa seem to follow an approach that resembles German law rather than US law, although no explicit reference is made in this regard.

## **Opsomming**

Hierdie proefskrif ondersoek drie gebiede van grondwetlike eiendomsreg-leerstelling, naamlik die konsep van eiendom vir grondwetlike doeleinades, die onderskeid tussen ontneming en onteiening en die toepassing van die proporsionaliteitsbeginsel as meganisme om die legitimiteit van inmenging met eiendom te bepaal. Die ondersoek is verder gerig op hoe hierdie drie leerstellingsgebiede in die meer gevestigde grondwetlike demokrasieë van Duitsland en die Verenigde State van Amerika en die beginsels ontwikkel deur die Europese Hof van Menseregte benader word, vergeleke relatief jong grondwetlike demokrasieë in Sentraal-Oos-Europa en in Suid Afrika.

Die onderskeie Duitse en Amerikaanse benaderings verskil met betrekking tot sekere aspekte. Interessant genoeg, verskil hul uitgangspunte in bepaalde opsigte en tog word soortgelykste gevolgtrekkings getref. Wat die drie leerstellingsgebiede betref, verteenwoordig hierdie twee jurisdiksies dus twee punte op 'n kontinuum. Onderliggend aan hierdie ondersoek is die vraag of demokrasieë van Sentraal-Oos-Europa en Suid-Afrika se benaderings vergelykbaar is met die Duitse of eerder die Amerikaanse reg. Die beginsels van die Europese Hof van Menseregte word ook in hierdie verband ondersoek omdat hulle 'n alternatiewe raamwerk daarstel, veral wat die ontwikkeling van grondwetlike eiendomsreg in die jonger grondwetlike demokrasieë betref. Hier ter sprake is veral Sentraal-Oos-Europa, as gevolg van hul bande met die Europese Unie.

Met betrekking tot die drie leerstellingsgebiede kom die proefskrif oor die algemeen tot die gevolgtrekking dat op die kontinuum tussen Duitse en Amerikaanse reg, die grondwetlike demokrasieë in Sentraal-Oos-Europa en in Suid Afrika benaderings volg wat vergelykbaar is met die Duitse reg eerder as die Amerikaanse reg, al word daar in hierdie verband nie eksplisiet daarna verwys nie.

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# Chapter 1

## Introduction

### 1 1 Introduction

The development of constitutional property law can be said to be contextual in nature. The direction one jurisdiction chooses to go in developing or choosing not to develop their constitutional property law will not necessarily be the same as another. The Central Eastern European jurisdictions faced this problem of having to develop their constitutional property law following the fall of Communism in this region. Many of the countries in this region have set out on a course of constitutional transformation, beginning with the creation of new constitutions.

With the process of creating a new constitution comes the question of how to approach the development of a new constitutional law for the region. South Africa was faced with this question after the end of *apartheid*. The Central Eastern European jurisdictions, like South Africa, looked abroad for guidance regarding how to go about constructing a new constitution and a new constitutional law. An advantage of looking beyond their own borders is that the dissemination of constitutional experience makes it possible for well-established and tested constitutional principles to be adopted quickly.<sup>1</sup> The Central Eastern European jurisdictions found themselves in a unique position: they could choose to forge ahead and create their own constitutional property law, or employ the approaches of other

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<sup>1</sup> Ludwikowski R “Searching for a new constitutional model for East-Central Europe” (1991) 17 *Syracuse J Int’l L & Comm* 92-170 at 92. See further Lach K & Sadurski W “Constitutional courts of Central and Eastern Europe: Between adolescence and maturity” (2008) 3 *J Comp L* 212-233 at 213-216; Schwartz H “The bill of rights in America and Central East Europe” (1992) 15 *Harv J L & Pub Pol'y* 93-98 at 93-94; Schweisfurth T & Alleweldt A “New constitutional structures in Central and Eastern Europe” (1998) 24 *Rev Cent & E Eur L* 289-328 at 294.

European jurisdictions as a starting point for developing their own constitutional property law. They could also adopt the constitutional principles regarding the protection of property developed by the European Court of Human Rights (ECHR). Some Central Eastern European jurisdictions have decided to apply the principles of the ECHR to provide content to the rights listed in their respective constitutions. In some jurisdictions the principles are applied in a secondary manner to confirm the results of the particular jurisdiction's own existing constitutional principle. Others apply their own constitutional principles and do not use the principles of the ECHR at all. Generally speaking, the constitutional principles of the ECHR seem to be an important factor that may influence the development of constitutional law, particularly constitutional property law, in Central Eastern Europe. Regarding those Central Eastern European jurisdictions that apply their own constitutional principles, the question arises whether the approach of these jurisdictions to the constitutional definition of property, the distinction between deprivation and expropriation of property and the application of the principle of proportionality perhaps resembles the approach to other, more established constitutional democracies, like for instance Germany and the United States.

Just like the Central Eastern European jurisdictions, South Africa can also be characterised as a relatively young constitutional democracy that is still in the process of refining its constitutional property law. In *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape*,<sup>2</sup> Froneman J stated that the question of property is fiercely contested in South African society and that there is, as yet, little common

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<sup>2</sup> *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* 2015 (6) SA 125 (CC).

ground on how we conceive property under section 25 of the Constitution,<sup>3</sup> why we should do so, and what purpose the protection of property should serve.<sup>4</sup> South Africa does not have a broad, regional framework that it can adopt to provide clarity to any constitutional property law issues that are unclear. Therefore, it will be interesting to see how South Africa approaches the specific constitutional property law issues of the constitutional definition of property, the distinction between deprivation and expropriation of property and the application of the principle of proportionality and whether these approaches perhaps resemble those employed by more established constitutional democracies, in this case Germany and the United States.

## 1 2 Research question, hypotheses and methodology

### 1 2 1 Outline of the research problem

The research question of this dissertation can be described as follows: assuming that German law and US law represent two more or less opposite approaches to three doctrinal issues in constitutional property law (specifically the definition of constitutional property, the distinction between deprivation and expropriation, and the role of proportionality in adjudicating the validity of state limitations of property rights), can it be said that the emerging constitutional property law doctrine in younger constitutional democracies (specifically jurisdictions in Central Eastern Europe, and also South Africa) resemble one, rather than the other, of these

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<sup>3</sup> Constitution of the Republic of South Africa, 1996.

<sup>4</sup> *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* 2015 (6) SA 125 (CC) para 4.

approaches? Secondly, is it possible to establish why developments in any of the younger democracies tend to follow a particular approach?

## 1 2 2 Hypotheses

The German and US law approaches to the concept of property for constitutional purposes, the distinction between deprivation and expropriation and the application of the proportionality principle are discussed in chapter 2 of this dissertation. My hypotheses in this regard are, firstly, that these two older, more established constitutional democracies represent different approaches to these three themes; in instances where similar outcomes are reached in relation to the three themes, the methodology and reasoning differs between the two jurisdictions. Secondly, the German and US law approaches to the three main themes can be set up as two points on a continuum of approaches against which the approaches of younger constitutional democracies such as the Central Eastern European jurisdictions and South Africa to the three main themes can be measured.

Chapter 3 explores the principles of the ECHR regarding the protection of possessions. In this regard, my hypothesis is that the principles relating to the protection of possessions in terms of Article 1 of Protocol No 1 to the European Convention on the Protection of Human Rights and Fundamental Freedoms<sup>5</sup> represent an alternative framework to the approaches of German and US law to the three main themes that influence the development of constitutional property law in the Central Eastern European jurisdictions. This is because of the special relationship that exists between the ECHR and those Central Eastern European

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<sup>5</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (as amended by Protocols Nos 11 and 144 and by supplemented Protocols Nos 1, 4, 6, 7, 12 and 13).

jurisdictions that are either signatories to the Convention on the Protection of Human Rights and Fundamental Freedoms, the Maastricht Treaty,<sup>6</sup> member states of the European Union or have a different connection to the ECHR.

Chapter 4 investigates the development of constitutional property law in the selected Central Eastern European jurisdictions relating to the three main themes of the concept of property for constitutional purposes, the distinction between deprivation and expropriation and the application of the proportionality principle. The hypotheses in this regard are, firstly, that the selected Central Eastern European jurisdictions make use of the principles regarding the protection of possessions developed by the ECHR because all of the Central Eastern European jurisdictions discussed are signatories to the European Convention on the Protection of Human Rights and Fundamental Freedoms. Secondly, those Central Eastern European jurisdictions that do not follow the approach of the ECHR follow an approach that is closer to the general trend of German law rather than US law.

The South African law approaches to the concept of property for constitutional purposes, the distinction between deprivation and expropriation and the application of the proportionality principle are discussed in chapter 5. The purpose of this discussion is to determine where South African law currently stands regarding the three main themes. The hypothesis in this regard is that the South African Constitutional Court's approach to each of the three main themes is closer to the general trend of German law rather than US law.

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<sup>6</sup> Treaty on European Union (Maastricht text), 29 July 1992, 1992 OJ C 191/1.

### 1 2 3 Methodology

The dissertation will attempt to provide a normative assessment of the approach to the three problem areas followed in the Central Eastern European jurisdictions and South Africa and to determine why they follow the approach that they do, insofar as it is possible to determine this. The primary focus remains on the approaches adopted by the Central Eastern European jurisdictions but South African constitutional law is investigated as well to add to the comparative approach of this dissertation and because South Africa is also a relatively young constitutional democracy that could perhaps benefit from the doctrine of older and more established constitutional democracies.

In order to answer the research question, German and US law, being much older and more established constitutional democracies, are presented as two different approaches to constitutional property law, particularly with reference to the three problem areas of the definition of property for constitutional purposes, the distinction between deprivation and expropriation of property and the role of proportionality in adjudicating the validity of state limitations of property. The approach of the Central Eastern European jurisdictions and South Africa to each of these three doctrinal areas will ultimately be measured against that of German and US law to see if these relatively young constitutional democracies follow something more like the German or more like the US law approach. The role of the ECHR and the Central Eastern European jurisdictions' international law relationship to it is also investigated in a separate chapter to determine how this relationship affects the development of their constitutional property law. The discussions of German law and the Central Eastern European jurisdictions are based on secondary sources that were available in English. Invariably, the availability of English sources regarding the

constitutional property law of the Central Eastern European affects the level of detail in certain areas of the discussion as well the generality of the conclusions regarding the research questions investigated in that chapter.

### **1 3 Outline of chapters**

#### **1 3 1 Established doctrine**

Chapter 2 presents German and US law as examples of established doctrine in core doctrinal areas of constitutional property law and as two different approaches to the three core doctrinal areas of constitutional property law focused on in this dissertation. These two jurisdictions represent opposite approaches in certain core areas, while in other areas they reach similar conclusions although their points of departure are different. German and US law are also presented as two markers on a continuum of approaches to the three doctrinal areas. This chapter briefly describes both the German and US law approaches to the constitutional definition of property, the distinction between deprivation and expropriation and the role of proportionality in adjudicating the validity of state limitations of property rights. The purpose of this is to assess the Central Eastern European and South African approaches to the three doctrinal issues to determine if they follow an approach that is closer to the German or US law.

#### **1 3 2 European Court of Human Rights**

In chapter 3 of the dissertation another framework that might influence the development of constitutional property law in the Central Eastern European

jurisdictions is analysed. The purpose of this comparative chapter is to investigate the special relationship between the ECHR and those Central Eastern European countries that are either signatories to the Convention on the Protection of Human Rights and Fundamental Freedoms, signatories to the Maastricht Treaty, member states of the European Union or that have some other connection to the ECHR. In this regard, this chapter specifically investigates the doctrine of the ECHR regarding the definition of possessions, the distinction between deprivation (regulation) and expropriation of possessions and the application of the fair balance principle developed through the court's interpretation of Article 1 of Protocol No 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>7</sup> An investigation into the ECHR's doctrine regarding the three core doctrinal areas is necessary because the Central Eastern European jurisdictions discussed in this dissertation are in principle members of the European Union and are therefore bound by the ECHR's principles. It will be clear in this chapter that some of the Central Eastern European constitutional courts apply the ECHR's doctrine when adjudicating constitutional matters involving property, either to provide content to their own constitutional right to property or in conjunction with the specific constitutional court's existing principles.

### 13 3 Central Eastern European jurisdictions

Chapter 4 investigates the development of constitutional property law in Central Eastern Europe following the fall of Communism in the region. The aim of this investigation is to determine, as far as possible based on the sources available in

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<sup>7</sup> Council of Europe, *Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 20 March 1952, ETS 9.

English, whether these developments follow a particular approach generally. It is also investigated, based on the sources available in English, whether the development of constitutional property law relating to the constitutional definition of property, the distinction between deprivation and expropriation of property and the application of the proportionality principle as a means of legitimising interferences with property resembles either the German or the US approach to these three doctrinal areas. Therefore the focus of this chapter is not on whether the Central Eastern European jurisdictions directly cite or follow German or US law, but rather to establish normatively whether the Central Eastern European jurisdictions follow an approach that is closer to the general trend of German or US law.

### 13.4 South African law

Chapter 5 investigates how the concept of property for constitutional purposes, the distinction between deprivation and expropriation of property and the principle of proportionality as a requirement for the validity of interferences with property are approached in South African constitutional property law. The purpose and approach of the chapter is not to determine whether there is anything in the emerging case law of Central Eastern European jurisdictions that the South African Constitutional Court can use. Rather, the South African Constitutional Court's reasons for following or not following specific foreign law examples and whether these reasons align with those of the Central Eastern European jurisdictions for either following or not following certain foreign law examples will be investigated. It will also be investigated whether the South African constitutional property law approach to the three issues is closer to either the German or US law markers established in chapter 2. Consequently, the ultimate purpose of this investigation is to determine where the South African law

currently stands regarding these three doctrinal areas and where the approach to these three doctrinal areas falls on the continuum between the German and US law approaches.

## 1 4 Qualifications

This dissertation is limited to the discussion of how the concept of property for constitutional purposes, the distinction between deprivation and expropriation and the application of the proportionality principle is understood in German law, US law, the doctrine of the ECHR, selected Central Eastern European jurisdictions and South African law. I do not attempt to discuss all the relevant material pertaining to the three main themes from the jurisdictions discussed. I discuss a selection of relevant and important case law and examples in order to pick up general trends in the respective jurisdictions and to draw conclusions in this regard.

Chapter 2 of this dissertation dealing with German and US law is not intended as a detailed analysis of the approach of these two jurisdictions regarding the three main themes discussed. The purpose of that chapter is to provide a cursory description and a broad outline of the German and US law positions (or doctrine) regarding the three main themes. As mentioned already, the discussion of German law will be based on secondary sources available in English because I cannot read German.

The investigation of the selected Central Eastern European jurisdictions' approach to the three themes in chapter 4 is based on sources that are available in English and therefore I realise that the discussion in that chapter may not be

complete and that it is likely that certain areas will perhaps be more detailed than others. This will necessarily affect the generality of the conclusions reached in that chapter. However, my argument is that it is possible, given what is available in English, to draw specific conclusions about whether the trend in the respective jurisdictions pertaining to the three issues tends more towards one end of the continuum than another.

# Chapter 2

## German and US law: Established doctrine

### 2 1 Introduction

German law<sup>1</sup> and US law represent two examples of established doctrine in certain core doctrinal constitutional property law issues, specifically the definition of constitutional property, the distinction between deprivation and expropriation, and the role of proportionality in adjudicating the validity of state limitations of property rights. In some of the core areas, they represent opposite approaches, while in others they reach a similar conclusion although their points of departure are very different. This chapter presents German and US law as two examples of different approaches to three doctrinal issues relating to constitutional property law and as two markers on a continuum. The purpose of the chapter is to ultimately assess the Central Eastern European and South African approaches to the three doctrinal issues to determine if they follow an approach that tends more towards German or US law.<sup>2</sup>

Both German and US law protect property from arbitrary interference by the state.<sup>3</sup> However, their respective constitutional provisions concerning property look

<sup>1</sup> I cannot read German and therefore the discussion of German law will be based on secondary sources that are available in English.

<sup>2</sup> See chapters 4 and 5 below.

<sup>3</sup> Blaauw-Wolf L & Wolf J “A comparison between German and South African limitation provisions” (1996) *SALJ* 267-296 at 267; Kleyn D “The constitutional protection of property: A comparison between the German and South African approach” (1996) 11 *SAPL* 402-445 at 427-427; Blaauw-Wolf L “The ‘balancing of interests’ with reference to the principle of proportionality and the doctrine of *Güterabwägung* – A comparative analysis” (1999) 14 *SAPL* 178-215 at 180-201; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 158-163, 451-458; Dana DA & Merrill TW *Property: Takings* (2002) 121-168; Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 258-314; Singer JW *Introduction to Property* 2<sup>nd</sup> ed (2005)

very different. Article 14 of the German Basic Law<sup>4</sup> guarantees property as a right and states that the law determines the substance and limits of property. Furthermore, Article 14 states that property entails obligations and the use of property should serve the public interest and also provides for expropriation of property if certain requirements are met. The property clause of the United States Constitution<sup>5</sup> appears in the Fifth Amendment,<sup>6</sup> read with the Fourteenth Amendment<sup>7</sup> to the United States Constitution. The Fifth Amendment proscribes the deprivation of property without due process of law (the Due Process Clause) and states that property shall not be taken for public use without just compensation (the Takings Clause).<sup>8</sup>

The German and US property clauses differ substantially in terms of both form and content. Article 14 not only guarantees property as a right but also sets out how the legislature should determine the content of property for the purposes of Article 14.<sup>9</sup> This allows for the regulation of property and achieves a similar goal to that of

722-732; Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 133-147, 73-95; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 201, 203, 215-217, 225-227, 241-242, 272-273, 454-455, 493-501.

<sup>4</sup> Basic Law for the Federal Republic of Germany, 1949 (as amended on and up to 30 December 1993) (*Grundgesetz, GG*).

<sup>5</sup> Constitution of the United States of America, 1787.

<sup>6</sup> Fifth Amendment, 1791.

<sup>7</sup> Fourteenth Amendment, 1868.

<sup>8</sup> Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 398-399; Dana DA & Merrill TW *Property: Takings* (2002) 3-4; Singer JW *Introduction to Property* 2<sup>nd</sup> ed (2005) 678-692; Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 64.

<sup>9</sup> Kleyn D “The constitutional protection of property: A comparison between the German and South African approach” (1996) 11 SAPL 402-445 at 413; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 124-132, 132-146; Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 80-85, 224; Alexander GS *The Global Debate*

the Due Process Clause in the Fifth Amendment,<sup>10</sup> even though Article 14 and the Due Process Clause are very different. Article 14 distinguishes between the regulation of property in Article 14.1 and the expropriation of property in Article 14.3,<sup>11</sup> whereas the Fifth Amendment only refers to “deprivation” of property in the sense of regulation of property.<sup>12</sup> Regarding expropriation, Article 14.3 sets strict requirements for a valid expropriation. Expropriation may only take place in the public interest and pursuant to a law, which must also determine the nature and extent of compensation. The Fifth Amendment requires a public use and just compensation for property to be “taken” or expropriated.

In US constitutional property law the courts developed the doctrine of regulatory takings. A regulatory taking occurs when a regulation of property in terms of the state’s police power goes too far and is treated as a taking of property, thus

*over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 114-115, 124-131; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 172-174.

<sup>10</sup> Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 398-408, 441-450; Dana DA & Merrill TW *Property: Takings* (2002) 68-85; Singer JW *Introduction to Property* 2<sup>nd</sup> ed (2005) 2-6; Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 69-70; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 121-123, 174-175.

<sup>11</sup> Kleyn D “The constitutional protection of property: A comparison between the German and South African approach” (1996) 11 *SAPL* 402-445 at 424-427; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 132-150; Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 278-289; Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 116-124; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 365-367.

<sup>12</sup> Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 410-423, 423-440; Dana DA & Merrill TW *Property: Takings* (2002) 86-118; Singer JW *Introduction to Property* 2<sup>nd</sup> ed (2005) 675-752; Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 64-95; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 201.

requiring compensation to the affected owner.<sup>13</sup> This concept results in a grey area between a regulation and expropriation of property. This grey area does not exist in German constitutional property law where an interference with property can only be characterised as a regulation (determination of the scope and content of property) or an expropriation of property. This is due to the strict requirements that must be adhered to in order for either a regulation or expropriation of property to be constitutionally valid. If the specific requirements are not met, the regulation or expropriation is unconstitutional. Therefore, the concept of a regulatory taking cannot exist in German constitutional property law.

On a methodological note, the purpose of this chapter is not to analyse German and US law in any detail relating to the constitutional concept of property, the distinction between deprivation and expropriation and the role of proportionality in adjudicating the validity of state limitations of property rights. The purpose of this chapter is to superficially describe and broadly outline the German<sup>14</sup> and US law positions regarding these core doctrinal areas for the ultimate purpose of comparing them with the other jurisdictions discussed in subsequent chapters. As was indicated earlier in this introduction, German and US law overlap in some of these core areas, at least to some extent, but diverge so widely in others that they can be seen as opposite ends on a continuum of possible positions regarding the specific point at hand. The relative positions adopted in these two legal systems are therefore useful

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<sup>13</sup> *Pennsylvania Coal Co v Mahon* 260 US 393 (1922) at 415. See further Dana DA & Merrill TW *Property: Takings* (2002) 4-6; Singer JW *Introduction to Property* 2<sup>nd</sup> ed (2005) 670, 680-692; Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 70-77; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 355-359; Bezuidenhout K *Compensation for Excessive but Otherwise Lawful Regulatory State Action* (LLD dissertation Stellenbosch University 2015) 62-80.

<sup>14</sup> Therefore, it will be unnecessary to expand the citations for the German law aspects of the chapter beyond those required for the superficial description and broad outline.

markers for a broader comparison of developments in other, less developed systems.

## 2 2 Property

### 2 2 1 Introduction

The German Basic Law and the US Constitution both provide for the protection of property from state interference, except in certain circumscribed instances. However, these two jurisdictions follow different approaches regarding how property is viewed from a constitutional perspective. German private law views property as a relationship between persons and things in which they have a concrete and vested right. A much wider range of interests is recognised as property for the purposes of Article 14 than under the German private law definition of property.<sup>15</sup> Article 14 protects the property of a person and not their wealth in general.<sup>16</sup> Therefore, Article 14 must be relied on in relation to a specific item of property that is recognised as such under Article 14.

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<sup>15</sup> Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 124-131. See further Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 226-227; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 117-119.

<sup>16</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 119. The US Supreme Court also follows this approach, in that it protects only identifiable assets and not general financial interests. See further Kleyn D “The constitutional protection of property: A comparison between the German and South African approach” (1996) 11 SAPL 402-445 at 414; Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 227-229; Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 127-128.

US law views property as a relationship between people with regard to things and not between people and things, even in private law.<sup>17</sup> The question of whether a particular interest or object constitutes property plays a relatively minor role in the adjudication of property disputes under this view, which allows for a wide range of interests to fall under the property protection provided for in the Fifth and Fourteenth Amendments, without much concern for any differences between private and constitutional law. What is at issue in property disputes under US law are the rights and duties pertaining to the legal relationship between the parties in so far as these rights and duties pertain to property interests.

## 2 2 2 German law

Article 14 of the German Basic Law regulates the constitutional protection of property.<sup>18</sup> Article 14.1 provides that property and the right of inheritance are guaranteed and that the law determines the substance of property and the right of inheritance and their limits. Article 14.2 provides that property entails obligations and that its use should also serve the public interest. Article 14 does not guarantee the right of “ownership” alone, but rather “property”, as is clear from the official English translation of *Eigentum* as property and the fact that a much wider range of

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<sup>17</sup> Singer JW *Introduction to Property* 2<sup>nd</sup> ed (2005) 2. See further Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 4; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 103-104.

<sup>18</sup> Kleyn D “The constitutional protection of property: A comparison between the German and South African approach” (1996) 11 SAPL 402-445 at 413; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 124-132, 132-146; Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 80-85, 224; Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 114-115, 124-131; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 172-174.

proprietary interests than ownership in the private law sense is protected under Article 14.<sup>19</sup> Article 14.1 is phrased in general terms and does not provide a constitutional definition of property. This means that the property guarantee in Article 14.1 could, in theory, encompass all conceivable forms of property but it is the legislature that determines which forms of property qualify for protection and what their contents are.<sup>20</sup>

Regarding the constitutional concept of property, the German Federal Constitutional Court (*Bundesverfassungsgericht*) (*BVerfG*) held in the *Naßauskiesung*<sup>21</sup> case that

“[t]he legal view that the right to property conferred by § 903 of the Civil Code takes precedence over public-law norms [...] contradicts the Basic Law. The concept of property as guaranteed by the constitution must be derived from the constitution itself. This concept of property in the constitutional sense cannot be derived from legal norms

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<sup>19</sup> Kleyn D “The constitutional protection of property: A comparison between the German and South African approach” (1996) 11 SAPL 402-445 at 413; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 151; Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 224-225; Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 124-131; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 172-174.

<sup>20</sup> Kleyn D “The constitutional protection of property: A comparison between the German and South African approach” (1996) 11 SAPL 402-445 at 413; Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 224; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 172.

<sup>21</sup> BVerfGE 58, 300 (1981) (*Naßauskiesung*). Case translation in Kommers DP & Miller RA *The Constitutional Jurisprudence of the Federal Republic of Germany* 3<sup>rd</sup> ed (2012) 642. See further Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 117-118; Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 247-250.

[ordinary statutes] lower in rank than the constitution, nor can the scope of the concrete property guarantee be determined on the basis of private-law regulations.”<sup>22</sup>

Kommers and Miller explain that, in this case, the *BVerfG* departed from the liberal orientation whereby its concept of property deferred to the historical, private law notion of the right to property (also *Eigentum*) codified in the German Civil Code.<sup>23</sup> In German private law, property is limited to corporeal things (*Sachen*).<sup>24</sup> The approach of the *BVerfG* begins with the private law concept of property but then expands it to establish the constitutional concept of property for the purposes of Article 14. The private law notion of property is consequently narrower than the constitutional concept of property under Article 14.

The *BVerfG* has indicated which sources it does and does not use to determine what is regarded as property for constitutional purposes.<sup>25</sup> One source that the *BVerfG* regards as carrying less weight is the text of the Basic Law itself. Instead of relying on a direct textual interpretation of the Basic Law or on private law doctrine, the *BVerfG* relies on the fundamental purpose of property as a constitutional right, namely the securing of a sphere of personal liberty necessary for individuals to take responsibility for their own life and to participate in the development and functioning

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<sup>22</sup> BVerfGE 58, 300 (1981) (*Naßauskiesung*). Case translation in Kommers DP & Miller RA *The Constitutional Jurisprudence of the Federal Republic of Germany* 3<sup>rd</sup> ed (2012) 642.

<sup>23</sup> Kommers DP & Miller RA *The Constitutional Jurisprudence of the Federal Republic of Germany* 3<sup>rd</sup> ed (2012) 640.

<sup>24</sup> Kleyn D “The constitutional protection of property: A comparison between the German and South African approach” (1996) SAPL 402-445 at 419; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 151; Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 215; Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 125-127; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 117.

<sup>25</sup> Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 124.

of the social order. In deciding whether a particular interest is included or excluded from constitutional property, the question is whether the constitutional protection of an interest would serve this fundamental purpose.

The *BVerfG* embraces a wide concept of property, subject to the requirements that recognised rights must be both concrete in nature and vested.<sup>26</sup> Only specific assets are regarded as property for the purposes of the Basic Law and not a person's general wealth or financial status.<sup>27</sup> The wider notion of property that the Federal Constitutional Court developed on the basis of a general constitutional principle allows for future extrapolation of the concept of property.<sup>28</sup> In line with this principle, the *BVerfG* has held that it is for the courts to bring the range of objects to be protected under Article 14 in line with developments in private law as well as with

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<sup>26</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 163. See further Kleyn D "The constitutional protection of property: A comparison between the German and South African approach" (1996) 11 SAPL 402-445 at 421-422; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 156-157; Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 229; Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 128-131.

<sup>27</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 119. The US Supreme Court also follows this approach, in that it protects only identifiable assets and not general financial interests. See further Kleyn D "The constitutional protection of property: A comparison between the German and South African approach" (1996) 11 SAPL 402-445 at 414; Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 227-229; Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 127-128.

<sup>28</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 117. See further Kleyn D "The constitutional protection of property: A comparison between the German and South African approach" (1996) 11 SAPL 402-445 at 419; Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 224-225; Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 125.

social needs in general, thereby extending the concept of property to new objects continuously as the need arises.<sup>29</sup>

Regarding the interpretation of *Eigentum* by the *BVerfG*, Van der Walt states that:

"The German Federal Constitutional Court established a typically constitutional interpretation of the term *Eigentum* that is different from the traditional private-law meaning of this term, both in referring to the objects of property rights (*property* as opposed to *things*) and in referring to the range of property rights or entitlements (*property* as opposed to *ownership*). The constitutional meaning of *Eigentum* as property was developed by interpreting it according to the constitutional question whether the inclusion of a specific object or right of property under the protection of article 14 GG would serve the constitutional purpose of creating and protecting a sphere of personal freedom where the individual is enabled (and expected to take responsibility for the effort) to realise and promote the development of her own life and personality, within the social context."<sup>30</sup>

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<sup>29</sup> Kleyn D "The constitutional protection of property: A comparison between the German and South African approach" (1996) 11 SAPL 402-445 at 419. See further Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 225; Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 125; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 119, where Van der Walt states that a purposive or functional approach, which relies on the constitutional purpose of the property clause, ensures a generous understanding of the objects of property rights in German-language jurisdictions, where such an approach might seem counterintuitive in view of the narrow definition of property as tangible things in private law.

<sup>30</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 104-105. See further Kleyn D "The constitutional protection of property: A comparison between the German and South African approach" (1996) 11 SAPL 402-445 at 414; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 151-153; Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 226; Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 124.

The result of this approach is that the term *Eigentum*, as referring to the objects of property rights, is interpreted as “things” for the purposes of private law and as “property” for the purposes of constitutional law.<sup>31</sup> Tangible things are obviously protected under Article 14, but a number of intangible objects are also regarded as property for the purposes of Article 14. Examples of these intangible objects are intellectual property rights such as copyright<sup>32</sup> and trademarks.<sup>33</sup> Commercial property interests such as contractual<sup>34</sup> and delictual claims<sup>35</sup> are also recognised as

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<sup>31</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 118. See further Kleyn D “The constitutional protection of property: A comparison between the German and South African approach” (1996) 11 SAPL 402-445 at 413; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 151; Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 215, 224; Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 124-125.

<sup>32</sup> BVerfGE 31, 229 (1971) (*Urheberrecht*), discussed in Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 147 and translation in Kommers DP & Miller RA *The Constitutional Jurisprudence of the Federal Republic of Germany* 3<sup>rd</sup> ed (2012) 651-654. See further Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 233-234.

<sup>33</sup> BVerfGE 51, 193 (1979) (*Warenzeichen*), discussed in Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 118. See further Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 152; Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 233-234.

<sup>34</sup> BVerfGE 83, 201 (1991) (*Vorkaufsrecht*), discussed in Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 118. See further Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 152; Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 230.

<sup>35</sup> BVerfGE 42, 263 (1976) (*Contergan*), discussed in Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 118. See further Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 152-153; Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 230.

property, as well as workers' rights<sup>36</sup> and certain public-law participation rights.<sup>37</sup> Despite this wide constitutional view of property adopted by the *BVerfG*, it has nevertheless held that intangible interests are only recognised as property once they have vested in the beneficiary of the interest in accordance with the law on the basis of own investment or performance and not merely on the basis of contingent interests or expectations.<sup>38</sup>

The *BVerfG* has stated that:

“The contents and functions of property are capable and in need of adaptation to social and economic conditions. It is the task of the legislature to undertake such

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<sup>36</sup> BVerfGE 50, 290 (1979) (*Mitbestimmung*), discussed in Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 118. See further Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 140-142; Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 238; Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 100, 114.

<sup>37</sup> BVerfGE 69, 272 (1985) (*Eigenleistung*), discussed in Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 118. See further Kleyn D “The constitutional protection of property: A comparison between the German and South African approach” (1996) 11 SAPL 402-445 at 421; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 156-157; Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 238; Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 128-131.

<sup>38</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 119; BVerfGE 69, 272 (1985) (*Eigenleistung*), discussed in Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 118. See further Kleyn D “The constitutional protection of property: A comparison between the German and South African approach” (1996) 11 SAPL 402-445 at 421; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 156-157; Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 238; Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 128-131.

adaptation while taking into account the fundamental constitutional guideline concerning ethical values.”<sup>39</sup>

Based on this point of departure, Mostert concludes that the legislature and the *BVerfG* must allow changes in common perceptions to be channelled into law, while maintaining the Basic Law as a guideline to measure such changes. Therefore, the constitutional property guarantee anticipates a differentiation between the various kinds of property according to the kind of protection they deserve.<sup>40</sup>

The *BVerfG* has held that certain public law entitlements are included under the protection of the property guarantee in Article 14, while others are not.<sup>41</sup> In order for a public law entitlement to be included under the protection of Article 14, it must meet the three requirements set out in the *Eigenleistung* case.<sup>42</sup> Firstly, the right

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<sup>39</sup> BVerfGE 12, 112 (1969) (*Niedersächsisches Deichgesetz*) 117. Translation in Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 225.

<sup>40</sup> Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 225. See further Kleyn D “The constitutional protection of property: A comparison between the German and South African approach” (1996) 11 SAPL 402-445 at 419; Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 130-131; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 117-119.

<sup>41</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 163. See further Kleyn D “The constitutional protection of property: A comparison between the German and South African approach” (1996) 11 SAPL 402-445 at 421; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 156-157; Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 238; Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 128-131.

<sup>42</sup> BVerfGE 69, 272 (1985) (*Eigenleistung*), discussed in Kleyn D “The constitutional protection of property: A comparison between the German and South African approach” (1996) 11 SAPL 402-445 at 421. See further Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 238; Alexander GS *The Global Debate over Constitutional Property:*

must resemble private property in that it takes the form of an exclusionary right that the holder has been awarded by the state; secondly, it must be based on substantial contributions (efforts or inputs) of the holder of the right; and thirdly, the right must serve to ensure the holder's existence (survival). The second requirement excludes from protection mere welfare handouts by the state to which the individual did not substantially and directly contribute, for example expectations of social benefit grants, claims to educational grants, and business and state housing subsidies. The protected public law rights depend on a relationship of exchange between the individual and the state; as counter-performance for the individual's contribution, the state allocates the right to the individual for private use in accordance with the first and third requirements.<sup>43</sup>

Van der Walt explains:

"These requirements are based on the fundamental guideline which ensures that an equitable balance can be struck between the interests of the individual and the public interest. On the one hand, recognition of a public-law participatory right as property means that it is protected just like any other property, although the usual principles of constitutional property apply: only concrete rights are protected and not wealth in general; and only vested rights or acquired rights are recognised. [...] On the other hand the public interest is also taken into account: the German Federal Constitutional Court has decided that the public-law rights, funded as they are from public money, are not absolute entitlements but relative to the state of the economy in the sense that their monetary value can be

*Lessons for American Takings Jurisprudence* (2006) 128-131; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 163.

<sup>43</sup> Kleyn D "The constitutional protection of property: A comparison between the German and South African approach" (1996) 11 SAPL 402-445 at 421. See further Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 156-157; Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 238; Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 128-131; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 163.

amended to suit the state's financial situation, without the amendment amounting to an unlawful deprivation or expropriation.”<sup>44</sup>

Therefore, the *BVerfG* embraces a wide concept of constitutional property that is capable of further extrapolation should the need arise. The basic principle is that only concrete, vested or acquired rights are protected under Article 14.

## 2 2 3 US law

The Fifth<sup>45</sup> and Fourteenth<sup>46</sup> Amendments to the Constitution of the United States of America<sup>47</sup> (the Constitution), read together, provide protection for property.<sup>48</sup> These two clauses are usually referred to as the “Takings Clause”<sup>49</sup> and the “Due Process

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<sup>44</sup> Van der Walt AJ *Constitutional Property Law* 3rd ed (2011) 163-164. See further Kleyn D “The constitutional protection of property: A comparison between the German and South African approach” (1996) 11 SAPL 402-445 at 421; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 156-157; Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 238; Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 128-131; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 163.

<sup>45</sup> Fifth Amendment 1791. Dana DA & Merrill TW *Property: Takings* (2002) 1: The Fifth Amendment, as part of the original Bill of Rights, directly constrains the federal Government.

<sup>46</sup> Fourteenth Amendment 1868. Dana DA & Merrill TW *Property: Takings* (2002) 1-2: The protection afforded by the Fifth Amendment is applied to the individual states through the Due Process Clause of the Fourteenth Amendment.

<sup>47</sup> Constitution of the United States of America, 1787.

<sup>48</sup> Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 398-408 and 441-450; Dana DA & Merrill TW *Property: Takings* (2002) 68-85; Singer JW *Introduction to Property* 2<sup>nd</sup> ed (2005) 2-6; Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 69-70; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 121-123 and 174-175.

<sup>49</sup> The Fifth Amendment states that “[n]o 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.”

Clause<sup>50</sup> respectively.<sup>51</sup> The Due Process Clause provides that nobody shall be deprived of property without due process of law and the Takings Clause provides that private property shall not be taken for public use without just compensation. In case law and literature, concerns about the objects of property play a very minor role.<sup>52</sup> A wide range of intangible interests tend to be recognised as property for the purposes of constitutional law because there were few concerns with this issue in private law and therefore it was unnecessary to set off constitutional law against a narrow private law tradition as in German law. The result is that a range of objects are regarded as property in US constitutional law, including some personal or creditor's rights, the mainstream intellectual property interests, intangible commercial interests, certain social or welfare interests and the right to pursue certain legal remedies.<sup>53</sup>

Similar to German law, not just any intangible interest of value is recognised as property.<sup>54</sup> Certain categories of intangible interests are not regarded as constitutional property, such as general financial interests falling short of being identifiable assets,<sup>55</sup> contingent future interests such as prospective clients for a

<sup>50</sup> The Fourteenth Amendment states that "... nor shall any State 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 law."

<sup>51</sup> Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 398-399. See further Dana DA & Merrill TW *Property: Takings* (2002) 1-2.

<sup>52</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 121. See further, for example, *Goldberg v Kelly* 397 US 254 (1970) and *Board of Regents v Roth* 408 US 564 (1972).

<sup>53</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 122, 135-137, 147-148.

<sup>54</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 135. See further Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 69.

<sup>55</sup> *Eastern Enterprises v Apfel* 524 US 498 (1998). See further Dana DA & Merrill TW *Property: Takings* (2002) 70-71; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 135.

business<sup>56</sup> and benefits that derive directly from the government, such as future social security payments.<sup>57</sup> This indicates that in US law a wide range of intangibles is recognised as property for constitutional purposes, but the mere fact that an intangible interest is valuable does not necessarily qualify it as property. This is similar to the position in German law, where interests amounting to mere expectancies or contingent interests and general financial interests or wealth do not qualify as property either.<sup>58</sup>

The requirement that an interest must be property has not been a problem for purposes of the Takings Clause.<sup>59</sup> Alexander states that:

“[t]he overwhelming majority of governmental actions that are likely to implicate the takings clause, including both overt exercises of the eminent domain power and regulatory measures, involve interests that clearly satisfy the ‘property’ requirement, usually standard estates or lesser interests in land. Certainly all interests that are classified as property under the private law rules of property, real and personal, satisfy the constitutional requirement.”<sup>60</sup>

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<sup>56</sup> *College Savings Bank v Florida Prepaid Secondary Educational Expense Board* 527 US 666 (1999). See further Dana DA & Merrill TW *Property: Takings* (2002) 74-75; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 135.

<sup>57</sup> *Flemming v Nestor* 363 US 603 (1960); *Board of Regents v Roth* 408 US 564 (1972); *Town of Castle Rock, Colorado v Gonzales* 545 US 748 (2005). See further *Goldberg v Kelly* 397 US 254 (1970). In this case the Supreme Court was willing to accept that social security payments are worthy of protection as far as the Due Process Clause of the property guarantee was concerned, but not for purposes of the Takings Clause: Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 442; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 135.

<sup>58</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 123. See further 2 2 2 above.

<sup>59</sup> Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 69.

<sup>60</sup> Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 69.

Therefore, easements,<sup>61</sup> leases,<sup>62</sup> mineral rights<sup>63</sup> and security interests<sup>64</sup> have all been considered to be property for the purposes of the Takings Clause.<sup>65</sup> However, not all interests are protected under the Takings Clause. The United States Supreme Court (the Supreme Court) has expressly held that no compensation is required for governmental actions that affect interests that are not private property.<sup>66</sup>

In *Board of Regents v Roth*<sup>67</sup> the Supreme Court held that:

“Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.”<sup>68</sup>

This is the positivist approach to the issue of property and under this approach, constitutional property relies on independent sources such as, but not limited to, state law.<sup>69</sup> An important ambiguity exists in this statement. Dana and Merrill argue

<sup>61</sup> *United States v Virginia Electric & Power Co* 365 US 624 (1961) (flowage easement).

<sup>62</sup> *United States v General Motors Corp* 323 US 373 (1945) (leasehold).

<sup>63</sup> *Pennsylvania Coal Co v Mahon* 260 US 393 (1922) (mining interest).

<sup>64</sup> *United States v Security Industrial Bank* 459 US 70 (1982) (security interest).

<sup>65</sup> Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 69.

<sup>66</sup> Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 69. For example in *United States v Willow River Power Co* 324 US 499 (1945) the Supreme Court held that the Willow River Power Company's interest or advantage in the high-water level of the St Croix River in order to maintain its power output was not a right protected by law and thus did not constitute private property for the purposes of the Fifth Amendment.

<sup>67</sup> *Board of Regents v Roth* 408 US 564 (1972). See further Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 443-444; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 122.

<sup>68</sup> *Board of Regents v Roth* 408 US 564 (1972) at 577.

<sup>69</sup> Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 85. See further Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 174-175.

that this statement could mean that state law both provides the definition of property and determines whether property has been created in a given case. Alternatively, this statement could mean that federal constitutional law defines property and that state law is the source to which courts should look to determine whether property has been created, applying the constitutional definition.<sup>70</sup> Subsequent case law has done little to clarify which of the above meanings is correct. Alexander refers to *Phillips v Washington Legal Foundation*<sup>71</sup> and *Palazollo v Rhode Island*<sup>72</sup> to suggest that the Supreme Court rejects the pure positivistic approach of the first meaning, but the implications of these decisions remains unclear.<sup>73</sup>

As stated above, the United States Supreme Court has rarely dealt with the issue of what constitutes “private property” for the purposes of the Fifth Amendment. An explanation for this lack of attention to what could be considered a threshold inquiry is that most of the cases that implicate the Takings Clause deal with interests that obviously satisfy the “private property” requirement. The Supreme Court will only venture into an analysis of what it considers to be “private property” for the purposes of the Fifth Amendment when it encounters an interest that is not an obvious example of “private property.” Another explanation is that property in US law tends to be viewed in terms of rights as relationships between legal subjects and not in terms of specific objects. This tendency results in the objects of property playing a minor role in a property dispute, while property rights are given prominence.

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<sup>70</sup> Dana DA & Merrill TW *Property: Takings* (2002) 62-63. See further Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 70.

<sup>71</sup> *Phillips v Washington Legal Foundation* 524 US 156 (1998).

<sup>72</sup> *Palazollo v Rhode Island* 533 US 606 (2001).

<sup>73</sup> Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 85-86. See further Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 174-175.

## 2.2.4 Conclusion

From the above, certain similarities and differences emerge from the comparison between the German and US law approaches to the constitutional concept of property. Both German and US law have a wide constitutional notion of property that begins with the private law concept but then, in the case of German law, goes beyond it. The constitutional notion of property in these two jurisdictions includes most well-known and recognised rights and interests in property, both real and personal, regarding both tangible things and intangibles, and that includes things like intellectual property and some public law rights as well.

US law appears to end up in the same place as German law to the extent that a wide definition of property is recognised for constitutional protection, with roughly similar categories of non-property interests excluded in both systems, such as a person's general wealth or mere expectations. This similarity is only partial since there are categories, such as public participation rights, where US law recognises the interest as property but only for the purposes of due process, in other words the interest cannot be the object of a taking that requires compensation.

Another difference is that the German Basic Law explicitly allows the legislature to determine the content and limits of property, meaning that property is not a pre-constitutional right. In US law, the source of property is state law, which can imply that at least some property rights are pre-constitutional. The importance of this difference is that any limitation of pre-constitutional rights will require compensation and in German law there are no such rights.

## 2 3 Distinction between deprivation and expropriation

### 2 3 1 Introduction

The distinction between deprivation and expropriation is not always clear and easy to make. There are a number of different approaches or ways of viewing this distinction. Van der Walt explains that there are four approaches to the distinction between deprivation and expropriation:<sup>74</sup> as two discrete categories that do not overlap at all; as two partially overlapping categories; as two extremes on a continuum; or as two overlapping categories of which the smaller is wholly included in the larger. Confusion is worst when the two categories are seen as overlapping in part or as the two extremes on a continuum, because both of these approaches create the possibility to distinguish a grey area where deprivation shades into expropriation. Where it is accepted that such a grey area exists, courts appear to struggle to distinguish deprivation cases from expropriation cases clearly and consistently. However, where deprivation and expropriation are viewed either as two discrete, non-overlapping categories or as a smaller category wholly incorporated into a larger one, the potential for confusion is reduced, though the initial distinction is not necessarily easier to make.<sup>75</sup> Besides these four approaches, there are a variety of other ways of distinguishing cases of deprivation from cases of expropriation. Different approaches could for instance compare the characteristics of each, the public use or public purpose requirement for an expropriation to be constitutional and the fact that an expropriation must be accompanied by compensation.

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<sup>74</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 192.

<sup>75</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 192.

## 2 3 2 Terminology

Differences in terminology may cause confusion when attempting to compare how different jurisdictions approach the distinction between deprivation and expropriation. For example, some jurisdictions refer to “deprivations” of property in the sense of regulation of property, whereas others use the term “deprivation” when what is really meant is an expropriation of property. Another example is US law, which uses neither the term “deprivation” nor “expropriation” but expropriation is included in its notion of taking.<sup>76</sup>

Article 14 of the German Basic Law<sup>77</sup> does not expressly refer to the deprivation of property. Instead, Article 14.1.2 provides for the statutory determination of the substance (content) and limits of property rights. Article 14.2 stipulates, firstly, that property entails obligations and secondly, that its use should also serve the public interest. Read together, Article 14.2 and 14.1.2 constitute the property regulation clause of the Basic Law.<sup>78</sup> The statutory regulation of property is subject to a prohibition on the excessive regulation of property (*Übermaßverbot*), in other words, the proportionality principle.<sup>79</sup> Article 14 expressly refers to the

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<sup>76</sup> It is important to note that US law uses the term “deprivation” to refer to the regulation of property in terms of the state’s police power. South African law also uses the term “deprivation” to refer to the regulation of property.

<sup>77</sup> Basic Law for the Federal Republic of Germany, 1949 (as amended on and up to 30 December 1993) (*Grundgesetz*, GG).

<sup>78</sup> Kleyn D “The constitutional protection of property: A comparison between the German and South African approach” (1996) 11 SAPL 402-445 at 424-427; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 132-150; Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 278-289; Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 116-124; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 365-367.

<sup>79</sup> Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 132.

expropriation<sup>80</sup> of property and the requirements for a valid expropriation are found in Article 14.3. Firstly, expropriation is only permissible if it serves the public interest; secondly, it may only be ordered pursuant to a law that determines the nature and extent of the compensation to be paid; and finally, the amount of compensation must reflect a fair balance<sup>81</sup> between the public interest and the interests of those affected by the expropriation. Regulation of property rights and expropriations operate as limitations on constitutionally guaranteed property positions and thus they must be justified according to the requirements set out in Article 14.

The Fifth and Fourteenth Amendments to the Constitution of the United States provide that no person shall be deprived of, among other things, property without due process of law and that private property shall not be taken for public use without just compensation.<sup>82</sup> Deprivation in US law is most often referred to as “regulation” of property in terms of the state’s police power. Secondly, the Fifth Amendment refers

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<sup>80</sup> Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 147. There are two categories of expropriation allowed under Article 14.3, namely statutory expropriations (*Legalenteignungen*) and administrative expropriations (*Administrativenteignungen*). Statutory expropriations are considered an exceptional category subject to stricter scrutiny and they are legitimate only if they are justified by extraordinary circumstances. See further Slade BV *The Justification of Expropriation for Economic Development* (LLD dissertation Stellenbosch University 2012) 95; Kleyn D “The constitutional protection of property: A comparison between the German and South African approach” (1996) 11 SAPL 402-445 at 435-436.

<sup>81</sup> In other words, the calculation of the amount of compensation for an expropriation is subject to the proportionality principle.

<sup>82</sup> Constitution of the United States of America, 1787. See further Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 410-423, 423-440; Dana DA & Merrill TW *Property: Takings* (2002) 86-118; Singer JW *Introduction to Property* 2<sup>nd</sup> ed (2005) 675-752; Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 64-95; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 201; Nginase XH *The Meaning of ‘Public Purpose’ and ‘Public Interest’ in Section 25 of the Final Constitution* (LLM thesis Stellenbosch University 2009) 67; Slade BV *The Justification of Expropriation for Economic Development* (LLD dissertation Stellenbosch University 2012) 69.

to property being “taken” against the payment of just compensation. The feature that sets US takings law apart from the position in other jurisdictions is the distinction between a taking of property and an expropriation of property. “Taking” is a wide term that includes the narrower category of formal expropriations or compulsory acquisitions in terms of the power of eminent domain, but it also extends to a further category of state actions that have the form of police-power regulation of property but in effect amount to takings because they “go too far” (a regulatory taking).<sup>83</sup> Takings, both formal and regulatory, are subject to two requirements, namely public use and just compensation.

### 2 3 3 Characteristics

Article 14 of the German Basic Law explicitly states that property is not absolute and its use should serve the public interest. Justified state interference with property takes the form of either a limitation, which does not require compensation, or an expropriation, which does require compensation.<sup>84</sup> Therefore, property can be regulated, provided the regulation is based upon general legislative authority;

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<sup>83</sup> Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 423. See further Dana DA & Merrill TW *Property: Takings* (2002) 5-6, 86-87; Singer JW *Introduction to Property* 2<sup>nd</sup> ed (2005) 675-692; Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 70-77; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 355-359; Bezuidenhout K *Compensation for Excessive but Otherwise Lawful Regulatory State Action* (LLD dissertation Stellenbosch University 2015) 62-80.

<sup>84</sup> Kleyn D “The constitutional protection of property: A comparison between the German and South African approach” (1996) 11 SAPL 402-445 at 424. See further Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 132-145, 146-151; Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 279-281; Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 116-124; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 365-367.

establishes a fair balance between the public interest and the private interest; and is not disproportionate in its effects. This regulation is performed in terms of the state's regulatory power. The state may interfere with the use and enjoyment of property in terms of the police power principle, and the state will not have an obligation to pay compensation if the limitation is within the bounds of the law. This principle lies at the heart of the notion of uncompensated regulatory deprivation of property. The police-power principle is established in German case law. In the *Contergan* case,<sup>85</sup> the German Federal Constitutional Court (*Bundesverfassungsgericht*) (*BVerfG*) confirmed that the legislature, when making laws to establish the necessary balance between the public interest and private interests, is acting within clear limits but is nevertheless not precluded from affecting and even changing private property rights, even with detrimental effects. This principle was refined further in cases where it was held that the extent to which a regulatory deprivation may affect private property negatively is partly determined by the nature of the property and its relation to the autonomy and privacy of the person or persons affected. The stronger the social relation and function of the property, the wider the regulatory powers of the legislature in determining the content and limits of that property; the stronger the personal and individual character and function of the property, the more limited the state's power to restrict its use through regulation.<sup>86</sup>

In the context of regulation and expropriation of property, there is a strong emphasis in German law on the formal source of power to perform either of these

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<sup>85</sup> BVerfGE 42, 263 (1976) (*Contergan*) discussed in Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 216-217.

<sup>86</sup> BVerfGE 42, 263 (1976) (*Contergan*) discussed in Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 217. See further BVerfGE 50, 290 (1979) (*Mitbestimmung*) discussed in Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 140-142.

actions. According to Article 14.3, the laws authorising expropriation must specifically provide for compensation. This distinguishes them from the regulatory laws that determine the content and limits of property rights according to Article 14.1.2. The *BVerfG* has held that regulatory restrictions on the use of property (statutory determination of the content and limits of property rights) could be unconstitutional for being excessive and unfair. Excessive restrictions cannot be transformed into expropriations simply because they require an extraordinary or inequitable sacrifice from the property holder. This is so because these two kinds of actions derive from different sources of authority and each must be judged according to its own authority and requirements.<sup>87</sup> Compensation is required for expropriations only and never for statutory determinations of the content and limits of property rights. If the effects of the latter are excessive and unfair the regulatory action may be invalid.<sup>88</sup> Therefore, a law that authorises either a regulation of property rights or an expropriation of

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<sup>87</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 366. Van der Walt explains that the most obvious requirement not met by regulatory measures is the linking clause in Article 14.3.2, which requires that an expropriation should be authorised by a law that also provides for the form and extent of compensation. Regulatory laws contain no such clause and therefore do not satisfy this requirement because they do not foresee the payment of compensation, which means that expropriatory compensation cannot be awarded for actions under their authority. This was confirmed in BVerfGE 100, 226 (1999) (*Rheinland-Pfälzischen Denkmalschutz-und-Pflegegesetz*), discussed in Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 119-120. The *BVerG* stated in the *Rheinland-Pfälzischen Denkmalschutz-und-Pflegegesetz* case that it is the regulatory intention, and not the regulatory effect, that determines whether a restriction is a regulation or an expropriation. Alexander explains that the advantage of this approach is the creation of a strict dichotomy between regulation and expropriation of property, which eliminates any middle ground between them. See further Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 140-145.

<sup>88</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 203. See further Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 279-281; Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 116-117.

property must strictly comply with the relevant and necessary requirements set out in Article 14 in order for the particular kind of action to be valid. Furthermore, due to the fact that the requirements for a valid regulation of property rights are different from those of a valid expropriation, the authorisation for such regulation is not sufficient to constitute authority for expropriation if the regulation is excessive.

German law appears to follow the first approach to the distinction between deprivation and expropriation, treating regulation and expropriation as two discrete categories of actions that do not overlap at all. This is so because of the strict separation of regulation and expropriation of property based on their respective sources of authority and discrete requirements. If a regulation of property has an excessive effect it will be regarded as unconstitutional and invalid. It cannot be transformed into an expropriation of property because expropriation requires a different form of authorisation than regulation. Therefore, German law does not recognise an overlap between these two kinds of limitations on property.

The formal source of power is also important for the distinction between deprivation and expropriation in US law. Van der Walt explains that, simply put, expropriation refers to exercises of the state's power of eminent domain and deprivation (regulation) refers to exercises of the police power.<sup>89</sup> Furthermore, this distinction rests on the different sources of power by which each form of limitation is authorised. This suggests a reason for the fact that compensation is usually not required for regulatory deprivation: exercises of the police power, even though they may cause loss or damage to property, are as a rule not compensated because their purpose is to protect public health and safety for everyone's benefit and their restrictive effect is spread more or less equally amongst all citizens or property

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<sup>89</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 201.

owners.<sup>90</sup> Therefore, it is assumed that expropriation expects one person or a small number of people to give up their property in exchange for compensation in the public interest, whereas everyone suffers more or less equal limitations and enjoys more or less equal benefits through regulatory deprivation.<sup>91</sup> However, this distinction is blurred to the extent that US case law recognises a grey area between exercises of the police power and formal expropriations, while German law does not. It was said that when a regulatory limitation on the use of property “goes too far” it becomes a taking that requires compensation.<sup>92</sup> These instances are known as regulatory takings. Van der Walt points out that this grey area of regulatory takings is recognised with reference to the excessive effects of some regulatory deprivations, rather than the authorising source of power.<sup>93</sup>

In deciding whether challenged government action constitutes a taking, a two-level approach is followed. Dana and Merrill explain this test as follows:

“The first level, which we call categorical review, considers whether the action falls within some category for which compensation is *always* required as a matter of constitutional law, or some category for which compensation is *never* required. The idea behind this categorical approach is that there are certain government actions that either so clearly demand compensation or are so clearly immune from liability for compensation that they require no case-specific judgment by courts. The second level of review, which we call *ad hoc* review, occurs only if the categorical tests for compensation or no compensation do not apply. This second-level review is explicitly open-ended, entailing a case-by-case balancing of rather poorly defined factors.”<sup>94</sup>

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<sup>90</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 201. See further Dana DA & Merrill TW *Property: Takings* (2002) 52-57.

<sup>91</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 201.

<sup>92</sup> *Pennsylvania Coal Co v Mahon* 260 US 393 (1922) at 413. See further Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 71.

<sup>93</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 201. See further Dana DA & Merrill TW *Property: Takings* (2002) 87; Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 70-73.

<sup>94</sup> Dana DA & Merrill TW *Property: Takings* (2002) 87-88.

The US Supreme Court has recognised situations that are automatically regarded as takings, the most important of which is when the government formally exercises the power of eminent domain. The Supreme Court has additionally recognised a number of so-called categorical rules,<sup>95</sup> two of which are those that govern permanent physical occupations and complete loss of value.

The Supreme Court has held that permanent physical occupation of property by the government constitutes a taking and thus requires the payment of compensation, no matter how trivial the economic impact of the occupation or how reasonable the government rationale for the occupation.<sup>96</sup> The rule that permanent physical occupations are automatically takings was developed in the case of *Loretto v Teleprompter Manhattan CATV Corp.*<sup>97</sup> The Supreme Court stated that property rights in a physical thing are the rights to possess, use and dispose of the thing and to the extent that the government permanently occupies physical property, it effectively destroys each of these rights with respect to the space occupied. This is so because the owner has no right to possess the occupied space himself and has no power to exclude the occupier from possession and use of the space. Furthermore, the permanent physical occupation of the property forever denies the owner any power to control the use of the property, in that he can neither exclude others nor make any non-possessory use of the property. Finally, even though the owner may retain the bare legal right to dispose of the occupied space by transfer or

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<sup>95</sup> Singer JW *Introduction to Property* 2<sup>nd</sup> ed (2005) 692-722. See further Dana DA & Merrill TW *Property: Takings* (2002) 86-120; Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 73-77.

<sup>96</sup> Dana DA & Merrill TW *Property: Takings* (2002) 94. See further Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 358.

<sup>97</sup> *Loretto v Teleprompter Manhattan CATV Corp* 458 US 419 (1982). See further Singer JW *Introduction to Property* 2<sup>nd</sup> ed (2005) 693-694; Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 76.

sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property.<sup>98</sup>

The Supreme Court justified the application of a categorical rule for permanent physical occupations on two grounds. Firstly, its application would avoid “otherwise difficult line-drawing problems” and would present “relatively few problems of proof”.<sup>99</sup> Dana and Merrill explain that the rule would reduce information gathering and processing costs that would otherwise be incurred in examining this category of government action under the open-ended *ad hoc* test.<sup>100</sup>

In *Horne v Department of Agriculture*<sup>101</sup> the US Supreme Court had to determine whether a marketing order requiring raisin growers to set aside a certain percentage of their crops for the account of the government, free of charge, constitutes an unconstitutional taking under the Fifth Amendment. The Court held that the government’s “categorical duty” under the Fifth Amendment to pay compensation when it physically takes possession of an interest in property applies to both real and personal property.<sup>102</sup> The Court stated that the classic taking is one where the government directly appropriates private property for its own use and in the case of real property, such appropriation constitutes a *per se* taking that requires just compensation.<sup>103</sup> There was nothing to suggest that the rule is any different when it comes to the appropriation of personal property.<sup>104</sup> The Court held further

<sup>98</sup> *Loretto v Teleprompter Manhattan CATV Corp* 458 US 419 (1982) at 435-436.

<sup>99</sup> At 436-437.

<sup>100</sup> Dana DA & Merrill TW *Property: Takings* (2002) 96.

<sup>101</sup> *Horne v Department of Agriculture* 576 US 275 (2015).

<sup>102</sup> At 4.

<sup>103</sup> At 4.

<sup>104</sup> At 5.

that the Fifth Amendment protects private property without any distinction between different types.<sup>105</sup>

Regarding the reserve requirement imposed by the marketing order, the Court held that this was a clear physical taking because the raisins were transferred from the growers to the government and thus the raisin growers subject to the reserve requirement lost their entire bundle of property rights in the appropriated raisins, namely the right to possess, use and dispose of them.<sup>106</sup> The government cannot avoid its duty to pay compensation for the physical taking of the raisins by reserving contingent interest in a portion of the value of the raisins for the raisin growers because this reservation of a portion of the value does not mean that there had not been a physical taking.<sup>107</sup>

The Court then considered whether a governmental mandate to relinquish specific, identifiable property as a condition on permission to engage in commerce effects a *per se* taking. In this case, the reserve requirement did effect a *per se* taking.<sup>108</sup> The Court rejected the government's argument that the reserve requirement did not effect a taking because the raisin growers voluntarily chose to participate in the raisin market and if they were unhappy with the situation, they could simply grow other types of crops.<sup>109</sup> The government also relied on the

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<sup>105</sup> At 5.

<sup>106</sup> At 8-9.

<sup>107</sup> At 9-10.

<sup>108</sup> At 12.

<sup>109</sup> At 12. The US Supreme Court referred to its decision in *Loretto v Teleprompter Manhattan CATV Corp* 458 US 419 (1982) where it rejected a similar argument, namely that New York law in question did not result in a taking because the landlord could avoid the effect of the law by ceasing to be a landlord. Rather, the Court held that a landlord's right to rent out his property could not be conditioned on his forfeiting the right to compensation for a physical occupation.

decision of *Ruckelshaus v Monsanto Co*,<sup>110</sup> where the Court decided that companies manufacturing pesticides, fungicides and rodenticides can be required to disclose health, safety and environmental information about their products as a condition to receiving a permit to sell these products.<sup>111</sup> While this information included trade secrets in which the pesticide manufacturers had a property interest, they were not subjected to a taking because they received a valuable government benefit in the form of a permit to sell the products.<sup>112</sup> The Court rejected the argument by saying that, firstly, the taking in this case cannot reasonably be characterised as similar to the voluntary exchange that took place in *Ruckelshaus* and, secondly, the Court had already rejected the idea that the reasoning in *Ruckelshaus* can be extended by regarding basic and familiar uses of property as a government benefit on the same order as a permit to sell hazardous chemicals.<sup>113</sup> Therefore, the Court concluded that “[s]elling produce in interstate commerce, although certainly subject to reasonable government regulation, is [...] not a special government benefit that the [g]overnment may hold hostage, to be ransomed by the waiver of constitutional protection”.<sup>114</sup>

The second categorical rule deals with instances of complete loss of economically viable use of land.<sup>115</sup> This second category is illustrated by the decision of *Lucas v South Carolina Coastal Council*.<sup>116</sup> Here, the Supreme Court stated that the Fifth Amendment is violated when land use regulation does not substantially advance legitimate state interests or denies an owner economically viable use of his

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<sup>110</sup> *Ruckelshaus v Monsanto Co* 467 US 986 (1984).

<sup>111</sup> *Horne v Department of Agriculture* 576 US 275 (2015) at 13.

<sup>112</sup> At 13.

<sup>113</sup> At 13.

<sup>114</sup> At 13.

<sup>115</sup> For a more comprehensive discussion of this categorical rule, see Singer JW *Introduction to Property* 2<sup>nd</sup> ed (2005) 707-718.

<sup>116</sup> *Lucas v South Carolina Coastal Council* 505 US 1003 (1992).

land.<sup>117</sup> The Supreme Court justified this categorical rule by stating that a total deprivation of beneficial use is, from the owner's perspective, equivalent to a permanent physical occupation of the property and in these situations it becomes less realistic to indulge the usual assumption that the legislature is merely "adjusting the benefits and burdens of economic life"<sup>118</sup> in a manner that secures an "average reciprocity of advantage"<sup>119</sup> to everyone concerned.<sup>120</sup> Furthermore, "[t]he *functional* basis for permitting the government, by regulation, to affect property values without compensation [...] does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses".<sup>121</sup> The Supreme Court also pointed out that regulations that leave the owner of land without economically beneficial or productive options for its use – typically, as in this case, by requiring land to be left substantially in its natural state – carry with them the heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.<sup>122</sup> The Supreme Court concluded that there are good reasons for the frequently expressed belief that when the owner of real property has been called upon to sacrifice all economically beneficial use in the name of the common good, in other words to leave his property economically idle, he has suffered a taking.<sup>123</sup>

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<sup>117</sup> At 1016.

<sup>118</sup> With reference to *Penn Central Transportation Co v City of New York* 438 US 104 (1978).

<sup>119</sup> With reference to *Pennsylvania Coal Co v Mahon* 260 US 393 (1922).

<sup>120</sup> *Lucas v South Carolina Coastal Council* 505 US 1003 (1992) at 1017-1018.

<sup>121</sup> At 1018.

<sup>122</sup> At 1018.

<sup>123</sup> At 1019.

Justice Scalia carved out an exception to the categorical rule in cases where regulations that prohibit all economically beneficial use of land inhere in the title itself:

"[A]ny limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the [s]tate's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts – by adjacent landowners (or other uniquely affected persons) under the [s]tate's law of private nuisance, or by the [s]tate under its complimentary power to abate nuisances that affect the public generally, or otherwise."<sup>124</sup>

In other words, if the regulation that prohibits all economically beneficial use of land is akin to the restrictions placed on the land by the particular state's common law of property and nuisance, no compensation is required. In order for the state to avoid its compensation obligation, "it must locate some land-use prohibition existing in the historical common law of nuisance and link that prohibition with the use proscribed by the challenged regulation".<sup>125</sup>

The recognition of this grey area between ordinary exercises of the police power and formal expropriations seems to indicate that US law follows the third approach, viewing regulation and expropriation as two extremes on a continuum. Viewing these two concepts in this way allows for a grey area of regulatory takings to be distinguished in between the extremes.

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<sup>124</sup> At 1029.

<sup>125</sup> Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 83.

## 2 3 4 Public use/public purpose

Article 14.3 of the German Basic Law states that expropriation is only permissible if it is in the public interest. German courts have interpreted the public interest requirement strictly, requiring that expropriation must be the only possible way of achieving the required result (which must also be in the public interest) and the expropriation must be strictly necessary to satisfy the need in question.<sup>126</sup> Therefore, both the purpose of the expropriation and expropriation of the property in realisation of the purpose must be in the public interest. Van der Walt states that the *BVerfG* treats this public interest requirement as an open-ended but justiciable constitutional requirement that cannot be amended by normal legislation or by administrative decision.<sup>127</sup> Furthermore, any law or administrative action that does not comply with this requirement is in conflict with the Basic Law and is therefore unconstitutional. Finally, courts have the duty and the jurisdiction to test whether every individual expropriation is justified by the public interest it is meant to serve and authorised by legislation for that purpose.<sup>128</sup>

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<sup>126</sup> Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 302-404; Nginase XH *The Meaning of 'Public Purpose' and 'Public Interest' in Section 25 of the Final Constitution* (LLM thesis Stellenbosch University 2009) 90-93; Slade BV *The Justification of Expropriation for Economic Development* (LLD dissertation Stellenbosch University 2012) 95-96; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 147; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 476.

<sup>127</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 476.

<sup>128</sup> BVerfGE 56, 249 (1981) (*Dürkheimer Gondelbahn*) discussed in Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 477-478. See further Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 302-404; Nginase XH *The Meaning of 'Public Purpose' and 'Public Interest' in Section 25 of the Final Constitution* (LLM thesis Stellenbosch University 2009) 90-93; Slade BV *The Justification of Expropriation for Economic Development* (LLD dissertation Stellenbosch University 2012) 96-98.

Expropriation is only justifiable if it is the only possible way in which the specific public need or purpose can be satisfied, and if the expropriation is strictly necessary to fulfil that purpose, in terms of the proportionality requirement.<sup>129</sup> Van der Walt explains that

"[T]he public interest that justifies a specific expropriation has to be sufficiently important to justify the extraordinary disturbance that expropriation brings about in the constitutional balance between the interests of the individual and of society, and it must justify subjecting the individual interest to the interests of society in that specific case (the justification aspect of the public purpose requirement). Expropriation is not automatically validated when it is generally or loosely associated with some public purpose, interest or benefit; each case has to be tested individually to establish that the expropriation actually serves a specific public purpose and is justified by it in the sense that the public purpose is a more important and overriding interest than the private interest that is affected by the expropriation."<sup>130</sup>

In other words, not only must a public purpose exist in order for expropriation to take place, that public purpose must have sufficient importance to justify this level of interference as well as be specific. A broad purpose will be inadequate and may result in the expropriation being declared unconstitutional. In the German case of *Dürkheimer Gondelbahn*<sup>131</sup> Böhmer J engaged in a detailed investigation of the public interest requirement in Article 14 and concluded that the public interest requirement means that expropriation has to be strictly necessary for some public duty that has to be performed. However, he emphasised that not every public action

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<sup>129</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 476-477. Van der Walt also points out that if the public purpose in question could have been served by another measure, the expropriation may be in conflict with the proportionality principle and unjustified.

<sup>130</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 477 (footnotes omitted).

<sup>131</sup> BVerfGE 56, 249 (1981) (*Dürkheimer Gondelbahn*) discussed in Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 477-478. See further Nginase XH *The Meaning of 'Public Purpose' and 'Public Interest' in Section 25 of the Final Constitution* (LLM thesis Stellenbosch University 2009) 90-93; Slade BV *The Justification of Expropriation for Economic Development* (LLD dissertation Stellenbosch University 2012) 96-98.

that serves the public interest in general or benefits the public in some general manner is in the public interest as intended in Article 14.3. Specifically, “public purpose” is a narrower category than “public benefit” and the mere fact that a development benefits the public in some broad sense is insufficient to satisfy the public purpose requirement in Article 14.3.<sup>132</sup>

In addition to the justification of the expropriation, the public purpose relating to a specific expropriation must be established in every individual case with regard to the relevant authorising legislation.<sup>133</sup> The *BVerfG* will determine in each case whether the objective of the expropriation, as stated in the authorising legislation, corresponds with a public purpose and whether that objective is in fact realised.<sup>134</sup> This means that, besides the need for the public purpose to be important enough to justify expropriation, the authorising legislation must authorise and enable the state explicitly and clearly to make use of its powers of expropriation in order to pursue or

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<sup>132</sup> BVerfGE 56, 249 (1981) (*Dürkheimer Gondelbahn*) discussed in Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 477-478. See further Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 147-149; Nginase XH *The Meaning of ‘Public Purpose’ and ‘Public Interest’ in Section 25 of the Final Constitution* (LLM thesis Stellenbosch University 2009) 90-93; Slade BV *The Justification of Expropriation for Economic Development* (LLD dissertation Stellenbosch University 2012) 96-98.

<sup>133</sup> BVerfGE 56, 249 (1981) (*Dürkheimer Gondelbahn*); Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 478; Nginase XH *The Meaning of ‘Public Purpose’ and ‘Public Interest’ in Section 25 of the Final Constitution* (LLM thesis Stellenbosch University 2009) 90-93; Slade BV *The Justification of Expropriation for Economic Development* (LLD dissertation Stellenbosch University 2012) 96-98.

<sup>134</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 478. See further BVerfGE 56, 249 (1981) (*Dürkheimer Gondelbahn*) discussed in Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 477-478; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 147-149; Nginase XH *The Meaning of ‘Public Purpose’ and ‘Public Interest’ in Section 25 of the Final Constitution* (LLM thesis Stellenbosch University 2009) 90-93; Slade BV *The Justification of Expropriation for Economic Development* (LLD dissertation Stellenbosch University 2012) 95-98.

promote the specific public purpose.<sup>135</sup> If the authorising legislation does not clearly authorise expropriation to serve the particular public purpose identified in the legislation, any act of expropriation performed pursuant to the legislation will be invalid and therefore unconstitutional, even if the expropriation serves a legitimate and clear public purpose generally.<sup>136</sup>

An improper purpose can never justify expropriation. For example, expropriation for the general purpose of improving or increasing the property or wealth of the state cannot be justified because the purpose of the power to expropriate is not to enrich the state but to serve specific public purposes that cannot be fulfilled by any other means.<sup>137</sup> Another example of an unjustifiable expropriation would be the expropriation of one person's property for the purpose of benefitting or enriching another private person.<sup>138</sup> However, the German courts will not necessarily invalidate an expropriation merely because a private person benefits from it. As long

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<sup>135</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 478. See further BVerfGE 56, 249 (1981) (*Dürkheimer Gondelbahn*) discussed in Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 477-478; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 147-149; Nginase XH *The Meaning of 'Public Purpose' and 'Public Interest' in Section 25 of the Final Constitution* (LLM thesis Stellenbosch University 2009) 90-93; Slade BV *The Justification of Expropriation for Economic Development* (LLD dissertation Stellenbosch University 2012) 95-98.

<sup>136</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 478.

<sup>137</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 478. See further Kleyn D "The constitutional protection of property: A comparison between the German and South African approach" (1996) 11 SAPL 402-445 at 436; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 148; Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 302.

<sup>138</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 478. See further Kleyn D "The constitutional protection of property: A comparison between the German and South African approach" (1996) 11 SAPL 402-445 at 436; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 148; Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 302.

as the expropriation is clearly undertaken to achieve a public purpose or is in the public interest and not solely for personal gain, the public purpose requirement could be satisfied, despite a private person benefitting from it.<sup>139</sup>

The Fifth Amendment of the US Constitution states that “[n]o 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”.<sup>140</sup> This means that there are two conditions under which the state may expropriate private property: the first is that the expropriation must be for public use and the second is expropriation must be accompanied by payment of just compensation.<sup>141</sup> Therefore, whenever private property is taken for a “public use”, just compensation must be paid to the owner of the taken private property. The US Supreme Court has interpreted this requirement to mean that takings of private property will only be constitutional if both just compensation is paid and the taking is for public use.<sup>142</sup> It follows that a taking

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<sup>139</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 478-479. See further Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 147-149; Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 302-303; Slade BV *The Justification of Expropriation for Economic Development* (LLD dissertation Stellenbosch University 2012) 105-106.

<sup>140</sup> Fifth Amendment 1791.

<sup>141</sup> Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 64. See further Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 424; Dana DA & Merrill TW *Property: Takings* (2002) 169, 191; Singer JW *Introduction to Property* 2<sup>nd</sup> ed (2005) 743; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 356; Slade BV *The Justification of Expropriation for Economic Development* (LLD dissertation Stellenbosch University 2012) 69.

<sup>142</sup> Dana DA & Merrill TW *Property: Takings* (2002) 191. See further Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 424; Singer JW *Introduction to Property* 2<sup>nd</sup> ed (2005) 743; Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 64; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 356;

performed in accordance with the power of eminent domain for which full compensation has been paid may nevertheless be declared unconstitutional if the use for which the property was taken was private as opposed to public.<sup>143</sup> Both requirements must be adhered to in order for a taking of private property to be constitutional. The US Supreme Court has held that the public use requirement is met if the taking serves a legitimate public use or purpose even if the government achieves the purpose by taking property from one owner and giving it to another owner.<sup>144</sup>

Dana and Merrill argue that the public use limitation on takings of private property, despite its potential as a significant barrier to takings of property, is “rather toothless”.<sup>145</sup> The reason for this assessment is the highly deferential interpretation of the public use requirement that the US Supreme Court has adopted.<sup>146</sup> As stated earlier, both public use and compensation paid are required for a taking to be constitutional. A compensated taking of property that is for a private use is unconstitutional. However, in *Berman v Parker*,<sup>147</sup> it was accepted that courts would defer to the legislature’s wide discretion to determine what public use is. The US Supreme Court stated that “[s]ubject to specific constitutional limitations, when the

Slade BV *The Justification of Expropriation for Economic Development* (LLD dissertation Stellenbosch University 2012) 69.

<sup>143</sup> Dana DA & Merrill TW *Property: Takings* (2002) 191. See further Singer JW *Introduction to Property* 2<sup>nd</sup> ed (2005) 743; Slade BV *The Justification of Expropriation for Economic Development* (LLD dissertation Stellenbosch University 2012) 69.

<sup>144</sup> Singer JW *Introduction to Property* 2<sup>nd</sup> ed (2005) 743 referring to *Berman v Parker* 348 US 26 (1954); *Hawaii Housing Authority v Midkiff* 467 US 229 (1984). See further Slade BV *The Justification of Expropriation for Economic Development* (LLD dissertation Stellenbosch University 2012) 66-67.

<sup>145</sup> Dana DA & Merrill TW *Property: Takings* (2002) 191, with reference to *Hawaii Housing Authority v Midkiff* 467 US 229 (1984).

<sup>146</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 483.

<sup>147</sup> *Berman v Parker* 348 US 26 (1954).

legislature has spoken, the public interest has been declared in terms well nigh conclusive".<sup>148</sup> The deferential approach in *Berman* was developed with reference to the state's regulatory police powers, but in *Hawaii Housing Authority v Midkiff*<sup>149</sup> the US Supreme Court stated that the public use requirement in the Takings Clause is "coterminous with the scope of a sovereign's police power".<sup>150</sup> This established a deferential approach towards the public use requirement in terms of the power of eminent domain along with the police power. In *Midkiff*, the US Supreme Court stated further that while the courts do have a role in reviewing what the legislature judges as falling into public use, this role is the "extremely narrow one of ensuring that the legislature's determination does not involve an impossibility".<sup>151</sup> In *Kelo v City of New London*<sup>152</sup> the majority of the US Supreme Court reiterated that the literal requirement that property may only be expropriated if it is actually made available to or used by the public or the state had been rejected in favour of the broader interpretation of public use as public purpose.<sup>153</sup>

This requirement of public use appears to be interpreted less strictly than its German counterpart, where any proposed public use used to justify expropriation is

<sup>148</sup> At 32.

<sup>149</sup> *Hawaii Housing Authority v Midkiff* 467 US 229 (1984).

<sup>150</sup> At 240. See further Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 484; Slade BV *The Justification of Expropriation for Economic Development* (LLD dissertation Stellenbosch University 2012) 66-67.

<sup>151</sup> At 241. See further Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 485; Slade BV *The Justification of Expropriation for Economic Development* (LLD dissertation Stellenbosch University 2012) 66-67.

<sup>152</sup> *Kelo v City of New London* 545 US 469 (2005). See further Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 486; Slade BV *The Justification of Expropriation for Economic Development* (LLD dissertation Stellenbosch University 2012) 76-81.

<sup>153</sup> At 420. See further Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 486; Slade BV *The Justification of Expropriation for Economic Development* (LLD dissertation Stellenbosch University 2012) 66-67.

scrutinised to ensure that it complies with Article 14.3 and if it fails to do so, the expropriation is unconstitutional. The mere fact that the public use appears in authorising legislation does not shield it from scrutiny by the *BVerfG*. There is no deferential approach in favour of the legislature, as there is in the US. The US approach to this requirement is one of deference to the legislature's determination of what constitutes a public use. The most extreme form of scrutiny of this determination by a court is to decide whether the proposed public use does not involve an impossibility, a rather low standard to overcome.

### 2 3 5 Compensation

Article 14.3 of the German Basic Law requires, in order for an expropriation (*Enteignung*) of property to be valid, that the legislation authorising the expropriation must provide for compensation as well as stipulate the type and extent of compensation specifically.<sup>154</sup> This is known as the *Junktim-Klausel* or linking-clause provision.<sup>155</sup> This provision places an obligation on the state to compensate owners who are forced to sacrifice their rights and privileges for the common good.<sup>156</sup>

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<sup>154</sup> Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 300. See further Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 150; Du Plessis WJ *Compensation for Expropriation under the Constitution* (LLD dissertation Stellenbosch University 2009) 160.

<sup>155</sup> Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 301. See further Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 147.

<sup>156</sup> Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 301 explains that this compensation can be in the form of money or compensation in kind, but the authorising legislation must determine the nature and measure of compensation.

Furthermore, Article 14.3 requires that compensation for expropriation reflect a fair balance between the public interest and the interests of those affected.<sup>157</sup> In other words, the amount of compensation for expropriation of property is determined in a contextual manner, taking into account the relevant public interest and interests of those affected by the expropriation. Van der Walt explains:

“The determination whether compensation as provided for indeed creates a fair balance between the public interest and the individual interest, as required by article 14.3, is made with reference to the fundamental purpose of the property guarantee, and therefore involves a weighing of all relevant factors and circumstances in view of the proportionality principle. The market value of the property and the financial loss of the owner have to be considered to establish the fair balance, but they have to be weighed against other interests (including the public interest) and circumstances, and do not determine the nature or measure of payment on their own.”<sup>158</sup>

German courts have indicated that the compensation paid in the event of expropriation of property need not be equal to the market value of the property.<sup>159</sup>

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<sup>157</sup> Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 300. Mostert explains that this is the so-called “Abwägungsgebot”, which does not allow for the payment of nominal compensation for expropriation and also does not require that the compensation paid should be equal to full market value of the expropriated property. See further Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 150-151; Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 115; Du Plessis WJ *Compensation for Expropriation under the Constitution* (LLD dissertation Stellenbosch University 2009) 160-161.

<sup>158</sup> Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 151. See further Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 115.

<sup>159</sup> See BVerfGE 24, 367 (1968) (*Deichordnung*) discussed in Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 510. See further Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 301; Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 115.

While *Enteignung* refers only to those instances that comply with the requirements of Article 14.3, there are also instances (known as *enteignungsgleiche Eingriffe*) where legislation unintentionally infringes on an owner's property rights through regulation.<sup>160</sup> In these circumstances, an owner is required to make a sacrifice regarding his property, which exceeds the ordinary bounds of what is expected from a non-expropriatory regulation of property.<sup>161</sup> The requirement that compensation be provided for so that an expropriation is valid means that compensation is not payable in these instances.<sup>162</sup> However, it is sometimes possible to receive a monetary award in these instances of excessive regulation that is not considered compensation for expropriation. Rather, this award is an equalisation payment that moderates the impact of the burden which a regulatory measure or action places upon an individual property holder, thereby ensuring that

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<sup>160</sup> Du Plessis WJ *Compensation for Expropriation under the Constitution* (LLD dissertation Stellenbosch University 2009) 151. See further Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 281-282; Bezuidenhout K *Compensation for Excessive but Otherwise Lawful Regulatory State Action* (LLD dissertation Stellenbosch University 2015) 145-146. Bezuidenhout explains that some *enteignungsgleiche Eingriffe* are infringements of property resulting from regulatory state action that is not property authorised, or where the state failed to act in accordance with a legal duty and an infringement occurred as a result of that omission, in which case the regulations are unlawful and constitutionally invalid. On the other hand, some *enteignender Eingriffe* are lawful interferences with property rights that require an owner to make a special or extraordinary sacrifice. These types of interferences are usually the unintended and unexpected results of otherwise legitimate regulatory measures and may give rise to a claim for equalisation compensation.

<sup>161</sup> Du Plessis WJ *Compensation for Expropriation under the Constitution* (LLD dissertation Stellenbosch University 2009) 151. See further Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 281; Bezuidenhout K *Compensation for Excessive but Otherwise Lawful Regulatory State Action* (LLD dissertation Stellenbosch University 2015) 145.

<sup>162</sup> Du Plessis WJ *Compensation for Expropriation under the Constitution* (LLD dissertation Stellenbosch University 2009) 151.

the burden is not invalid for being excessive in terms of the proportionality principle. These equalisation payments are not constitutional compensation for expropriation and therefore recognition of this procedure is fundamentally different from expropriatory compensation for regulatory takings in US law.<sup>163</sup>

In the case of *Rheinland-Pfälzischen Denkmalschutz-und-Pflegegesetz*<sup>164</sup> the *BVerfG* restricted the practice of providing solely monetary equalisation in the case where legislation caused an overly burdensome regulation of property.<sup>165</sup> This case concerned the demolition of a structure that was protected by legislation aimed at preserving national monuments. This legislation required that an owner seeking to demolish a structure protected by the legislation had to apply for a permit before commencing with the demolition. The owner in this case applied for the permit but its application was rejected. The *BVerfG* held that this legislation constituted a regulation and not an expropriation of property, and therefore no compensation for expropriation was required.<sup>166</sup> However, the *BVerfG* held that this regulation was

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<sup>163</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 367. See further Bezuidenhout K *Compensation for Excessive but Otherwise Lawful Regulatory State Action* (LLD dissertation Stellenbosch University 2015) 132-168.

<sup>164</sup> BVerGE 100, 226 (1999) (*Rheinland-Pfälzischen Denkmalschutz-und-Pflegegesetz*) discussed in Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 119-121. See further Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 203, 210-211; Strydom J A *Hundred Years of Demolition Orders: A Constitutional Analysis* (LLD dissertation Stellenbosch University 2012) 246-255; Kommers DP & Miller RA *The Constitutional Jurisprudence of the Federal Republic of Germany* 3<sup>rd</sup> ed (2012) 645-650.

<sup>165</sup> Kommers DP & Miller RA *The Constitutional Jurisprudence of the Federal Republic of Germany* 3<sup>rd</sup> ed (2012) 645. For a further discussion of this case, see Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 119-121; Strydom J A *Hundred Years of Demolition Orders: A Constitutional Analysis* (LLD dissertation Stellenbosch University 2012) 246-255.

<sup>166</sup> Kommers DP & Miller RA *The Constitutional Jurisprudence of the Federal Republic of Germany* 3<sup>rd</sup> ed (2012) 646. See further Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 120.

disproportionate because it left the owner with something that could not be considered “property”.<sup>167</sup> The regulation was unconstitutional because a party could not expect compensation as a result of a limitation (regulation) of property in accordance with Article 14. Where the regulation of property is excessive or disproportionate, the appropriate remedy is the invalidation of the legislation imposing the regulation and not compensation.<sup>168</sup>

The *BVerfG* then considered whether the disproportionate impact of the regulation could be remedied with some form of equalisation. It held that the legislature must anticipate and make provision in the regulatory legislation for the possible need for equalisation.<sup>169</sup> This means making provision within the regulatory statute for the relevant administrative body to provide equalisation in the appropriate form.<sup>170</sup> The *BVerfG* held that the compensation clause in the relevant legislation in this case did not remedy the disproportionate effect in this case because it was too vague.<sup>171</sup> Furthermore, the *BVerfG* stated that equalisation provisions should be specifically designed to prevent unreasonable or disproportionate effects through administrative, technical and financial means, that the equalisation measures must

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<sup>167</sup> Kommers DP & Miller RA *The Constitutional Jurisprudence of the Federal Republic of Germany* 3<sup>rd</sup> ed (2012) 648. See further Strydom J A *Hundred Years of Demolition Orders: A Constitutional Analysis* (LLD dissertation Stellenbosch University 2012) 251.

<sup>168</sup> Kommers DP & Miller RA *The Constitutional Jurisprudence of the Federal Republic of Germany* 3<sup>rd</sup> ed (2012) 647.

<sup>169</sup> Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 120. See further Kommers DP & Miller RA *The Constitutional Jurisprudence of the Federal Republic of Germany* 3<sup>rd</sup> ed (2012) 649.

<sup>170</sup> Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 120.

<sup>171</sup> Strydom J A *Hundred Years of Demolition Orders: A Constitutional Analysis* (LLD dissertation Stellenbosch University 2012) 253. See further Kommers DP & Miller RA *The Constitutional Jurisprudence of the Federal Republic of Germany* 3<sup>rd</sup> ed (2012) 649.

be provided for in the legislation and the circumstances in which the equalisation provision would be applied must also be specified in the legislation.<sup>172</sup>

Therefore, equalisation measures are possible remedies in a case of excessive regulation of property, but these measures are only available in exceptional circumstances and they must be appropriate and sufficient in preventing the excessive regulatory burden from being disproportionate.<sup>173</sup> Equalisation measures must be provided for in the authorising legislation and such provision must be clear and detailed.<sup>174</sup> Finally, where there is no provision for equalisation measures, the affected owner will not be able to claim compensation and if the interference is found to be excessive, the legislation imposing it will be declared invalid.<sup>175</sup>

In US law, the Fifth Amendment states that expropriation of property may only take place if “just compensation” is provided. Just compensation does not necessarily mean that full compensation will be awarded.<sup>176</sup> The basic legal standard for determining what constitutes just compensation is the fair market value standard.<sup>177</sup> According to this standard the owner is entitled to the fair market value of the property taken (expropriated) by the condemning authority. Fair market value

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<sup>172</sup> Strydom J *A Hundred Years of Demolition Orders: A Constitutional Analysis* (LLD dissertation Stellenbosch University 2012) 254.

<sup>173</sup> Bezuidenhout K *Compensation for Excessive but Otherwise Lawful Regulatory State Action* (LLD dissertation Stellenbosch University 2015) 167. See further Kommers DP & Miller RA *The Constitutional Jurisprudence of the Federal Republic of Germany* 3<sup>rd</sup> ed (2012) 649.

<sup>174</sup> Bezuidenhout K *Compensation for Excessive but Otherwise Lawful Regulatory State Action* (LLD dissertation Stellenbosch University 2015) 167-168.

<sup>175</sup> Bezuidenhout K *Compensation for Excessive but Otherwise Lawful Regulatory State Action* (LLD dissertation Stellenbosch University 2015) 168.

Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 68.

<sup>177</sup> Dana DA & Merrill TW *Property: Takings* (2002) 169; Singer JW *Introduction to Property* 2<sup>nd</sup> ed (2005) 748.

means the amount “a willing buyer would pay a willing seller of the property, taking into account all possible uses to which the property might be put other than the use contemplated by the taker”.<sup>178</sup> Fair market value is determined by a number of techniques, the four most common ones being a) examination of recent sales prices for the property in question; b) examination of recent sales prices for other properties in the area deemed to be comparable to the property in question; c) capitalisation of the actual or potential rental value of the property in question; and d) calculation of the cost of rebuilding the property minus depreciation to reflect age and wear and tear.<sup>179</sup> The rules regarding which technique is preferred vary among the states. There are other standards available to implement the just compensation requirement; such as the “restitution” standard, whereby compensation is set to equal the benefit received by the taker, and the “indemnification” standard, where compensation is based on the loss to the owner.<sup>180</sup> The preferred standard is the “indemnification” standard, measuring compensation according to the loss suffered by the owner.<sup>181</sup>

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<sup>178</sup> Dana DA & Merrill TW *Property: Takings* (2002) 169-170; Singer JW *Introduction to Property* 2<sup>nd</sup> ed (2005) 748.

<sup>179</sup> Dana DA & Merrill TW *Property: Takings* (2002) 170-171.

<sup>180</sup> Dana DA & Merrill TW *Property: Takings* (2002) 172-173. See further *United States v Causby* 328 US 256 (1946) at 261; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 440-441.

<sup>181</sup> *United States v Causby* 328 US 256 (1946) at 261. See further Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 440.

## 2 3 6 Excessive deprivation or regulation

In German law, constructive expropriation is not recognised. An excessive regulation is regarded as invalid and not simply relabelled as an expropriation.<sup>182</sup> An expropriation is seen as a partial or complete acquisition of concrete individual property holdings for the realisation of specific public duties, provided it complies with constitutional and statutory requirements. The German Federal Constitutional Court (*BVerfG*) has unambiguously stated that excessive regulatory action does not satisfy the requirements for valid regulation and is therefore invalid. The provision of compensation does not transform an excessive interference into a valid regulation. If the legislation does not satisfy the requirements for a valid regulation or expropriation of property, the legislation is constitutionally invalid. This means that the idea of constructive expropriation does not have a place in German constitutional law. Constructive expropriation is usually associated with a claim for compensation for excessive regulation. Under the clear distinction between regulation of property rights and expropriation in German law, the kind of excessive regulation associated with constructive expropriation would be invalid, a fact confirmed by the *BVerfG*. The impugned excessive regulation cannot be repurposed as an expropriation and thus cannot found a compensation claim. Therefore, an award of expropriatory compensation for constructive expropriation is impossible in German constitutional law. When a person is adversely affected by unlawful or excessive regulatory action,

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<sup>182</sup> Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 149. See further Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 365-367; BVerfGE 50, 290 (1979) (*Mitbestimmung*) discussed in Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 366.

the correct course of action would be to challenge the validity of the regulation in the administrative courts and not to claim compensation.<sup>183</sup>

US law treats the distinction between deprivation (regulation) and expropriation (taking) of property as two ends on a continuum, which results in judicial recognition of a grey area between the two.<sup>184</sup> However, a regulation performed in terms of the state's police power that is deemed to be excessive is known as a regulatory taking and not constructive expropriation. This is merely a terminological distinction as the effect of the two is the same. Only those regulatory actions that are otherwise lawful and legitimate but are excessive in their effect on the owner can qualify as regulatory takings.<sup>185</sup> An excessive regulatory action that is, for example, for an improper purpose or is not properly authorised will be invalid.<sup>186</sup> The notion of a regulatory taking was first recognised in the decision of *Pennsylvania Coal Co v Mahon*,<sup>187</sup> where the US Supreme Court held that regulations performed in terms of the police power can sometimes have the equivalent impact of an exercise of the state's power of eminent domain.<sup>188</sup> This decision gave rise to the "regulatory takings" doctrine: if

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<sup>183</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 367. See further Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 144.

<sup>184</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 356. See further *Pennsylvania Coal Co v Mahon* 260 US 393 (1922); Singer JW *Introduction to Property* 2<sup>nd</sup> ed (2005) 680-686; Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 70-71.

<sup>185</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 353.

<sup>186</sup> Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 418. See further Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 353-354; Bezuidenhout K *Compensation for Excessive but Otherwise Lawful Regulatory State Action* (LLD dissertation Stellenbosch University 2015) 60.

<sup>187</sup> *Pennsylvania Coal Co v Mahon* 260 US 393 (1922).

<sup>188</sup> Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 71. See further Bezuidenhout K *Compensation for Excessive but Otherwise Lawful Regulatory State Action* (LLD dissertation Stellenbosch University 2015) 64-65.

an exercise of the police power “goes too far” in interfering with property rights, it will be invalidated unless the government pays just compensation.<sup>189</sup> Dana and Merrill explain that this doctrine prevents the government from evading the limits that the Takings Clause places on the power of eminent domain by trying to accomplish the same result through an exercise of the police power.<sup>190</sup> Van der Walt explains that, initially, the US Supreme Court made use of *ad hoc* factual inquiries to determine whether a regulation had gone too far.<sup>191</sup> In later cases the US Supreme Court subscribed to either a strict rule-bound approach or restricted the *ad hoc* inquiry to situations where the regulatory action in question could not be categorically identified as a regulatory taking.<sup>192</sup>

Similar to German law, providing compensation for an otherwise unlawful and invalid regulation or taking of property does not retrospectively validate the unconstitutional regulation or taking.

### 2 3 7 Conclusion

German and US constitutional property law use different terminology when referring to the limitation of property rights. Article 14 of the German Basic Law does not refer to deprivation of property; instead it provides the statutory regulation of the contents

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<sup>189</sup> *Pennsylvania Coal Co v Mahon* 260 US 393 (1922) at 415; Dana DA & Merrill TW *Property: Takings* (2002) 4-5; Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 71; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 201.

<sup>190</sup> Dana DA & Merrill TW *Property: Takings* (2002) 5. See further Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 356.

<sup>191</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 356-358.

<sup>192</sup> Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 73-77. See further Dana DA & Merrill TW *Property: Takings* (2002) 121-168; Singer JW *Introduction to Property* 2<sup>nd</sup> ed (2005) 687-692.

and limits of property. It also refers to expropriation of property and states the requirements for a valid expropriation. On the other hand, the Fifth and Fourteenth Amendments to the US Constitution refer to the deprivation of property, which is understood to mean the regulation of property in terms of the state's police power. Whereas German law refers to expropriation, US law refers to takings of property against compensation. The term "taking" is understood as a term that includes the narrower category of formal expropriations and compulsory acquisitions in terms of the power of eminent domain.

In both German law and US law there is a strong emphasis on the formal source of power to perform either regulation or expropriation of property. In German law, a law that authorises expropriation must specifically provide for compensation, which distinguishes them from laws that determine the contents and limits of property. In US law, expropriation refers to the exercise of the state's power of eminent domain while deprivation (regulation) refers to exercises of the state's police power. German law does not recognise a grey area between regulation and expropriation of property, where deprivation can shade into expropriation if it is excessive. If a regulation of property is excessive, it will be unconstitutional for being excessive and cannot be transformed into an expropriation because each limitation derives from a different source of authority and each must be judged according to its own authority and requirements. On the other hand, US law does recognise a grey area between the exercise of the police power and formal expropriation. Actions that fall into this grey area are known as regulatory takings and are recognised with reference to their excessive effect rather than the source of authority. Whereas German law requires that expropriation be in the public interest and interprets this requirement strictly, US law requires that property must be expropriated for public

use and the US Supreme Court has adopted a highly deferential approach to the interpretation of the public use requirement.

Regarding compensation for expropriation, German law requires that the legislation authorising the expropriation must provide for compensation, specify the type and extent of compensation and such compensation must reflect a fair balance between the public interest and the interest of those affected. On the other hand, US law requires that just compensation is required in the event of expropriation. This does not necessarily mean that full compensation will be paid. Rather, compensation is determined according to the fair market value standard. Whereas US law provides for expropriatory compensation to be paid in the event of a regulatory taking, German law does not. German law allows for equalisation to be paid to an owner whose property rights have been unintentionally infringed by legislation, but this is not compensation for expropriation.

German and US law have opposite approaches to the notion of excessive regulation of property. Whereas the notion of constructive expropriation is not recognised in German law at all, US law recognises the concept of a regulatory taking. A regulatory taking occurs when a police power regulation is deemed excessive and treated as a taking requiring compensation. The notion of regulatory takings exists in a grey area between regulation and expropriation. This grey area exists due to US law treating regulation and expropriation as points on a continuum. German law treats regulation and expropriation at two distinct categories of limitation on property rights and therefore, no grey area can exist between the two categories. A regulation of property that is excessive is invalid because it does not satisfy the requirements for a constitutional limitation of property rights and it will not be

relabelled as an expropriation because it does not satisfy the requirements for a valid expropriation of property either.

## 2 4 Proportionality and judicial balancing

### 2 4 1 Introduction

The proportionality principle is a fundamental and well-developed principle in German law,<sup>193</sup> despite not being expressly mentioned in the Basic Law.<sup>194</sup> The proportionality principle is derived from the *Rechtsstaat* principle.<sup>195</sup> The function of the proportionality principle “is to ensure that the regulation starts with but also ends

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<sup>193</sup> Kleyn D “The constitutional protection of property: A comparison between the German and South African approach” (1996) 11 SAPL 402-445 at 427-427; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 158-163, 451-458; Dana DA & Merrill TW *Property: Takings* (2002) 121-168; Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 258-314; Singer JW *Introduction to Property* 2<sup>nd</sup> ed (2005) 722-732; Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 133-147, 73-95; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 201, 203, 215-217, 225-227, 241-242, 272-273, 454-455, 493-501.

<sup>194</sup> Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 133.

<sup>195</sup> Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 133. This term is often translated as a state subject to “rule of law” but Alexander regards this as a misleading translation, a better one being “constitutional state”. See further Kleyn D “The constitutional protection of property: A comparison between the German and South African approach” (1996) 11 SAPL 402-445 at 424-425; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 158; Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 287-289.

with the public interest, and that it respects and protects both the public interest and the individual interests equally".<sup>196</sup>

The proportionality principle is not completely unknown in US law, but its use is limited.<sup>197</sup> The term "proportionality" is used with reference to regulatory takings and specific forms of regulations, of which exactions are a good example. Exactions are demands or conditions set by cities that property owners must comply with in order to receive a government permit to build on their land.<sup>198</sup> However, the Supreme Court has held<sup>199</sup> that the police power involved in regulating property in this manner cannot be used to "extort" a sacrifice of property in exchange for some discretionary land-use permission and disguise it as a regulatory control over the use of property, even if the sacrifice is clearly beneficial for public purposes and loosely connected with the benefit derived from the land-use permission".<sup>200</sup>

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<sup>196</sup> Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 135. See further Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 133; Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 290-291; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 365.

<sup>197</sup> Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 199.

<sup>198</sup> Singer JW *Introduction to Property* 2<sup>nd</sup> ed (2005) 735-740. See further Dana DA & Merrill TW *Property: Takings* (2002) 210-217; Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 80-82; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 290.

<sup>199</sup> See *Nollan v California Coastal Commission* 483 US 825 (1987) and *Dolan v City of Tigard* 512 US 374 (1994). See further Singer JW *Introduction to Property* 2<sup>nd</sup> ed (2005) 735-740; Dana DA & Merrill TW *Property: Takings* (2002) 210-217; Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 80-82; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 290.

<sup>200</sup> Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 416. See further Singer JW *Introduction to Property* 2<sup>nd</sup> ed (2005) 735-740; Dana DA & Merrill TW *Property: Takings* (2002) 210-217; Alexander GS *The Global Debate over Constitutional Property: Lessons for*

The dominant methodology in US law for analysing takings cases is judicial balancing, even though the US Supreme Court has developed at least two categorical rules to assist in resolving taking cases.<sup>201</sup> However, when entering the realm of regulatory takings, these categorical rules are of less assistance and the analysis takes the form of an essentially *ad hoc* factual enquiry.<sup>202</sup>

## 2 4 2 Proportionality review in German law

There is no explicit provision relating to proportionality in the Basic Law.<sup>203</sup> Other than the right to human dignity, all the rights in the Basic Law are relative.<sup>204</sup> Furthermore, some of these rights do not have explicit limitation clauses while others can only be limited by law or specify their own specific limitation requirements.<sup>205</sup> The right to property in Article 14 of the Basic Law is an example of a right that may

*American Takings Jurisprudence* (2006) 80-82; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 290.

<sup>201</sup> Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 73.

<sup>202</sup> Dana DA & Merrill TW *Property: Takings* (2002) 121. See further Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 358-359.

<sup>203</sup> Basic Law for the Federal Republic of Germany, 1949 (as amended on and up to 30 December 1993) (*Grundgesetz*, GG). See further Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 290; Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 133.

<sup>204</sup> Barak A *Proportionality: Constitutional Rights and their Limitations* (2012) 179. See further Kleyn D "The constitutional protection of property: A comparison between the German and South African approach" (1996) 11 SAPL 402-445 at 424; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 127-128; Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 258 -260.

<sup>205</sup> Barak A *Proportionality: Constitutional Rights and their Limitations* (2012) 179. See further Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 263.

only be limited by law. According to Article 19(1) of the Basic Law, a fundamental right may be limited as long as three conditions are met: firstly, a right may only be restricted by or pursuant to a law; secondly, a right so restricted must be based on a law that has general application; finally, the law allowing for the restriction must specify the fundamental right concerned and explicitly mention the article concerned.<sup>206</sup>

Van der Walt explains that “proportionality review ensures that a state limitation (either deprivation or expropriation) of property establishes a proper balance between the public purpose it serves, the means employed to promote that purpose and the effect that the limitation has on the affected property holder”.<sup>207</sup> Furthermore, in order for a limitation to be valid it must be strictly necessary (*erforderlich*), suitable for the purpose it serves (*geeignet*) and not impose burdens disproportionate to its benefits (*unverhältnismäßig* or *unzumutbar*).<sup>208</sup> The requirement of necessity means that the legislature must, among the options available, adopt the one that least limits the right in question.<sup>209</sup> The requirement of suitability means that the legislative limitation must have some rational connection to

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<sup>206</sup> Blaauw-Wolf L “The ‘balancing of interests’ with reference to the principle of proportionality and the doctrine of *Güterabwägung* – A comparative analysis” (1999) 14 SAPL 178-215 at 180. See further Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 261-262.

<sup>207</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 242.

<sup>208</sup> Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 135. See further Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 289-290; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 242.

<sup>209</sup> Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 134. See further Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 289.

the intended aim of the limitation.<sup>210</sup> Alexander explains that the third requirement asks whether the harm caused to the rights holder is proportionate to the stated objective.<sup>211</sup>

It is important to distinguish the principle of proportionality from the theory of *Güterabwägung* or “balancing of interests”. Blaauw-Wolf explains that:

“Although some of the criteria for interpretation overlap and lead to the same results, the main critique against this theory is that all limitations are regarded as ‘conflicts’. More importantly, different constitutional norms are weighted and ranked, some being considered more important than others, although the Basic Law does not provide for such interpretation. To complicate matters, the principle of proportionality in the narrow sense is often also referred to as a ‘balancing of interests’, a reference to the stages of confining all the possible measures to attain a specific goal to the least far-reaching restriction.”<sup>212</sup>

According to the *Güterabwägung* theory, rights and values are “ranked” according to their source, for example constitutional rights are ranked higher than rights provided

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<sup>210</sup> Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 134. See further Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 289; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 242.

<sup>211</sup> Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 134. See further Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 290; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 242.

<sup>212</sup> Blaauw-Wolf L “The ‘balancing of interests’ with reference to the principle of proportionality and the doctrine of *Güterabwägung* – A comparative analysis” (1999) 14 SAPL 178-215 at 197. See further Blaauw-Wolf L & Wolf J “A comparison between German and South African limitation provisions” (1996) SALJ 267-296 at 282-283; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 162-163; Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 293-296.

for in other statutes.<sup>213</sup> Furthermore, this theory proposes a hierachal ranking of fundamental rights, in that freedom, for example, will rank higher than the right to property as well as other rights that protect things due to the fact that freedom is a personal right. The importance of a right is dependent upon, among other things, its relevance to the community. The degree of relevance to the community is linked to the importance of freedom. Finally, the fundamental principle of this theory determines that “the more fundamental a right is for the maintenance of values in a democratic state, the higher its position in this pyramid of fundamental rights”.<sup>214</sup>

There is also a “concrete ranking” of rights that exists over and above the “abstract ranking” discussed immediately above.<sup>215</sup> This “concrete ranking” can be applied in certain situations to determine which right has preference over another, in other words which right will have to give way to another should they clash. Whether a right must give way to another depends on the number of values or interests at

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<sup>213</sup> Blaauw-Wolf L “The ‘balancing of interests’ with reference to the principle of proportionality and the doctrine of *Güterabwägung* – A comparative analysis” (1999) 14 SAPL 178-215 at 197. See further Blaauw-Wolf L & Wolf J “A comparison between German and South African limitation provisions” (1996) SALJ 267-296 at 282-283; Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 293.

<sup>214</sup> Blaauw-Wolf L “The ‘balancing of interests’ with reference to the principle of proportionality and the doctrine of *Güterabwägung* – A comparative analysis” (1999) 14 SAPL 178-215 at 197. See further Blaauw-Wolf L & Wolf J “A comparison between German and South African limitation provisions” (1996) SALJ 267-296 at 282-283; Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 293-294.

<sup>215</sup> Blaauw-Wolf L “The ‘balancing of interests’ with reference to the principle of proportionality and the doctrine of *Güterabwägung* – A comparative analysis” (1999) 14 SAPL 178-215 at 197. See further Blaauw-Wolf L & Wolf J “A comparison between German and South African limitation provisions” (1996) SALJ 267-296 at 282-283; Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 293-294.

stake, the intensity of the infringement and the degree to which a right deserves protection. It is important to note that this *Güterabwägung* approach remains controversial and has not been endorsed by the *BVerfG*; just a few academics support its application in the constitutional context.<sup>216</sup> Some of the criticisms leveled against *Güterabwägung* are,<sup>217</sup> for example, that the concretisation of fundamental rights could potentially be limited to interest balancing, resulting in the negation of the formal elements of these rights contained in the provisions of the Bill of Rights. Another view is that *Güterabwägung* does not enhance legal certainty but encourages a subjective assessment of constitutional norms.<sup>218</sup>

Alexander explains that a theoretical distinction is drawn between proportionality and balancing in German law: balancing is an abstract weighting or ranking of fundamental rights while proportionality is viewed as a matter of institutional competence.<sup>219</sup> The proportionality test is used to determine whether the legislature has overstepped its competence to determine the scope and content of

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<sup>216</sup> Blaauw-Wolf L “The ‘balancing of interests’ with reference to the principle of proportionality and the doctrine of *Güterabwägung* – A comparative analysis” (1999) 14 SAPL 178-215 at 198. See further Blaauw-Wolf L & Wolf J “A comparison between German and South African limitation provisions” (1996) SALJ 267-296 at 283; Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 295.

<sup>217</sup> Blaauw-Wolf L “The ‘balancing of interests’ with reference to the principle of proportionality and the doctrine of *Güterabwägung* – A comparative analysis” (1999) 14 SAPL 178-215 at 198-199.

<sup>218</sup> Blaauw-Wolf L “The ‘balancing of interests’ with reference to the principle of proportionality and the doctrine of *Güterabwägung* – A comparative analysis” (1999) 14 SAPL 178-215 at 198. See further Mostert H *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany: A Comparative Analysis* (2002) 295.

<sup>219</sup> Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 203; Blaauw-Wolf L “The ‘balancing of interests’ with reference to the principle of proportionality and the doctrine of *Güterabwägung* – A comparative analysis” (1999) 14 SAPL 178-215 at 198-201.

the property guarantee. Finally, the point of both proportionality review and balancing is to determine whether a legislative limitation of the right to property is excessive. The processes of each form of review often overlap and often lead to the same result. The distinction between proportionality review and balancing is important because the fundamental mode in German law is proportionality, based on a notion of authority, while balancing accords more with US law.

### 2 4 3 Judicial balancing in US law

As mentioned above, proportionality is not completely unknown in US law and finds application in the context of regulatory takings and exactions. The leading Supreme Court decisions regarding exactions are *Nollan v California Coastal Commission*<sup>220</sup> and *Dolan v City of Tigard*.<sup>221</sup> In both cases, building permission was conditional upon the dedication of certain parts of the landowners' property for public use. In *Nollan*, the Supreme Court held that the condition would be valid only if there was a sufficient nexus<sup>222</sup> between the condition and the reason for the development limitation.<sup>223</sup> The Supreme Court held that there was no nexus at all between the condition and the reason for the development restriction and thus did not elaborate

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<sup>220</sup> *Nollan v California Coastal Commission* 483 US 825 (1987).

<sup>221</sup> *Dolan v City of Tigard* 512 US 374 (1994)

<sup>222</sup> Crump D "Takings by regulation: How should the Court weigh the balancing factors?" (2012) 52 52 *Santa Clara LR* 1-45 at 8 explains that a possible reason for the specification of this close nexus standard was the prevention of "pretextual takings". Crump gives the example of a situation where the government "regulates" an owner's property in a manner that is not related to its regulatory goal of, for instance, securing land for a public park. If the regulation forces the owner to use his property for a public use, such as recreation by the nonpaying public, then the close nexus test would cut through this pretext and identify the government's action as a taking.

<sup>223</sup> Singer JW *Introduction to Property* 2<sup>nd</sup> ed (2005) 736, discussing *Nollan v California Coastal Commission* 483 US 825 (1987).

on how tight the connection between these two points has to be.<sup>224</sup> In *Dolan*, the Supreme Court addressed this question. The Supreme Court held that there must be a sufficient nexus between the condition and the projected impact of the development and there must also be “rough proportionality” between the condition and the projected impact of the proposed development in order to satisfy the Takings Clause.<sup>225</sup> The principles developed in the *Nollan* and *Dolan* decisions are confined to exaction cases and do not apply to challenges to direct regulation generally.<sup>226</sup>

Despite the occasional reliance on proportionality in this sense, the dominant methodology for dealing with takings cases in US law is balancing, combined with the application of at least two categorical rules to assist in resolving takings cases. Alexander explains that balancing in US law is “basically a form of cost-benefit analysis, in which multiple factors are weighed in the abstract rather than in a contextualised fashion”.<sup>227</sup> When faced with a case of a potential regulatory taking, the Supreme Court resorts to an *ad hoc* factual inquiry.<sup>228</sup> The Court’s balancing method is usually structured around several requirements, most of which are derived

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<sup>224</sup> Singer JW *Introduction to Property* 2<sup>nd</sup> ed (2005) 737, discussing *Nollan v California Coastal Commission* 483 US 825 (1987).

<sup>225</sup> Singer JW *Introduction to Property* 2<sup>nd</sup> ed (2005) 737-738, discussing *Nollan v California Coastal Commission* 483 US 825 (1987). See further Dana DA & Merrill TW *Property: Takings* (2002) 222-225; Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 81.

<sup>226</sup> Dana DA & Merrill TW *Property: Takings* (2002) 212-213. See further Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 80-81.

<sup>227</sup> Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 203. See further Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 451-458.

<sup>228</sup> Dana DA & Merrill TW *Property: Takings* (2002) 121. See further Singer JW *Introduction to Property* 2<sup>nd</sup> ed (2005) 687-692.

from the opinion of Holmes J in the decision of *Pennsylvania Coal Co v Mahon*.<sup>229</sup> The issue in this case was state legislation that prohibited the mining of coal in a manner that caused subsistence of houses on the land under which the coal was located.<sup>230</sup> The Pennsylvania Coal Company challenged the legislation on the basis of an allegation that it causes an uncompensated taking of the pillars of coal that the Company cannot mine due to the legislation.<sup>231</sup> Holmes J identified several factors for determining whether a taking has “gone too far”: firstly, the diminution of value caused by the regulation; secondly, whether the regulation served to avoid a harm to the general public; thirdly, whether the regulation provided an average reciprocity of advantage among all affected property owners; and finally, whether the regulation effectively destroyed discrete property and/or contractual rights.<sup>232</sup>

In Holmes J’s view, the legislation in question had the effect of destroying previously existing property and contractual rights.<sup>233</sup> The legislation sought to abolish a recognised, and valuable, estate in land<sup>234</sup> and had the effect of appropriating or destroying the right to mine by making it commercially impracticable

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<sup>229</sup> *Pennsylvania Coal Co v Mahon* 260 US 393 (1922).

<sup>230</sup> At 413. See further Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 74; Dana DA & Merrill TW *Property: Takings* (2002) 123-127; Singer JW *Introduction to Property* 2<sup>nd</sup> ed (2005) 680-686.

<sup>231</sup> Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 74, discussing *Pennsylvania Coal Co v Mahon* 260 US 393 (1922). See further Dana DA & Merrill TW *Property: Takings* (2002) 123-127; Singer JW *Introduction to Property* 2<sup>nd</sup> ed (2005) 680-686.

<sup>232</sup> Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 74, discussing *Pennsylvania Coal Co v Mahon* 260 US 393 (1922). See further Dana DA & Merrill TW *Property: Takings* (2002) 123-127; Singer JW *Introduction to Property* 2<sup>nd</sup> ed (2005) 680-686.

<sup>233</sup> *Pennsylvania Coal Co v Mahon* 260 US 393 (1922) at 413.

<sup>234</sup> At 414.

to exercise the right to mine.<sup>235</sup> Furthermore, this legislation was aimed at avoiding harm to a single private home rather than reducing harm to the public interest.<sup>236</sup> The legislation in this case did not secure an “average reciprocity of advantage” because it gave a benefit to the owners of the surface properties while placing a burden on the owners of the subsurface coal.<sup>237</sup>

In *Penn Central Transportation Co v City of New York*,<sup>238</sup> the Court reaffirmed its commitment to a multifactor balancing approach, but at the same time revised the factors to be considered.<sup>239</sup> The diminution in value factor was retained but two new factors, the character of the government action and distinct investment-backed expectations, were added.<sup>240</sup> Together, *Pennsylvania Coal* and *Penn Central* indicate that there are at least six factors taken into account in the Court’s balancing analysis: diminution in value; reciprocity of advantage; prevention of public harm; destruction of an existing and discrete property interest; character of the government action (whether invasive or not); and interference with investment-backed

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<sup>235</sup> At 414.

<sup>236</sup> At 414.

<sup>237</sup> *Pennsylvania Coal Co v Mahon* 260 US 393 (1922) at 414 discussed in Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 74. See further Dana DA & Merrill TW *Property: Takings* (2002) 127-131; Singer JW *Introduction to Property* 2<sup>nd</sup> ed (2005) 687-692.

<sup>238</sup> *Penn Central Transportation Co v City of New York* 438 US 104 (1978).

<sup>239</sup> Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 74, discussing *Penn Central Transportation Co v City of New York* 438 US 104 (1978). See further Dana DA & Merrill TW *Property: Takings* (2002) 127-131; Singer JW *Introduction to Property* 2<sup>nd</sup> ed (2005) 687-692.

<sup>240</sup> Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 74, discussing *Penn Central Transportation Co v City of New York* 438 US 104 (1978). See further Dana DA & Merrill TW *Property: Takings* (2002) 127-131; Singer JW *Introduction to Property* 2<sup>nd</sup> ed (2005) 687-692.

expectations.<sup>241</sup> While all of these factors are potentially relevant in the balancing enquiry, it is “impossible to predict how much weight any one of them will carry in a given case. The Court has made it clear that it will weigh each factor on the basis of the specific facts of each case”.<sup>242</sup>

#### 2 4 4 Conclusion

The balancing approach of US law is quite different from proportionality review in German law. As stated above, balancing sees the US Supreme Court weigh up certain factors in an abstract, non-contextual manner while the proportionality review of the *BVerfG* is highly contextual and therefore the question of whether the requirements for proportionality have been met or not will depend on the facts of the case. The US balancing methodology places the emphasis on efficiency of resolution of property disputes, while German proportionality review places heavy emphasis on the authority for the interference with property rights, the means chosen to bring about the interference and the outcome of such interference on the persons affected. The US balancing methodology appears to be similar to the (non-judicially endorsed) German theory of *Güterabwägung*, which also involves the abstract and non-contextual ranking of rights and interests. A concrete ranking also exists in order to determine which right will prevail in a particular situation. Alexander points out

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<sup>241</sup> Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 75, discussing *Penn Central Transportation Co v City of New York* 438 US 104 (1978). See further Dana DA & Merrill TW *Property: Takings* (2002) 127-131; Singer JW *Introduction to Property* 2<sup>nd</sup> ed (2005) 687-692.

<sup>242</sup> Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 75.

certain distinct differences between balancing and proportionality.<sup>243</sup> firstly, balancing weighs up the relevant factors in an abstract manner, while a court engaged in proportionality review will consider multiple factors and evaluate the relevant weight to be given to each factor “in the immediate context of the problem before the court”.<sup>244</sup> Secondly, proportionality review is more structured than balancing. On the one hand, the three pronged German approach to proportionality “explicitly unpacks different questions and requires the court to focus on each one separately”.<sup>245</sup> On the other hand, “balancing involves a more amorphous process of tossing all relevant factors into a single calculus”.<sup>246</sup>

## 2 5 Conclusion

German and US Constitutional property law represent two different approaches to how property is defined for constitutional purposes, how to distinguish between deprivation and expropriation of property and the application of the proportionality principle as a means to test the legitimacy of an interference with constitutionally protected rights. The German constitutional property law system is regulated by the Basic Law and by legislation, which sets out clear requirements that must be followed in order for the protection provided by Article 14 to be applicable. These

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<sup>243</sup> Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 203-204.

<sup>244</sup> Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 203.

<sup>245</sup> Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 204.

<sup>246</sup> Alexander GS *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 204.

requirements are enforced strictly and failure to comply with them will result in constitutional invalidity. This strict enforcement of requirements is why the concept of constructive expropriation or regulatory takings has no place in German constitutional property law. A constructive expropriation of property does not comply with the requirements of a regulation or an expropriation and is therefore constitutionally invalid. US constitutional property law relies less on legislation and more on the wording of the Fifth and Fourteenth Amendments and doctrine developed by the courts over time. This approach has led to much confusion surrounding US takings law and discrepancies in the judgments of the courts adjudicating constitutional property matters. This approach also allowed for the creation of the regulatory takings doctrine, which in itself is confusing with at times unpredictable results. In some respects, the approaches of these two jurisdictions are similar and in other instances their approaches diverge quite significantly.

Both German and US constitutional law protect property from interference by the state and recognise a very wide concept of constitutional property even though their points of departure are different. What constitutes property for the purposes of this protection is determined differently in each of these jurisdictions. German law uses the private law definition of property as being limited to corporeal things as the point of departure for developing a much broader constitutional definition of property, which encompasses a variety of interests. The list of interests recognised as property for the purposes of Article 14 is also subject to expansion should the interests of society require it. German law regards property as a relationship between people and things, with things being the objects of property rights. US law views all property in terms of rights as relationships between legal subjects and not in terms of relationships to objects, even if the right in fact relates to some property

object. This means that the question of whether a particular object is property plays a minor role in the adjudication of property disputes because the focus of the enquiry is the relationship between the parties or how their competing rights must be reconciled. This approach allows for a large number of interests to be considered property because the rights in relation to object, and not necessarily the object itself, are what are important.

Despite the difference in approach, the constitutional notion of property in these two jurisdictions ends up including most well-known and recognised rights and interests in property. Both German and US law exclude from protection non-property interests such as the general wealth of an individual and mere expectations. German and US law also treat certain categories of property rights differently, such as public participation rights. Under German law, these rights are protected as property for all intents and purposes, whereas in US law these rights are only regarded as property for the purposes of due process and therefore cannot be the object of a taking requiring compensation. A difference between German and US law is that property in German law is not a pre-constitutional right because its Article 14 explicitly empowers the legislature to determine its content and limits. In US law, it can be implied that at least some property rights are pre-constitutional because the source of property is state law.

In terms of deprivation and expropriation, German and US constitutional property law diverge significantly. German law views these two forms of interference with property as being distinct from each other, as evidenced by the different validity requirements for each of them. This approach means that there is no grey area between a deprivation and an expropriation of property; an interference with property is either a deprivation (regulation) or an expropriation. It is not possible for a

regulation of property to be transformed into an expropriation by judicial interpretation; any attempted regulation of property that does not satisfy the requirements is constitutionally invalid. Thus, constructive expropriation is not recognised in German law. US law approaches the deprivation (regulation) and expropriation (taking) of property in a manner opposite to the German law approach. US law treats these two forms of interference as points on a continuum, with the possibility of a grey area existing in between. It is in this grey area that the regulatory takings doctrine finds its application. A regulatory taking is a regulation of property that exceeds the bounds of a regulation to the extent that it has the effect of a taking of property, requiring compensation to be paid for the excessive impact on the property rights of the affected party.

There are similarities between the German and US law approach to deprivation and expropriation, particularly with regard to excessive regulation of property. Both systems distinguish between the sources of state power employed to regulate or expropriate property. The consequences of attempting to interfere with property using the incorrect power are quite similar in German and US law. Where the state's regulation of property using the police power is excessive, German law will regard the regulation as constitutionally invalid if it does not meet the requirements of a valid regulation of property; compensation in the form of equalisation may be payable if it has been specifically provided for in the legislation. In US law, excessive regulation may be struck down as constitutionally invalid for being an improper use of the police power or it may give rise to a claim for expropriatory compensation because it amounts to a regulatory taking. In this regard equalisation is not the same as expropriatory compensation. Furthermore, in both systems, the provision of some form of equalisation or compensation does not legitimise the unconstitutional

interference. The interference remains unconstitutional with the equalisation or compensation serving to alleviate the excessive burden placed on the property holder or holders in question. German and US law differ regarding the interpretation of the public interest or public use requirement. Whereas German law interprets this requirement strictly, the US Supreme Court has adopted a deferential approach to the interpretation of this requirement. Regarding compensation for expropriation, German law requires that the authorising legislation provide for compensation, as well as specify the type and extent of compensation. The compensation must also reflect a fair balance between the public interest and the interest of those affected. US law requires that just compensation be paid for expropriation, determined on the basis of the fair market value standard. Just compensation does not necessarily mean that full compensation will be paid. Whereas US law provides for the payment of expropriatory compensation in the event of a regulatory taking, German law does not. German law allows for the payment of equalisation to an owner whose property rights have been unintentionally infringed by legislation, but this is not compensation for expropriation.

Regarding proportionality, the approach of German and US law diverges. Proportionality is a well-established principle of German constitutional law and is the primary method of testing the legitimacy of state interference with property. Proportionality takes two forms in German law. The first is a general application test, asking whether law of general application has infringed the right in question, whether the infringement is necessary, whether the infringement is properly authorised and asks whether the ends of the regulation justify of the means, generally speaking. The second form focuses on the effect of the regulation on the individual property owner. Proportionality is not unheard of in US law, but is only applied in certain cases, most

notably in cases of regulatory takings and exactions. The primary method of determining the constitutionality of takings of property is judicial balancing. Judicial balancing involves weighing up a number of factors in an abstract manner within a single calculation with the focus on the effect on the individual property owner or owners in question. It is not really concerned with a general application test. Judicial balancing bears a resemblance to the German theory of *Güterabwägung*, which involves the abstract and non-contextual ranking of rights and interests. *Güterabwägung* is not widely accepted in German law, with proportionality being the preferred method of determining the legitimacy of interferences with rights by the state.

# Chapter 3

## European Court of Human Rights: Its special role and relationship to new democracies in Central Eastern Europe

### 3 1 Introduction

Whereas chapter 2 is intended to show the continuum of approaches to constitutional property issues in German and US law that Central Eastern European jurisdictions might be expected to adopt in developing their own constitutional property law, this chapter indicates another framework that might influence that development because of the links of the jurisdictions to the European Union. This chapter investigates the doctrine developed by the European Court of Human Rights (ECHR) through its interpretation of Article 1 of Protocol No 1 (Article 1), specifically the meaning of “possessions” in the case law of the ECHR, the adjudication of the distinction between deprivations (regulations) and expropriations of property and the fair balance principle. It is necessary to investigate the ECHR’s principles regarding these three issues because the Central Eastern European jurisdictions discussed in chapter 4 are members of the European Union and therefore bound by the ECHR’s principles. Consequently, some of the Central Eastern European constitutional courts refer to and apply these principles when adjudicating constitutional matters.<sup>1</sup> These constitutional courts apply the principles of the ECHR either to provide content to their own constitutional right to property or in conjunction with the constitutional court’s existing principles.

The ECHR has emphasised that

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<sup>1</sup> See chapter 4 below.

"[T]he object and purpose underlying the Convention, as set out in Article 1, is that the rights and freedoms should be secured by the Contracting State within its jurisdiction. It is fundamental to the machinery of protection established by the Convention that the national systems themselves provide redress for breaches of its provisions, the Court exerting its supervisory role subject to the principle of subsidiarity."<sup>2</sup>

What is clear is that the Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention)<sup>3</sup> places the obligation of securing and giving effect to the rights and freedoms contained in the Convention to each member or contracting state within their own jurisdictions. Each contracting state must ensure that its legal system provides protection of the rights and freedoms that the Convention contains.

The ECHR's role in the resolution of disputes brought before it is supervisory in nature. The matters are first heard in the contracting state's courts and if litigants are dissatisfied with the outcome, the case may be brought before the ECHR. A dispute involving a right or freedom in the Convention must first be adjudicated according to the law of the contracting state before it may be considered by the ECHR. The ECHR is, therefore, not a court of first instance but is an institution that is similar to an appeal court for citizens of contracting states to approach if they are dissatisfied with the outcome of their case having been adjudicated by the contracting state's courts.

Article 1<sup>4</sup> is concerned with both the protection and regulation of "possessions" and is divided into three rules.<sup>5</sup>

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<sup>2</sup> *Z and Others v United Kingdom* 29392/95 ECHR 2001-V para 103.

<sup>3</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (as amended by Protocols Nos 11 and 144 and supplemented by Protocols Nos 1, 4, 6, 7, 12 and 13).

<sup>4</sup> Council of Europe, *Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 20 March 1952, ETS 9.

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of 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."

The first rule deals with the interference with enjoyment of possessions, the second rule deals with deprivation of possessions (in the sense of expropriation) and the third rule deals with controls regulating the use of property.<sup>6</sup> These rules are not

<sup>5</sup> Sermet L *The European Convention on Human Rights and Property Rights* (1998) 11-18; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 116-118; 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) 6, 10-20; Rook D *Property Law and Human Rights* (2001) 96-104; Allen T "The autonomous meaning of 'possessions' under the ECHR" in Cooke E (ed) *Modern Studies in Property Law Volume 2* (2003) 57-77 at 58-59; Allen T *Property and the Human Rights Act 1998* (2005) 39-94; Van Rijn A "Right to the peaceful enjoyment of one's possessions (Article 1 of Protocol No 1)" in Van Dijk P, Van Hoof F, Van Rijn A & Zwaak L (eds) *Theory and Practice of the European Court of Human Rights* (2006) 863-893 at 865-872; 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) 6-9; Svetlana S *Protection of Property Rights under the European Convention on Human Rights and the Russian National Legislation* (LLM thesis Lund University 2008) 9-27; Van der Walt AJ *Constitutional Property Law 3<sup>rd</sup> ed* (2011) 120-121, 164-165; Pradouroux S *The Protection of Property Rights in Comparative Perspective* (2013) 56-58.

<sup>6</sup> Sermet L *The European Convention on Human Rights and Property Rights* (1998) 22-31; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 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) 21-25; Rook D *Property Law and Human Rights* (2001) 60-69; Allen T *Property and the Human Rights Act 1998* (2005) 112-124; Van Rijn A "Right to the peaceful enjoyment of one's possessions (Article 1 of Protocol No 1)" in Van Dijk P, Van Hoof F, Van Rijn A & Zwaak L (eds) *Theory and Practice of the European Court of Human Rights* (2006) 863-893 at 878-893; 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) 10-12; Svetlana S *Protection of Property Rights under the European Convention on Human Rights and the Russian National Legislation* (LLM thesis Lund University 2008) 18-27;

treated in isolation. The second and third rules are concerned with specific instances of interference with the right of peaceful enjoyment of possessions and must be construed in light of the principle laid down in the first rule.<sup>7</sup> Allen explains that the first rule is a residual category in the sense that many types of interferences fall under either the second or third rule, but there are some that fall exclusively under the first rule.<sup>8</sup>

The three-rule structure of Article 1 seems to indicate that the ECHR treats deprivation (regulation) and expropriation as two discrete categories that do not overlap at all. While both must comply with the principle of lawfulness, be in the public or general interest and comply with the principle of proportionality, each constitutes a unique interference with the right to peaceful enjoyment of property. However, there is uncertainty regarding the relevance of this three-rule structure. The ECHR is inconsistent with its classification of interferences under one of the three rules.<sup>9</sup> It is not clear how this structure affects the judicial analysis in a given case.

Gray K & Gray SF *Elements of Land Law* 5<sup>th</sup> ed (2009) para 11.2.22; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 367-370; Praduroux S *The Protection of Property Rights in Comparative Perspective* (2013) 62-83; Sluysmans J, Verbist S & Waring E (eds) *Expropriation Law in Europe* (2015) 1-26.

<sup>7</sup> *James v United Kingdom* (1986) 8 EHRR 123 para 37.

<sup>8</sup> Allen T *Property and the Human Rights Act 1998* (2005) 107.

<sup>9</sup> Allen T *Property and the Human Rights Act 1998* (2005) 120 explains that the ECHR has sometimes treated the destruction or confiscation of property as an interference falling under either the first rule or the second rule. In *Allard v Sweden* 35179/97 ECHR 2003-VII, a joint owner of land was ordered to destroy a house they had built without the consent of their fellow owners. Clearly, this order was made to enforce private law rules on joint ownership and should have fallen under the third rule. However, the ECHR instead viewed it as a case falling under the second rule, with no explanation for this categorisation.

## 3 2 Possessions

### 3 2 1 Introduction

Article 1 of Protocol No 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Article 1) states 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.

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>10</sup>

There is an internal inconsistency that exists in the language of Article 1, namely that the nature of the interest protected by Article 1 is described differently from one translation to another.<sup>11</sup> The English version of the Protocol refers to “possessions” in the first two sentences and “property” in the final sentence whereas the French version refers to “biens” (possessions) in the first sentence and to “propriété” (ownership) in the second and third sentences.<sup>12</sup> In order to reduce the potential confusion, the ECHR has decided that the scope of Article 1 should be read broadly and thus it has adopted a construction of Article 1 that is closer to the French version

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<sup>10</sup> Council of Europe, *Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 20 March 1952, ETS 9.

<sup>11</sup> Allen T *Property and the Human Rights Act 1998* (2005) 29. See further Van Rijn A “Right to the peaceful enjoyment of one’s possessions (Article 1 of Protocol No 1)” in Van Dijk P, Van Hoof F, Van Rijn A & Zwaak L (eds) *Theory and Practice of the European Court of Human Rights* (2006) 863-893 at 865-866; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 120-121; *Marckx v Belgium* (1979) 2 EHRR 330.

<sup>12</sup> Allen T *Property and the Human Rights Act 1998* (2005) 29. See further 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) 6-9.

of Article 1.<sup>13</sup> Therefore, the first sentence of Article 1 covers all forms of interference with all types of property, while the second sentence covers only the acquisition of ownership and the first part of the third sentence covers regulatory controls on rights of exclusion and disposition as well as use of property.<sup>14</sup>

The property guarantee in Article 1 applies to both movable and immovable property.<sup>15</sup> The concept of “possessions” has been broadly interpreted by the ECHR,<sup>16</sup> which decided in its *Gasus Dosier- und Födertechnik GmbH v The Netherlands* judgment<sup>17</sup> that:

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<sup>13</sup> Allen T *Property and the Human Rights Act 1998* (2005) 29. See further *Marckx v Belgium* (1979) 2 EHRR 330; *Gasus Dosier- und Födertechnik GmbH v Netherlands* (1995) 20 EHRR 403; *Inze v Austria* (1998) 10 EHRR 394.

<sup>14</sup> Rook D *Property Law and Human Rights* (2001) 61-62. See further Allen T *Property and the Human Rights Act 1998* (2005) 29; Van der Walt AJ *Constitutional Property Law 3<sup>rd</sup>* (2011) 120-121; *Handyside v United Kingdom* (1976) 1 EHRR 737.

<sup>15</sup> Sermet L *The European Convention on Human Rights and Property Rights* (1998) 11-12. See further Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 117; 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) 6; Rook D *Property Law and Human Rights* (2001) 97; Allen T *Property and the Human Rights Act 1998* (2005) 40; Van Dijk P, Van Hoof F, Van Rijn A and Zwaak L (eds) *Theory and Practice of the European Court of Human Rights* (2006) 863-893 at 865-866; 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) 6-9; Svetlana S *Protection of Property Rights under the European Convention on Human Rights and the Russian National Legislation* (LLM thesis Lund University 2008) 13-17; Van der Walt AJ *Constitutional Property Law 3<sup>rd</sup> ed* (2011) 120-121, 164-165; Pradouroux S *The Protection of Property Rights in Comparative Perspective* (2013) 56.

<sup>16</sup> Sermet L *The European Convention on Human Rights and Property Rights* (1998) 11-18; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 116-118; Djajic S “The right to property and the *Vasilescu v Romania* case” (2000) 27 *Syracuse J Int'l L & Comm* 363-396 at 369-378; 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) 6, 10-20; Rook D *Property Law and Human Rights* (2001) 96-104; Allen T “The autonomous meaning of ‘possessions’ under the ECHR” in Cooke E (ed) *Modern Studies in Property Law Volume 2* (2003) 57-77 at 59; Allen T *Property and the Human Rights Act 1998* (2005) 39-94; Van Rijn A “Right to the peaceful enjoyment of one’s possessions

"[T]he notion 'possessions' [...] in Article 1 of Protocol No 1 [...] has an autonomous meaning which 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 'possessions', for the purposes of this provision [...]."<sup>18</sup>

The *Gasus Dosier- und Födertechnik GmbH v The Netherlands* judgment establishes that the autonomous meaning doctrine applies to Article 1 and, more specifically, to the interpretation of "possessions". This raises two broad questions,<sup>19</sup> the first of which is how far the autonomous meaning doctrine extends the applicability of Article 1. Allen suggests that this judgment indicates that the ECHR will apply the doctrine to the classification of rights already recognised under national law, and in such cases the autonomous meaning doctrine has a specific and limited application. The application of the autonomous meaning doctrine does not purport to establish vested rights where none exists under national law; rather it would allow the ECHR to find that, for instance, a bundle of rights classified as a non-proprietary interest under national law amounts to a possession under Article 1.

The second question is what function the doctrine serves in relation to Article 1.<sup>20</sup> In the *Gasus Dosier- und Födertechnik GmbH v Netherlands* judgment<sup>21</sup> the ECHR reasoned that the autonomous meaning doctrine should be applicable to

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(Article 1 of Protocol No 1)" in Van Dijk P, Van Hoof F, Van Rijn A & Zwaak L (eds) *Theory and Practice of the European Court of Human Rights* (2006) 863-893 at 865-872; 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) 6-9; Svetlana S *Protection of Property Rights under the European Convention on Human Rights and the Russian National Legislation* (LLM thesis Lund University 2008) 9-27; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 120-121, 164-165; Pradouroux S *The Protection of Property Rights in Comparative Perspective* (2013) 56-58.

<sup>17</sup> *Gasus Dosier- und Födertechnik GmbH v Netherlands* (1995) 20 EHRR 403.

<sup>18</sup> Para 53.

<sup>19</sup> Allen T *Property and the Human Rights Act 1998* (2005) 43-44.

<sup>20</sup> Allen T *Property and the Human Rights Act 1998* (2005) 44.

<sup>21</sup> *Gasus Dosier- und Födertechnik GmbH v Netherlands* (1995) 20 EHRR 403 para 53.

Article 1, but the decision does not indicate why this should be the case. This decision could perhaps be explained with reference to cases decided under Article 6 of the Convention. A concern of the ECHR in cases involving Article 6 is that a state might seek to limit its obligations by exploiting the differences in the legal systems of member states.<sup>22</sup> In *König v Germany*<sup>23</sup> the ECHR acknowledged the problem of autonomy of meaning of the expressions used in the Convention when compared to its domestic law counterparts.<sup>24</sup> The ECHR further acknowledged, as it had done in previous cases, that the concept of “civil rights and obligations” was autonomous in meaning and a failure to apply the principle of autonomy to this concept would lead to results that are incompatible with the object and purpose of the Convention.<sup>25</sup> One of the purposes served by the autonomous meaning doctrine is to prevent member states from circumventing their obligations under the Convention by simply re-labelling existing private property so as to put it beyond the protection of the Convention.<sup>26</sup>

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<sup>22</sup> Allen T *Property and the Human Rights Act 1998* (2005) 44. See further 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) 17-19.

<sup>23</sup> *König v Germany* (1978) 2 EHRR 170.

<sup>24</sup> Para 88.

<sup>25</sup> Para 88.

<sup>26</sup> Allen T *Property and the Human Rights Act 1998* (2005) 44. See further Allen T “The autonomous meaning of ‘possessions’ under the ECHR” in Cooke E (ed) *Modern Studies in Property Law Volume 2* (2003) 57-77 at 61 where Allen refers to *Brumărescu v Romania* (2001) 33 EHRR 35. In this case, a declaration by the Romanian court that reversed earlier judicial declarations that the applicant held certain property was treated as an interference with possessions.

### 3.2.2 Meaning of “possessions” for the purposes of Article 1

Article 1 provides no guidance or direction regarding the meaning of “possessions”, leaving the Strasbourg institutions to determine the scope of this concept.<sup>27</sup> Examples from case law of what constitutes a “possession” for the purposes of Article 1 include<sup>28</sup> immovable property;<sup>29</sup> shares in a company;<sup>30</sup> intellectual property rights;<sup>31</sup> the benefit of restrictive covenants in freehold land when combined with the receipt of an annual rent;<sup>32</sup> a leasehold estate;<sup>33</sup> security rights under a retention of title clause;<sup>34</sup> the goodwill of a business;<sup>35</sup> planning permission<sup>36</sup> and rights of user.<sup>37</sup>

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<sup>27</sup> Rook D *Property Law and Human Rights* (2001) 96. See further Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 116-118; 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) 10-17; Allen T “The autonomous meaning of ‘possessions’ under the ECHR” in Cooke E (ed) *Modern Studies in Property Law Volume 2* (2003) 57-77 at 62-63; Van Rijn A “Right to the peaceful enjoyment of one’s possessions (Article 1 of Protocol No 1)” in Van Dijk P, Van Hoof F, Van Rijn A & Zwaak L (eds) *Theory and Practice of the European Court of Human Rights* (2006) 863-893 at 865-872; 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) 6-9; Van der Walt AJ *Constitutional Property Law 3<sup>rd</sup> ed* (2011) 120-121; Praduroux S *The Protection of Property Rights in Comparative Perspective* (2013) 56-57.

<sup>28</sup> Rook D *Property Law and Human Rights* (2001) 97-98.

<sup>29</sup> *Wiggins v United Kingdom* (1978) 13 DR 40.

<sup>30</sup> *Bramelid and Malmström v Sweden* (1982) 5 EHRR 249.

<sup>31</sup> See, for example, *Smith Kline and French Laboratories v Netherlands* (1990) 66 DR 70; *British-American Tobacco Company Ltd v Netherlands* (1995) 21 EHRR 409.

<sup>32</sup> *S v United Kingdom* 10741/84 4 July 1988.

<sup>33</sup> *James v United Kingdom* (1986) 8 EHRR 123.

<sup>34</sup> *Gasus Dosier- und Födertechnik GmbH v Netherlands* (1995) 20 EHRR 403.

<sup>35</sup> See, for example, *Van Marle and Others v Netherlands* (1986) 8 EHRR 491; *Fredin v Sweden* (1991) ECHR Series A vol 192; *Iatridis v Greece* [GC] 31107/96 ECHR 1999-II.

<sup>36</sup> *Pine Valley Developments Ltd and Others v Ireland* (1992) 14 EHRR 319.

<sup>37</sup> *X v Federal Republic of Germany* (1959) YB 3 244.

The ECHR expanded its definition of “possessions” in *Saghinadze and Others v Georgia*,<sup>38</sup> where it stated that the concept of “possessions” is also independent from the formal classifications of domestic law.<sup>39</sup> The issue that must be examined is whether the circumstances of the case, considered as a whole, may be regarded as having conferred on the applicant title to a substantive interest protected under Article 1. Another way of determining whether a particular right or asset is a possession for the purposes of Article 1 is by considering the economic value of the right or asset.<sup>40</sup> The ECHR stated that “possessions” are not limited to physical possessions and that certain rights and interests constituting assets may also be regarded as possessions for the purposes of Article 1.<sup>41</sup> The concept of “possessions” is furthermore not limited to existing possessions and may also cover assets, including claims, in respect of which applicants can argue that they have at least a legitimate expectation of obtaining effective enjoyment of a property right.<sup>42</sup> An expectation is considered legitimate if it is based on either a legislative provision or a legal act bearing on the property interest in question.<sup>43</sup> The ECHR has interpreted and applied the concept of possessions under Article 1 in a series of cases dealing with interesting property situations.

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<sup>38</sup> *Saghinadze and Others v Georgia* 18768/05 27 May 2010.

<sup>39</sup> Para 103.

<sup>40</sup> Van Rijn A “Right to the peaceful enjoyment of one’s possessions (Article 1 of Protocol No 1)” in Van Dijk P, Van Hoof F, Van Rijn A & Zwaak L (eds) *Theory and Practice of the European Court of Human Rights* (2006) 863-893 at 866. See further Rook D *Property Law and Human Rights* (2001) 97; Pradouroux S *The Protection of Property Rights in Comparative Perspective* (2013) 56-57.

<sup>41</sup> *Iatridis v Greece* [GC] 31107/96 ECHR 1999-II para 54; *Beyeler v Italy* [GC] 33202/96 ECHR 2000-I para 100.

<sup>42</sup> *Saghinadze and Others v Georgia* 18768/05 27 May 2010 para 103. See further *Prince Hans-Adam II of Liechtenstein v Germany* [GC] 42527/98 ECHR 2001-VIII para 83.

<sup>43</sup> *Saghinadze and Others v Georgia* 18768/05 27 May 2010 para 103. See further *Plechanow v Poland* 22279/05 7 July 2009 para 83; *Kopecký v Slovakia* [GC] 44912/98 ECHR 2004-IX paras 45-52.

In the *Saghinadze* case,<sup>44</sup> the first applicant, a former high-ranking official in the Abkhazian Ministry of the Interior, was offered the position of Head of the Investigative Department of the Georgian Ministry of the Interior. After the first applicant accepted the position, he was granted permission to use a cottage owned by the Ministry. The applicants were later forcibly removed from the cottage based on an oral order by the newly appointed Minister of the Interior and police officers remained in control of the cottage as well as the adjacent premises, which had become the sixth applicant's registered property.<sup>45</sup> The applicants complained that this amounted to a taking of the cottage in terms of Article 1.<sup>46</sup>

The Court considered the meaning of "possessions" for the purposes of Article 1 and observed that the first applicant settled, together with his family, in the cottage. He was not squatting, as his employer, the Ministry of the Interior, had offered the dwelling to him.<sup>47</sup> Of paramount importance was the authorities' own manifest tolerance of the first applicant's exclusive, uninterrupted and open use of the cottage and the adjacent premises for more than 10 years. During this period, the first applicant installed various fixtures and planted fruit trees and vegetables, and started keeping poultry and small livestock. He was also able to accommodate eight of his displaced relatives without requiring additional permission from the state.

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<sup>44</sup> *Saghinadze and Others v Georgia* 18768/05 27 May 2010 para 8.

<sup>45</sup> Para 21.

<sup>46</sup> Para 75.

<sup>47</sup> Para 104. The ECHR does not mention what the situation would be had it been found that the first applicant and his family had been squatting in the cottage. However, had the first applicant and his family been occupying the cottage and the adjacent land unlawfully, Internally Displaced Persons and Refugees Act of 28 June 1996 (the IDPs Act) allowed for the eviction of internally displaced persons on a number of grounds, including if such occupation was vexatious and without lawful basis. Therefore, the state could have lawfully evicted the first applicant and his family in terms of the IDPs Act if it proved that their occupation was vexatious and unlawful.

The Court further attached importance to the fact that, subsequent to the transfer of the cottage by the Ministry to the first applicant for temporary accommodation, the state confirmed the rights of internally displaced persons (IDP) (like the applicants) in the housing sector and established solid guarantees for their protection.<sup>48</sup> The most conspicuous and authoritative of these was the Internally Displaced Persons and Refugees Act of 28 June 1996. This Act recognised that an IDP's possession of a dwelling in good faith constituted a right of a pecuniary nature, meaning that it was not possible to evict an IDP from an occupied dwelling against his or her will without offering in exchange either similar accommodation or appropriate monetary compensation in exchange.<sup>49</sup> In light of these considerations, the Court concluded that the first applicant had a right to use the cottage as his accommodation and that this right had a clear pecuniary dimension and should thus be regarded as a possession for the purposes of Article 1.<sup>50</sup>

Another interesting case dealing with rights relating to property is *Hamer v Belgium*.<sup>51</sup> The parents of the applicant built a holiday home in the Zutendaal area of Belgium in 1967, without obtaining the requisite planning permission to do so.<sup>52</sup> Following the death of the applicant's mother, the applicant and her father drew up a deed of partition, as the applicant had become the "remainderman" of half of the property through inheritance from her mother. This deed, which specifically mentioned the existence of the house in question, was registered with the Mortgage Registrar at the Ministry of Finance and a registration fee was paid.<sup>53</sup> Upon her

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<sup>48</sup> Para 107.

<sup>49</sup> Para 107.

<sup>50</sup> Para 108.

<sup>51</sup> *Hamer v Belgium* 21861/03 ECHR 2007-V.

<sup>52</sup> Para 7.

<sup>53</sup> Para 8.

father's death, the applicant became the sole owner of the property. The applicant specifically declared in a notarised deed of distribution that the property was a holiday home. These deeds were registered with the local authorities and the applicant paid the required inheritance tax as well as annual property taxes and second-residence taxes on the property. According to the applicant, her father had paid the relevant taxes until his death.<sup>54</sup>

The applicant later renovated the holiday home and had trees on the adjoining property felled. In 1994, a partly government-owned Flemish water-supply company carried out works to connect the holiday house to the drainage and water supply systems. At that time there was no response from the local authorities to this work.<sup>55</sup> Later in 1994, two separate police reports were drawn up by police officers that noted, firstly, that trees on the property had been felled in violation of a Flemish forestry decree and, secondly, that the holiday home had been built in 1967 without planning permission and that it was located in a forested area in which no such permission could be issued.<sup>56</sup> Court action ensued and the house was demolished pursuant to an enforcement order made by the Court of Cassation (the Belgian Supreme Court).<sup>57</sup>

One of the issues that the European Court had to determine was whether the applicant had a substantive interest protected by Article 1.<sup>58</sup> The Court held that the impugned building had been in existence for twenty-seven years before the domestic authorities recorded the offence. It is undeniably the responsibility of the authorities

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<sup>54</sup> Para 9.

<sup>55</sup> Para 10-11.

<sup>56</sup> Para 12-13.

<sup>57</sup> Para 14-37.

<sup>58</sup> Para 75. See further *Zwierzyński v Poland* 34049/96 ECHR 2001-VI para 63.

to record breaches of the town and country planning legislation and to allocate the necessary resources to do so. The Court held that the authorities could even be considered to have been aware of the existence of the building in issue, since the applicant had paid taxes on the building, just as her father had. Based on these facts, the Court considered that the authorities tolerated the situation for twenty-seven years and continued to tolerate it for a further ten years after the offence had been established.<sup>59</sup> The Court held that the applicant's proprietary interest in the enjoyment of her holiday home had been sufficiently established to amount to a substantive interest and therefore a possession for the purposes of Article 1. Furthermore, the applicant has a legitimate expectation of being able to continue to enjoy that possession.<sup>60</sup> This decision is not entirely in conflict with Belgian domestic law, since the practice of distinguishing between interests in land and interests in dwellings or buildings on the land is recognised in Belgian law.<sup>61</sup>

A similar case is *Öneryildiz v Turkey*.<sup>62</sup> The applicant in this case was living with twelve close relatives in a slum dwelling in an area adjacent to a rubbish tip. The dwelling was one of a large number of dwellings built without authorisation.<sup>63</sup> A methane explosion resulted in a landslide of waste that engulfed ten slum dwellings,

<sup>59</sup> This reference to time periods was for the purpose of indicating that the applicant's proprietary interest had been established to the level of being a possession for the purposes of Article 1. There was no prescription issue of any sort involved in this aspect of the judgment.

<sup>60</sup> *Hamer v Belgium* 21861/03 ECHR 2007-V para 76.

<sup>61</sup> Distinguishing between interests in land and interests in the buildings on the land is possible in Belgian law because of the institution of *opstal*, provided for in *Artikel 1* of the *Opstalwet van 10 Januarie 1824*. *Opstal* is not formally incorporated into the *Belgische Burgerlijk Wetboek*. See in this regard Mijnsen FHJ, Van Velten AA & Bartels SE *Mr C Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht* vol 5 *Zakenrecht: Eigendom en Beperkte Rechten* 15<sup>th</sup> ed (2008) 306; Sagaert V *Goederenrecht: Beginselen van Belgisch Privaatrecht* (2014) 131-135.

<sup>62</sup> *Öneryildiz v Turkey* 48839/99 ECHR 2004-XII.

<sup>63</sup> Para 10.

including the applicant's.<sup>64</sup> It was not disputed that the applicant's dwelling had been erected in breach of Turkish town-planning legislation and had not conformed to the relevant technical standards, or that the land the structure had occupied belonged to the Treasury.<sup>65</sup> However, the parties disagreed on whether the applicant had a possession for the purposes of Article 1.<sup>66</sup>

In respect of the land on which the dwelling in question had been built, the applicant argued that nothing prevented him at any time from taking steps to acquire ownership of the land in accordance with the relevant procedure. The Court rejected this speculative argument because it was unable, due to the lack of detailed information provided by the parties, to ascertain whether the land in question formed part of a slum-rehabilitation plan or whether the applicant satisfied the formal requirements under the town-planning legislation in force at the material time for obtaining transfer of title to the publicly owned land he was occupying. In any event the applicant admitted that he did not take any administrative steps to that end. The Court concluded that the applicant's hope of having the land transferred to him one day does not constitute a claim of a kind that was sufficiently enforceable in the courts and hence is not a distinct possession.<sup>67</sup>

In respect of the dwelling itself, the Court held that a different consideration applies.<sup>68</sup> The Court observed that between the unauthorised construction of the dwelling in issue in 1988 and the explosion in 1993, the applicant remained in possession of his dwelling despite the fact that his position was subject to rules laid

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<sup>64</sup> Para 11.

<sup>65</sup> Para 125.

<sup>66</sup> Para 125.

<sup>67</sup> *Öneryildiz v Turkey* 48839/99 ECHR 2004-XII para 126. See further *Kopecký v Slovakia* [GC] 44912/98 ECHR 2004-IX paras 25-26.

<sup>68</sup> Para 127.

down in legislation that permitted the authorities to destroy the dwelling at any time. There was no evidence that the relevant authorities had even envisaged taking such measures against the applicant. Furthermore, the authorities let the applicant and his close relatives live undisturbed in their house, in the social and family environment that they had created.<sup>69</sup> This led the Court to conclude that the authorities tolerated the applicant's actions. The Court held that these facts also supported the conclusion that the authorities acknowledged that the applicant and his close relatives had a proprietary interest in their dwelling and movable goods.<sup>70</sup> The Court concluded that the applicant's proprietary interest in his dwelling constitutes a substantive interest and that he has a possession within the meaning of Article 1.<sup>71</sup>

The *Hamer* and *Öneryildiz* cases are interesting in that both dealt with unlawfully constructed dwellings built on state owned land. In determining whether the applicants had interests amounting to possessions, the ECHR distinguished between the applicants' potential interest in the land upon which the dwellings were built and the applicants' potential interest in the dwellings themselves. In both cases the ECHR held that the applicants had no protected interest in the land upon which the dwellings were built because, in *Hamer*, the dwelling had been built without obtaining planning permission on state owned land in respect of which no such permission could have been obtained and, in *Öneryildiz*, the land in question was simply state owned land which the applicant had no right to inhabit.

The ECHR then determined whether the respective applicants had any protectable interest in the dwellings. In both cases the ECHR held that the respective

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<sup>69</sup> Para 105.

<sup>70</sup> Para 127.

<sup>71</sup> Para 129.

applicants had substantive interests in these dwellings that could be considered possessions for the purposes of Article 1, despite the fact that the dwellings had been built unlawfully. The substantive interest in the respective properties appears to stem from the fact that the authorities involved in these cases allowed the existence of these dwellings to continue for a significant period of time without taking any action against the inhabitants. While this reasoning is understandable in light of the facts of *Hamer*, where the structure had existed for decades and the applicant and her predecessors even paid property taxes on it, it is strange that the Court would treat the dwelling in *Öneryildiz* in a similar manner, considering that the dwelling had existed for only five years, during which time the applicant had not paid council taxes on it.

These cases illustrate how property law under Article 1 operates differently from private law. They show that the concept of possessions under Article 1 is not necessarily the same as the concept of property under the private law of a member state. This allows the ECHR to decide a particular matter unrestricted by domestic private law rules of property. The ECHR distinguished between the applicants' potential interest in the land and the applicants' potential interest in the dwellings they had built on the land. In both cases the ECHR found that the applicants had no protectable interest in the land upon which they had built their respective dwellings. However, the ECHR did find that the respective applicants had certain protectable interests in the dwellings they had built. In *Hamer*, the ECHR held that the applicant had a proprietary interest in the enjoyment of her holiday home that had risen to the level of a possession, despite the fact that the very existence of that holiday home was unlawful under Belgian private law. In *Öneryildiz*, the ECHR held that the applicant's proprietary interest in his dwelling constituted a substantive interest and

thus a possession. This methodology of separating interests in land and interests in dwellings or buildings on the land is possibly due to the nuanced concept of possessions created by the ECHR that is broader than the private law concept of property of the member states.

Aside from traditional instances of property such as land and dwellings, private law claims such as claims for delictual damages and public law claims such as social welfare benefits are also recognised as possessions under Article 1.<sup>72</sup> The question of whether a pecuniary claim in private law could constitute a possession for the purposes of Article 1 was considered in the judgment of *Stran Greek Refineries and Stratis Andreadis v Greece*.<sup>73</sup> In this case, a contract was concluded between the Greek state, which was controlled by a military dictatorship, and Andreadis for the construction of a crude oil refinery in the Megara region of Greece, near Athens.<sup>74</sup> Once democracy was restored, the government regarded the contract as prejudicial to the national economy and relied on legislation to terminate it.<sup>75</sup> The ECHR stated that, in order to determine if the applicants had a possession for the purposes of Article 1, the ECHR had to ascertain whether the judgment of the Athens Court of

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<sup>72</sup> Rook D *Property Law and Human Rights* (2001) 101. See further Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 117; 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) 13; Allen T *Property and the Human Rights Act 1998* (2005) 46-57; Van Rijn A "Right to the peaceful enjoyment of one's possessions (Article 1 of Protocol No 1)" in Van Dijk P, Van Hoof F, Van Rijn A & Zwaak L (eds) *Theory and Practice of the European Court of Human Rights* (2006) 863-893 at 867; 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) 7; Pradouroux S *The Protection of Property Rights in Comparative Perspective* (2013) 56.

<sup>73</sup> *Stran Greek Refineries and Stratis Andreadis v Greece* (1994) 19 EHRR 293.

<sup>74</sup> Para 7.

<sup>75</sup> Para 9.

First Instance dealing with this matter and an arbitration award granted in favour of the applicants gave rise to a debt in the applicants' favour that is "sufficiently established to be enforceable".<sup>76</sup>

The ECHR held that the effect of the judgment of the Athens Court of First Instance "was merely to furnish the applicants with the hope that they would secure recognition of the claim put forward [and] [w]hether the resulting debt was enforceable would depend on any review by two superior courts".<sup>77</sup> Regarding the arbitration award, the ECHR held that, according to its wording, it was final and binding.<sup>78</sup> Furthermore, this award granted the applicants a right under domestic law to the amount awarded and therefore this right constitutes a possession for the purposes of Article 1.<sup>79</sup>

The judgment of *Pressos Compania Naviera SA v Belgium*<sup>80</sup> concerned collisions involving the applicants' ships which they attributed to the negligence of the Belgian pilots.<sup>81</sup> The ECHR held that, in order to determine whether the applicants had a possession for the purposes of Article 1, it may have regard to the domestic law in place at the time of the alleged interference. The law in question in this case was the Belgian law of tort, under which claims for compensation come into existence as soon as the damage occurs. The ECHR held that a claim of this nature constitutes a possession for the purposes of Article 1.<sup>82</sup> The ECHR concluded that, on the basis of previous judgments of the Belgian Court of Cassation, the applicants

<sup>76</sup> Para 59.

<sup>77</sup> Para 60.

<sup>78</sup> Para 61.

<sup>79</sup> Para 62.

<sup>80</sup> *Pressos Compania Naviera SA v Belgium* (1995) 21 EHRR 301.

<sup>81</sup> Para 6.

<sup>82</sup> See in this regard *Van Marle and Others v Netherlands* (1986) 8 EHRR 491 para 41.

could argue that they had a legitimate expectation that their claims deriving from the accidents would be determined in accordance with the general law of tort.<sup>83</sup>

The two judgments discussed above confirm that a right to pecuniary compensation arising out of a private claim does constitute a possession for the purposes of Article 1, provided that it is sufficiently established so as to be enforceable. They also confirm that a mere hope of an enforceable claim will not be regarded as a possession for the purposes of Article 1. Conversely, the legitimate expectation that an applicant's claim will become enforceable according to the application of the generally applicable domestic law in place will be regarded as a possession because the right to compensation will be established as enforceable in terms of the domestic law.

The case law of the ECHR distinguishes between two types of public law claims; those based on the provision of consideration by the claimant and those based purely on state grants and concessions in relation to social or economic policy.<sup>84</sup> The first is a property-creating system and claims to benefits from the scheme constitute possessions for the purposes of Article 1.<sup>85</sup> The second is based

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<sup>83</sup> *Pressos Compania Naviera SA v Belgium* (1995) 21 EHRR 301 para 31. See further *Pine Valley Developments Ltd and Others v Ireland* (1992) 14 EHRR 319.

<sup>84</sup> Rook D *Property Law and Human Rights* (2001) 99 –101. See further Sermet L *The European Convention on Human Rights and Property Rights* (1998) 12-13; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 117-118; 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) 17; Van Rijn A “Right to the peaceful enjoyment of one's possessions (Article 1 of Protocol No 1)” in Van Dijk P, Van Hoof F, Van Rijn A & Zwaak L (eds) *Theory and Practice of the European Court of Human Rights* (2006) 863-893 at 867.

<sup>85</sup> Van Rijn A “Right to the peaceful enjoyment of one's possessions (Article 1 of Protocol No 1)” in Van Dijk P, Van Hoof F, Van Rijn A & Zwaak L (eds) *Theory and Practice of the European Court of Human Rights* (2006) 863-893 at 867. See further Rook D *Property Law and Human Rights* (2001) 99-101; Sermet L *The European Convention on Human Rights and Property Rights* (1998) 12-13;

on social solidarity and does not create any claim to an identifiable share for the participant, but only an expectation, and the amount depends on the conditions prevailing at the time the pension is being paid.<sup>86</sup> The ECHR has held that compulsory contributions to a state pension scheme may, in certain circumstances, found a right to payment of pension benefits, which amounts to a possession for the purposes of Article 1.<sup>87</sup> Furthermore, the ECHR has held that Article 1 does not guarantee entitlement to a pension of a particular amount.<sup>88</sup> The ECHR also held in *Gaygusuz v Austria*<sup>89</sup> that the right to an advance on a person's pension in the form of emergency assistance was a pecuniary right and therefore a possession for the purposes of Article 1.<sup>90</sup>

Article 1 only guarantees existing property; therefore it will not apply in cases where social welfare benefits have not been provided.<sup>91</sup> In *FPJM Kleine Staarman v*

Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 117-118; 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) 17.

<sup>86</sup> Van Rijn A "Right to the peaceful enjoyment of one's possessions (Article 1 of Protocol No 1)" in Van Dijk P, Van Hoof F, Van Rijn A & Zwaak L (eds) *Theory and Practice of the European Court of Human Rights* (2006) 863-893 at 867.

<sup>87</sup> Rook D *Property Law and Human Rights* (2001) 101. See further Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 117.

<sup>88</sup> *Müller v Austria* (1976) 3 DR 25.

<sup>89</sup> *Gaygusuz v Austria* (1996) 23 EHRR 365.

<sup>90</sup> *Gaygusuz v Austria* (1996) 23 EHRR 365 para 41.

<sup>91</sup> Allen T *Property and the Human Rights Act 1998* (2005) 71. See further Sermet L *The European Convention on Human Rights and Property Rights* (1998) 11; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 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) 6; Rook D *Property Law and Human Rights* (2001) 103-104; Van Rijn A "Right to the peaceful enjoyment of one's possessions (Article 1 of Protocol No 1)" in Van Dijk P, Van Hoof F, Van Rijn A & Zwaak L (eds) *Theory and Practice of the European Court of Human Rights* (2006) 863-893 at 869; 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*

*Netherlands*,<sup>92</sup> the European Commission did not treat a non-contributory scheme of disability benefits as possessions and held that there was no direct link between the contributions made and the benefits awarded, and therefore a person “does not have, at any given moment, an identifiable and claimable share in the fund”.<sup>93</sup> Therefore, Article 1 does not protect the mere expectation of benefits, only those benefits that have actually been provided. Allen explains that Article 1 “does not guarantee a minimum level of subsistence or other social benefits; nor does it apply to general promises to provide or enhance benefits”.<sup>94</sup>

Furthermore, according to Allen, if an existing benefit qualifies as a possession for the purposes of Article 1, the withdrawal or modification of the benefit should also qualify as an interference with that possession.<sup>95</sup> The *Kjartan Asmundsson v Iceland*<sup>96</sup> decision is an example of and instance where the modification of a social welfare benefit can result in an interference with a possession, the possession being

*Protocols* (2007) 7; Svetlana S *Protection of Property Rights under the European Convention on Human Rights and the Russian National Legislation* (LLM thesis Lund University 2008) 14; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 120-121.

<sup>92</sup> *FPJM Kleine Staarman v Netherlands* (1985) 42 DR 162.

<sup>93</sup> At 166.

<sup>94</sup> Allen T *Property and the Human Rights Act 1998* (2005) 71-72. See further Sermet L *The European Convention on Human Rights and Property Rights* (1998) 12-13; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 117-118; 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) 17; 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) 8-9.

<sup>95</sup> Allen T *Property and the Human Rights Act 1998* (2005) 72. See further Sermet L *The European Convention on Human Rights and Property Rights* (1998) 13; Rook D *Property Law and Human Rights* (2001) 101; Van Rijn A “Right to the peaceful enjoyment of one’s possessions (Article 1 of Protocol No 1)” in Van Dijk P, Van Hoof F, Van Rijn A & Zwaak L (eds) *Theory and Practice of the European Court of Human Rights* (2006) 863-893 at 868.

<sup>96</sup> *Kjartan Asmundsson v Iceland* 60669/00 ECHR 2004-IX.

a right to derive a benefit from a social welfare scheme, such as a pension. This case dealt with the loss of pension fund entitlements. In 1969, the applicant completed his training as a navigation officer at the Icelandic College of Navigation and started work as a seaman. However, an accident sustained aboard a trawler in 1978 left him unable to continue working as a seaman. His disability was assessed at 100%, which made him eligible for a disability pension from the Seamen's Pension Fund (the Pension Fund). The assessment was made according to criteria that applied under section 13(1) and (4) of the Seamen's Pension Fund Act,<sup>97</sup> notably that the claimant was unable to carry out the work he had performed before his disability, that his participation in the Seamen's Pension Fund had been intended to insure against this contingency, and that he had sustained a loss of fitness for work of 35% or more. The applicant underwent regular disability assessments by a physician accredited by the Seamen's Pension Fund and was each time assessed as 100% disabled in relation to his previous job. After the accident, the applicant joined a transport company as an office assistant and later became the head of its claims department.<sup>98</sup>

In 1992, an amendment to the Seamen's Pension Fund Act considerably altered the basis for the assessment of disability in that the assessment was not to be based on the Pension Fund beneficiaries' inability to perform the same work but work in general. The Pension Fund applied the new provisions not only to persons who had claimed a disability pension after the date of their coming into force but also to persons who were already in receipt of a disability pension before that date. Under the new rules, a fresh assessment of the applicant's disability was carried out and it

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<sup>97</sup> Seamen's Pension Fund Act (Law no 49/1974).

<sup>98</sup> *Kjartan Asmundsson v Iceland* 60669/00 ECHR 2004-IX para 8.

concluded that the applicant's loss of capacity for work in general was 25% and thus did not reach the minimum of 35%. As a result, from 1 July 1997 onwards, the Pension Fund stopped paying the applicant the disability pension and the related child benefits he had been receiving for nearly twenty years since the accident in 1978.<sup>99</sup>

The Court held that, according to case law decided in terms of the Convention, making contributions to a pension fund might, in certain circumstances, create a property right and such a right may be affected by the manner in which the Pension Fund is distributed. The rights stemming from payment of contributions to social insurance systems are pecuniary rights for the purposes of Article 1. However, even assuming that Article 1 guarantees benefits to persons who have contributed to a social insurance system, it cannot be interpreted as entitling that person to a pension of a specific amount. An important consideration in the assessment under this provision is whether the applicant's right to derive benefits from the social insurance scheme in question has been infringed in a manner resulting in the impairment of the essence of his pension rights.<sup>100</sup> The applicant's right to derive benefits from the Seaman's Pension Fund was regarded as a possession, and thus as property, for the purposes of Article 1.<sup>101</sup> This approach is similar to that of Germany and US as both jurisdictions require that a person make contributions to the pension fund in

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<sup>99</sup> Para 10-12.

<sup>100</sup> Para 39. See further *Domalewski v Poland* 34610/97 ECHR 1999-V.

<sup>101</sup> Para 40. In determining whether a fair balance had been struck between the demands of the general interest of the community and the protection of the individual's fundamental rights, the ECHR concluded that the applicant was forced to bear an excessive and disproportionate burden which could not be justified by the legitimate community interests relied on by the authorities because the applicant had been totally deprived of his entitlements. See further *Bellet, Huertas and Vialatte v France* 40832/98 27 April 1999; *Skorkiewicz v Poland* 39860/98 1 June 1999; *Gaygusuz v Austria* (1996) 23 EHRR 365 paras 39-41.

question before they obtain a constitutionally protected property right to derive a benefit from the pension fund.<sup>102</sup>

Allen explains that since the ratification of the Convention and its Protocols by former communist countries, the ECHR has had to deal with cases concerning claims to property taken under old regimes.<sup>103</sup> Furthermore, some countries enacted legislation that provided for the restoration of property or, in the alternative, for compensation in the form of money or substitute property. Allen further explains that:

“[S]ome of the [Article 1] cases concern individuals who still have a legal title to property but cannot obtain its return; others concern individuals who are excluded from compensation schemes or otherwise treated unfairly. There are therefore two distinct issues concerning the applicability of [Article 1]. The first is whether the formal title to property is a[n] [Article 1] possession, even where the property was taken many years ago and has since changed hands many times. The second arises when the original title is lost or not recognised as a[n] [Article 1] possession. Here, the issues concern statutory schemes of compensation or restoration of property where applicants fail to satisfy conditions on entitlement.”<sup>104</sup>

The ECHR has stated, regarding the survival of property rights, that:

“[P]ossessions’ can be ‘existing possessions’ or assets, including claims, in respect of which the applicant can argue that he has at least a ‘legitimate expectation’ of obtaining effective enjoyment of a property right. By way of contrast, the hope of recognition of the survival of an old property right which it has long been impossible to exercise effectively cannot be regarded as a ‘possession’”.<sup>105</sup>

In the *Malhous* decision, the only “hope of recognition” that the applicant had had been crystallised in 1991 legislation which allowed for persons in the applicant’s position to claim restitution. However, the applicant had failed to satisfy the

<sup>102</sup> See 2 2 2 and 2 2 3 above.

<sup>103</sup> Allen T *Property and the Human Rights Act 1998* (2005) 57. See further Djajic S “The right to property and the *Vasilescu v Romania* case” (2000) 27 *Syracuse J Int'l L & Comm* 363-396 at 363-364.

<sup>104</sup> Allen T *Property and the Human Rights Act 1998* (2005) 57.

<sup>105</sup> *Malhous v Czech Republic* Reports 2000-XII 533 at 553.

requirements for the restitution of the land itself. This meant that any claim for restitution of the land itself was remote before the 1991 legislation came into effect and remained remote after its promulgation. Therefore, according to the ECHR, the applicant did not have a claim to a possession protected under Article 1.

The decision of *Broniowski v Poland*<sup>106</sup> dealt with a situation comparable to that of *Malhous*. In *Broniowski* the rights relied upon by the applicant still existed and were recognised in domestic law. The applicant alleged that Article 1 had been breached in that his entitlement to compensation for property abandoned in the territories beyond the Bug River, referred to by the Polish Constitutional Court as his “right to credit”, had not been satisfied.<sup>107</sup> The crux of the applicant’s claim under the Convention lay in the state’s failure to satisfy his entitlement to compensatory property, which had vested in him under Polish law.<sup>108</sup> The applicant maintained that his entitlement constitutes a property right, which Poland has originally recognised in taking it upon itself the obligation to compensate repatriated persons for land abandoned in the territories beyond the Bug River. The obligation had later been incorporated into domestic law, which vested in the applicant, as the heir of his repatriated grandmother, a specific right to offset the value of the property abandoned by his family beyond the Bug River against the price, or the fee for perpetual use, of immovable property purchased from the state. The applicant added that the right is explicitly recognised as a property right by the Polish courts and that the Polish Constitutional Court had defined it as the “right to credit”. As such, it undeniably falls within the concept of possessions for the purposes of Article 1.<sup>109</sup>

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<sup>106</sup> *Broniowski v Poland* 31443/96 ECHR 2004-V.

<sup>107</sup> Para 121.

<sup>108</sup> Para 122.

<sup>109</sup> Para 126.

The European Court found that the applicant has a proprietary interest eligible for protection under Article 1. The Court further noted that the applicant's entitlement had continuously had a legal basis in domestic legislation and the Polish Supreme Court defined it as a "debt chargeable to the state" which had "a pecuniary and inheritable character."<sup>110</sup> When the matter was taken up in Poland, the Polish Constitutional Court described the applicant's entitlement as the right to credit, which has the special nature of an independent property right that should be recognised as a constitutionally protected property right under the Polish Constitution, and which is a special property right of a public law nature.<sup>111</sup> The Polish Constitutional Court accepted that the materialisation of this right depended on action by an entitled person, but it rejected the idea that the right did not exist until its realisation through a successful bid at an auction for the sale of state property. Consequently, the Polish Constitutional Court held that the right to credit is subject to protection under Article 1.<sup>112</sup>

Following the above judgment, the Polish Supreme Court considered that the right to credit was a particular proprietary right of a pecuniary value, which is inheritable and transferrable in a specific manner and whose substance consisted in the possibility of having a certain pecuniary obligation satisfied through the use of specific funds known as the "Bug River money".<sup>113</sup>

The European Court subscribed to the analysis and conclusions reached by the Polish Constitutional and Supreme Courts and concluded that the applicant's right to

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<sup>110</sup> Para 130.

<sup>111</sup> Para 131.

<sup>112</sup> Para 131.

<sup>113</sup> Para 131.

credit constitutes a possession for the purposes of Article 1.<sup>114</sup> The Court added that the applicant's possessions comprised the entitlement to obtain compensatory property of the kind listed in the relevant ordinance.<sup>115</sup> While the right was created in a somewhat inchoate form, its materialisation was to be effected by an administrative decision allocating state property to the applicant, thus section 81 of the Land Administration Act 1982, which laid down the applicant's right to credit, served as the legal basis for the state's obligation to comply with the right.<sup>116</sup>

This decision is a good example of how the definition of possessions in Article 1 operates with regard to a claim. In this case, the applicant's right to be compensated with property was regarded as a claim and thus as an asset potentially falling under the definition of a possession for the purposes of Article 1. In order for an asset, such as a claim, to be considered a possession, the applicant must be able to argue that he has at least a legitimate expectation of obtaining effective enjoyment of a property right. An expectation is considered "legitimate" if it is based on either a legislative provision or a legal act bearing on the property interest in question. In *Broniowski*, the applicant had such an expectation on the basis that his right to credit, in other words his right to claim compensation from the state, was recognised in domestic legislation binding the state to uphold his claim provided he brings proceedings to enforce it. The expectation was regarded as legitimate because the right to claim compensation is provided for in legislation that has a direct legal bearing on the right to claim the compensation in question that the legislation itself created.

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<sup>114</sup> Para 131.

<sup>115</sup> Para 133.

<sup>116</sup> Para 133.

### 3 2 3 Conclusion

Regarding Article 1, Allen reaches the following conclusion:

"The case law on the scope of [Article 1] possessions is characterised by reasoning that is formal, and ostensibly neutral, in the sense that it relies almost exclusively on national law to determine the content of [Article 1] possessions. As such, the cases reveal that [Article 1] is essentially conservative in its function. To the extent that there is an ethical theory underpinning the jurisprudence, it is only that property must be protected because it is property. The ethical basis for entitlement is determined at the national level, and [Article 1] simply provides further support for that determination."<sup>117</sup>

The cases discussed above support Allen's conclusion regarding the nature of property for the purposes of Article 1. The ECHR in the above cases first assessed whether a property right exists under the national law of the member state in question and if it finds that such a right does exist, it more easily accepts that the interest falls to be protected in terms of Article 1.<sup>118</sup> This is especially true with regard to claims, where the ECHR has specifically stated that the claim must have a basis in domestic law in order for it to be considered a possession for the purposes of Article 1.<sup>119</sup> However, the ECHR's interpretation is not dependent on any domestic law definitions of property. It will look at domestic law to determine if the interest in question is property in the domestic law of the state in question and if so, it will regard the interest as a possession for the purpose of Article 1. However, if the interest is not recognised as property in the domestic law of the state in question, the

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<sup>117</sup> Allen T *Property and the Human Rights Act 1998* (2005) 78.

<sup>118</sup> *Broniowski v Poland* 31443/96 ECHR 2004-V para 131. See further *Öneryildiz v Turkey* 48839/99 ECHR 2004-XII; *Kjartan Asmundsson v Iceland* 60669/00 ECHR 2004-IX; *Hamer v Belgium* 21861/03 ECHR 2007-V; *Saghinadze and Others v Georgia* 18768/05 27 May 2010.

<sup>119</sup> Para 133.

autonomous meaning doctrine allows the ECHR to determine if the interest in question is a possession for the purposes of Article 1 or not.

### **3 3 Distinction between deprivation and expropriation**

#### **3 3 1 Terminology**

Article 1 of Protocol No 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms (Article 1) provides that “[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions; [n]o 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.”<sup>120</sup> The use of the term

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<sup>120</sup> Council of Europe, *Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 20 March 1952, ETS 9. See further Sermet L *The European Convention on Human Rights and Property Rights* (1998) 22-31; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 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) 21-25; Rook D *Property Law and Human Rights* (2001) 60-69; Allen T *Property and the Human Rights Act 1998* (2005) 112-124; Van Rijn A “Right to the peaceful enjoyment of one’s possessions (Article 1 of Protocol No 1)” in Van Dijk P, Van Hoof F, Van Rijn A & Zwaak L (eds) *Theory and Practice of the European Court of Human Rights* (2006) 863-893 at 878-893; 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) 10-12; Svetlana S *Protection of Property Rights under the European Convention on Human Rights and the Russian National Legislation* (LLM thesis Lund University 2008) 18; Gray K & Gray SF *Elements of Land Law* 5<sup>th</sup> ed (2009) para 11.2.22; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 367-370; Pradouroux S *The Protection of Property Rights in Comparative Perspective* (2013) 62-83; Sluysmans J, Verbist S & Waring E (eds) *Expropriation Law in Europe* (2015) 1-26.

“deprive” in Article 1 refers to the actual taking away or dispossession of property in the sense usually understood in most jurisdictions as expropriation and not of the regulation of property.<sup>121</sup> The ECHR clarified the relationship between the different elements of Article 1 by stating that:

“The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the 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 recognises that the [s]tates are entitled, amongst 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.”<sup>122</sup>

The ECHR has said that these three rules are not distinct in that “[t]he second and third rules are concerned with particular instances of interference with the right of peaceful enjoyment of property and should therefore be construed in light of the

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<sup>121</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 191, 368. See further Sermet L *The European Convention on Human Rights and Property Rights* (1998) 23; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 105; 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) 21; Rook D *Property Law and Human Rights* (2001) 63; Allen T *Property and the Human Rights Act 1998* (2005) 112; Van Rijn A “Right to the peaceful enjoyment of one’s possessions (Article 1 of Protocol No 1)” in Van Dijk P, Van Hoof F, Van Rijn A & Zwaak L (eds) *Theory and Practice of the European Court of Human Rights* (2006) 863-893 at 872-878; 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) 10-11; Svetlana S *Protection of Property Rights under the European Convention on Human Rights and the Russian National Legislation* (LLM thesis Lund University 2008) 19; Pradouroux S *The Protection of Property Rights in Comparative Perspective* (2013) 73.

<sup>122</sup> *Sporrong and Lönnroth v Sweden* (1983) 5 EHRR 35 para 61. See further Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 100; 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) 21-22; Rook D *Property Law and Human Rights* (2001) 61-62; Allen T *Property and the Human Rights Act 1998* (2005) 102-104; 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) 10; Pradouroux S *The Protection of Property Rights in Comparative Perspective* (2013) 62-63.

general principle enunciated in the first rule".<sup>123</sup> Regarding this "general principle", the ECHR stated that rule 1 reflects the principle that there must be a "fair balance" between "the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights".<sup>124</sup> The second rule governs deprivation (expropriation) of possessions and sets out the conditions for a valid expropriation and the third rule governs controls on the use of property, in other words it deals with the member state's power to regulate the use of property within its borders. Allen explains that since the first rule is general in nature and the

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<sup>123</sup> *James v United Kingdom* (1986) 8 EHRR 123 para 37. See further Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 102; 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) 25; Rook D *Property Law and Human Rights* (2001) 61-62; Allen T *Property and the Human Rights Act 1998* (2005) 102; Van Rijn A "Right to the peaceful enjoyment of one's possessions (Article 1 of Protocol No 1)" in Van Dijk P, Van Hoof F, Van Rijn A & Zwaak L (eds) *Theory and Practice of the European Court of Human Rights* (2006) 863-893 at 875; 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) 10; Pradouroux S *The Protection of Property Rights in Comparative Perspective* (2013) 63.

<sup>124</sup> *Sporrong and Lönnroth v Sweden* (1983) 5 EHRR 35 para 69. See further Sermet L *The European Convention on Human Rights and Property Rights* (1998) 34-35; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 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) 31; Rook D *Property Law and Human Rights* (2001) 69; Allen T *Property and the Human Rights Act 1998* (2005) 103; Van Rijn A "Right to the peaceful enjoyment of one's possessions (Article 1 of Protocol No 1)" in Van Dijk P, Van Hoof F, Van Rijn A & Zwaak L (eds) *Theory and Practice of the European Court of Human Rights* (2006) 863-893 at 881; 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) 14; Svetlana S *Protection of Property Rights under the European Convention on Human Rights and the Russian National Legislation* (LLM thesis Lund University 2008) 32; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 369.

second and third rules are merely specific types of interferences with possessions, it follows that the fair balance principle applies to them as well.<sup>125</sup>

### 3.3.2 Characteristics

As stated above, Article 1 is divided into three rules. The first rule deals with the interference with enjoyment of possessions, the second rule deals with deprivation of possessions (in the sense of expropriation) and the third rule deals with controls regulating the use of property. The second and third rules are concerned with specific instances of interference with the right of peaceful enjoyment of possessions and must be construed in light of the principle laid down in the first rule. The first rule is a residual category in the sense that many types of interferences fall under either the second or third rule.<sup>126</sup> Furthermore, the first rule as a category is described negatively as being those cases that do not fall under the second or third rules. There is currently no single conception of what constitutes a first rule case, but an

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<sup>125</sup> Allen T *Property and the Human Rights Act 1998* (2005) 103. See further Sermet L *The European Convention on Human Rights and Property Rights* (1998) 34-36; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 119; 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) 31; Rook D *Property Law and Human Rights* (2001) 62; Van Rijn A "Right to the peaceful enjoyment of one's possessions (Article 1 of Protocol No 1)" in Van Dijk P, Van Hoof F, Van Rijn A & Zwaak L (eds) *Theory and Practice of the European Court of Human Rights* (2006) 863-893 at 881; 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) 14; Svetlana S *Protection of Property Rights under the European Convention on Human Rights and the Russian National Legislation* (LLM thesis Lund University 2008) 33; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 242; Pradouroux S *The Protection of Property Rights in Comparative Perspective* (2013) 63.

<sup>126</sup> Allen T *Property and the Human Rights Act 1998* (2005) 107. See further 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) 24; *Sporrong and Lönnroth v Sweden* (1983) 5 EHRR 35; *Stran Greek Refineries and Stratis Andreadis v Greece* (1994) 19 EHRR 293

arguably definable category of a first rule cases includes, among others, interferences relating to the expropriation of property.<sup>127</sup> These types of preliminary actions fall under the first rule, but once expropriation has taken place the second rule applies.

The second rule deals with deprivation of possessions. As mentioned above, the term “deprivation” in Article 1 is used in the sense of expropriation and not regulation. While the second rule does not explicitly require compensation, the ECHR has stated that a deprivation of possessions usually requires compensation in order to maintain a fair balance, in other words in accordance with proportionality.<sup>128</sup> Where it is found that a deprivation of property within the meaning of the second rule has taken place, it means that there has been an interference with the right of peaceful enjoyment of possessions. In order for an interference to be compatible with Article 1, it must satisfy three conditions. Firstly, it must be carried out subject to the conditions provided for by law, which excludes any arbitrary action on the part of the national authorities; secondly, it must be in the public interest; and thirdly, it must strike a fair balance between the owner’s rights and the interests of the community,

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<sup>127</sup> Allen T *Property and the Human Rights Act 1998* (2005) 107-110.

<sup>128</sup> Allen T *Property and the Human Rights Act 1998* (2005) 112. See further Sermet L *The European Convention on Human Rights and Property Rights* (1998) 39-40; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 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) 37-40; Rook D *Property Law and Human Rights* (2001) 66; Van Rijn A “Right to the peaceful enjoyment of one’s possessions (Article 1 of Protocol No 1)” in Van Dijk P, Van Hoof F, Van Rijn A & Zwaak L (eds) *Theory and Practice of the European Court of Human Rights* (2006) 863-893 at 881; 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; Svetlana S *Protection of Property Rights under the European Convention on Human Rights and the Russian National Legislation* (LLM thesis Lund University 2008) 34; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 511; Pradouroux S *The Protection of Property Rights in Comparative Perspective* (2013) 74.

in line with the proportionality principle.<sup>129</sup> Regarding the first condition of lawfulness, the existence of a legal basis for the interference is not, in itself, sufficient to satisfy the principle of lawfulness. Rather it is the quality of the applicable provisions that matters: they must be compatible with the rule of law and provide safeguards against arbitrariness. The legal norms upon which the deprivation of property is based must be in accordance with the domestic law of the relevant member state, including the provisions of its Constitution. The provisions of the domestic law must be sufficiently accessible, precise and foreseeable in their application. A particular rule is foreseeable when it affords a measure of protection against arbitrary interferences by the public authorities. However, the ECHR has limited power to review compliance with domestic law, especially when there is nothing from which it can conclude the authorities have applied the relevant legal provisions in a manifestly erroneous manner or so as to reach arbitrary conclusions.<sup>130</sup>

The ECHR has reiterated that, regarding the second condition of “public interest”; the national authorities are in principle better placed than the international

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<sup>129</sup> Van Rijn A “Right to the peaceful enjoyment of one’s possessions (Article 1 of Protocol No 1)” in Van Dijk P, Van Hoof F, Van Rijn A & Zwaak L (eds) *Theory and Practice of the European Court of Human Rights* (2006) 863-893 at 878-879. See further Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 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) 26 and 40; Rook D *Property Law and Human Rights* (2001) 65-74; Allen T *Property and the Human Rights Act 1998* (2005) 94 and 114; 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) 12; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 455; *Vistiņš and Perepjolkins v Latvia* [GC] 71243/01 25 October 2012 para 94; *Maksymenko and Gerasymenko v Ukraine* 49317/07 16 May 2013 para 51.

<sup>130</sup> *Maksymenko and Gerasymenko v Ukraine* 49317/07 16 May 2013 para 52-54; *Vistiņš and Perepjolkins v Latvia* [GC] 71243/01 25 October 2012 para 95-98.

judge to appreciate what is in the public interest because of their direct knowledge of their society and its needs. Furthermore, the ECHR has stated that:

“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.”<sup>131</sup>

Therefore, while national authorities are given wide discretion to determine what is in the public interest, the ECHR will intervene and consider this issue when it has found that the national authorities’ judgment as to what falls into the public interest is “manifestly without reasonable foundation”.

Regarding the third condition of a “fair balance”, the ECHR has stated that even if a measure of interference with the right to the peaceful enjoyment of possessions is lawful and carried out in the public interest, it must still strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights. In particular, there must be proportionality between the means employed and the aim sought to be realised by any measure depriving a person of his possessions.<sup>132</sup> Furthermore, the ECHR has stated that:

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<sup>131</sup> *Vistiņš and Perepjolkins v Latvia* [GC] 71243/01 25 October 2012 para 106.

<sup>132</sup> *Sporrong and Lönnroth v Sweden* (1983) 5 EHRR 35 para 69. See further Sermet L *The European Convention on Human Rights and Property Rights* (1998) 34-35; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 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*

"In determining whether this requirement is met, the Court recognises that the State enjoys a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question. Nevertheless, the Court cannot abdicate its power of review and must determine whether the requisite balance was maintained in a manner consonant with the applicants' right to the peaceful enjoyment of their possessions, within the meaning of the first sentence of Article 1 of Protocol No. 1."<sup>133</sup>

The concepts of a "fair balance" and "proportionality" are considered in more detail in a separate section of this chapter below.<sup>134</sup>

The third rule is concerned with regulatory controls over the use of property. This rule recognises that the member states are entitled, amongst other things, to control the use of property in accordance with the general interest by enforcing such laws as they deem necessary for this purpose. However, this rule, like the other two, is subject to the principle of proportionality. A fair balance must be struck between the public interest served by the laws controlling the use of property and the private interest affected. Furthermore, it is important to note the distinction between controls over the use of property and other controls over property. Allen argues that, by referring only to the use of property, the third rule excludes controls over the rights of

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(2001) 31; Rook D *Property Law and Human Rights* (2001) 69; Allen T *Property and the Human Rights Act 1998* (2005) 103; Van Rijn A "Right to the peaceful enjoyment of one's possessions (Article 1 of Protocol No 1)" in Van Dijk P, Van Hoof F, Van Rijn A & Zwaak L (eds) *Theory and Practice of the European Court of Human Rights* (2006) 863-893 at 881; 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) 14; Svetlana S *Protection of Property Rights under the European Convention on Human Rights and the Russian National Legislation* (LLM thesis Lund University 2008) 32; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 369.

<sup>133</sup> *Maksymenko and Gerasymenko v Ukraine* 49317/07 16 May 2013 para 61.

<sup>134</sup> See 3 4 below.

possession or disposition from its application.<sup>135</sup> However the ECHR has not applied the third rule in this way. The third rule has been applied to restrictions on the right of possession<sup>136</sup> as well as restrictions on rights of disposition.<sup>137</sup> Examples of controls judged under the third rule include legislation that imposes tenancy agreements on landlords and which set allegedly inadequate levels of rent.<sup>138</sup> The ECHR has held that interferences under this rule must comply with the principle of lawfulness, have a legitimate aim that is in the general interest, and strike a fair balance.<sup>139</sup> Furthermore, it has also held that a significant degree of deference to the national authorities will be allowed with regard to determining what is in the public or general interest, unless this determination is manifestly without reasonable foundation.<sup>140</sup>

The three-rule structure of Article 1 seems to indicate that the ECHR's approach to the distinction between deprivation (regulation) and expropriation treats these two forms of interference with property as two discrete categories that do not overlap at all. While both must comply with the principle of lawfulness, they must be in the public or general interest and comply with the principle of proportionality, each constitutes a unique interference with the right to peaceful enjoyment of property.<sup>141</sup>

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<sup>135</sup> Allen T *Property and the Human Rights Act 1998* (2005) 119.

<sup>136</sup> See, for example, *Chassagnou and Others v France* (2000) 29 EHRR 615.

<sup>137</sup> See, for example, *Marckx v Belgium* (1979) 2 EHRR 330; *Mellacher v Austria* (1990) 12 EHRR 391.

<sup>138</sup> See, for example, *Hutten-Czapska v Poland* [GC] 35014/97 ECHR 2006-VIII; *Edwards v Malta* 17647/04 24 October 2006; *Bittó and Others v Slovakia* 30255/09 28 January 2014.

<sup>139</sup> *Bittó and Others v Slovakia* 30255/09 28 January 2014 para 95; *Hutten-Czapska v Poland* [GC] 35014/97 ECHR 2006-VIII para 160-168; *Edwards v Malta* 17647/04 24 October 2006 para 52-78; *Nobel and Others v Netherlands* 27126/11 2 July 2013 para 31.

<sup>140</sup> Para 96.

<sup>141</sup> Sermet L *The European Convention on Human Rights and Property Rights* (1998) 23. See further Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 105; 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) 25; Rook D *Property Law and Human Rights* (2001) 61-62; Allen

However, there is uncertainty regarding the relevance of this three-rule structure. The ECHR is inconsistent with its classification of interferences under one of the three rules.<sup>142</sup> It is not clear how this structure affects the judicial analysis in a given case. Allen explains that, considering the three-rule structure, there are three distinct steps that should be followed in determining whether there has been a violation of Article 1.<sup>143</sup> The first step is to ask whether Article 1 is applicable, the second step is to identify the applicable rule and the third step is to ask whether the interference is justifiable. The purpose of the second step is to narrow the fairly broad inquiry under the third step by indicating which facts can be eliminated from the analysis of legality and proportionality as well as the weight and significance to be attached to facts that must be considered. Allen concludes that if the second step does not in any way perform this function, it has no useful purpose in the analysis of cases.<sup>144</sup>

### 3 3 3 Public interest

The second rule of Article 1 states that “[n]o one shall be deprived of his possessions except in the public interest [...].” The approach of the ECHR regarding the question of public interest is a sympathetic or deferential approach. The ECHR interprets public interest sympathetically towards the states, leaving them as wide a “margin of

T *Property and the Human Rights Act 1998* (2005) 103; Van Rijn A “Right to the peaceful enjoyment of one’s possessions (Article 1 of Protocol No 1)” in Van Dijk P, Van Hoof F, Van Rijn A & Zwaak L (eds) *Theory and Practice of the European Court of Human Rights* (2006) 863-893 at 887; 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) 10-11; Praduroux S *The Protection of Property Rights in Comparative Perspective* (2013) 79-80.

<sup>142</sup> Allen T *Property and the Human Rights Act 1998* (2005) 120.

<sup>143</sup> Allen T *Property and the Human Rights Act 1998* (2005) 121.

<sup>144</sup> Allen T *Property and the Human Rights Act 1998* (2005) 121.

appreciation” as possible, but the ECHR will investigate whether a legitimate public purpose was involved and whether the expropriation was properly authorised.<sup>145</sup>

The decision of *James v United Kingdom*<sup>146</sup> confirmed the deferent approach of the ECHR with regard to the public interest requirement. The ECHR held 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’. Nonetheless, the compulsory transfer of property from one individual to another may, depending on the circumstances, constitute a legitimate means for promoting the public interest.”<sup>147</sup> Furthermore, the public interest cannot be said to require the transferred property to be put into use for the general public or specific community, nor that the general public or the specific community in question benefit directly from the taking.<sup>148</sup> The ECHR concluded in this case that “a taking of property effected in pursuance of legitimate social, economic or other policies may be ‘in the public interest’, even if the community at large has no direct use or enjoyment of the property taken”.<sup>149</sup>

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<sup>145</sup> Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 113. See further Sermet L *The European Convention on Human Rights and Property Rights* (1998) 33-34; 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; Allen T *Property and the Human Rights Act 1998* (2005) 125-130; Van Rijn A “Right to the peaceful enjoyment of one’s possessions (Article 1 of Protocol No 1)” in Van Dijk P, Van Hoof F, Van Rijn A & Zwaak L (eds) *Theory and Practice of the European Court of Human Rights* (2006) 863-893 at 879-881; 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) 14; Svetlana S *Protection of Property Rights under the European Convention on Human Rights and the Russian National Legislation* (LLM thesis Lund University 2008) 30-32; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 488; Pradouroux S *The Protection of Property Rights in Comparative Perspective* (2013) 5-8.

<sup>146</sup> *James v United Kingdom* (1986) 8 EHRR 123.

<sup>147</sup> Para 40.

<sup>148</sup> Para 41.

<sup>149</sup> Para 45.

Regarding the margin of appreciation afforded to the national authorities, the ECHR stated the following:

"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."<sup>150</sup>

The ECHR's deferent approach to the public purpose requirement is also seen in its judgment in *Holy Monasteries v Greece*.<sup>151</sup> This case involved legislation, which transferred all the property held by the monasteries to the state unless the

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<sup>150</sup> Para 46. See further Sermet L *The European Convention on Human Rights and Property Rights* (1998) 33-34; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 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) 27; Rook D *Property Law and Human Rights* (2001) 35-37, 65; Allen T *Property and the Human Rights Act 1998* (2005) 125-130; Van Rijn A "Right to the peaceful enjoyment of one's possessions (Article 1 of Protocol No 1)" in Van Dijk P, Van Hoof F, Van Rijn A & Zwaak L (eds) *Theory and Practice of the European Court of Human Rights* (2006) 863-893 at 879; 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) 14; Svetlana S *Protection of Property Rights under the European Convention on Human Rights and the Russian National Legislation* (LLM thesis Lund University 2008) 30-32; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 488-490.

<sup>151</sup> *Holy Monasteries v Greece* (1995) ECHR Series A No 301A.

monasteries could establish that they held title to the property, by way of either a duly registered deed, a statutory provision or a final court decision against the state.<sup>152</sup> The reasons given by the state for this legislation were to end the illegal sale of the land in question, encroachments on it and the abandonment or the uncontrolled development thereof.<sup>153</sup> While the Court expressed some doubt as to the reasons for these measures, it held that these doubts were insufficient to deprive the legislation of its legitimacy as being in the public interest.<sup>154</sup>

The above analysis confirms the ECHR's deferent approach to the national authorities' determination of what would be in the public interest. However, the Court's deference to this determination is not complete because the ECHR will not defer to the national authority's determination if it finds that the determination is without any reasonable foundation. The ECHR's approach to the public interest requirement appears to be similar to the US approach to this requirement, in that the US Supreme Court also follows a deferent approach,<sup>155</sup> but the deference of the US courts is towards determinations of public interest identified by the legislature, while the ECHR defers to the member states. However, neither court is entirely deferent to the respective determinants of public interest. The courts will still, where necessary, assess the determinations to ensure that the proposed public use or public interests

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<sup>152</sup> Para 24.

<sup>153</sup> Para 69.

<sup>154</sup> Para 69. See further Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 106; Rook D *Property Law and Human Rights* (2001) 65; Allen T *Property and the Human Rights Act 1998* (2005) 125-130; Van Rijn A "Right to the peaceful enjoyment of one's possessions (Article 1 of Protocol No 1)" in Van Dijk P, Van Hoof F, Van Rijn A & Zwaak L (eds) *Theory and Practice of the European Court of Human Rights* (2006) 863-893 at 879-881; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 488-490.

<sup>155</sup> See 3 4 above.

is indeed legitimate. The German<sup>156</sup> approach is stricter in the sense that there is less deference to a statutory determination of public interest. A public interest relied on to justify an expropriation will always be scrutinised in order to ensure its legitimacy.

### 3 3 4 Compensation

Article 1 does not specifically mention the payment of compensation as a requirement for deprivation (in the sense of expropriation) of property. However, the jurisprudence of the ECHR indicates that compensation for expropriation of property is usually required on the basis of the proportionality principle.<sup>157</sup> The notion of payment of compensation was mentioned in *Sporrong and Lönnroth v Sweden*<sup>158</sup> where the ECHR held that the issuing of expropriation permits that authorised expropriation for an unlimited period of time interfered with the applicants' possession in such a way that only a reduction in the time period or compensation

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<sup>156</sup> See 3 4 above.

<sup>157</sup> *Sporrong and Lönnroth v Sweden* (1983) 5 EHRR 35; *James v United Kingdom* (1986) 8 EHRR 123. See further Sermet L *The European Convention on Human Rights and Property Rights* (1998) 39-40; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 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) 37-40; Rook D *Property Law and Human Rights* (2001) 66; Allen T *Property and the Human Rights Act 1998* (2005) 112; Van Rijn A "Right to the peaceful enjoyment of one's possessions (Article 1 of Protocol No 1)" in Van Dijk P, Van Hoof F, Van Rijn A & Zwaak L (eds) *Theory and Practice of the European Court of Human Rights* (2006) 863-893 at 881; 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; Svetlana S *Protection of Property Rights under the European Convention on Human Rights and the Russian National Legislation* (LLM thesis Lund University 2008) 34; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 511; Pradouroux S *The Protection of Property Rights in Comparative Perspective* (2013) 74.

<sup>158</sup> *Sporrong and Lönnroth v Sweden* (1983) 5 EHRR 35.

would render the interference legitimate.<sup>159</sup> This reference to compensation was picked up in *James*,<sup>160</sup> where the ECHR laid down principles regarding compensation: Article 1 impliedly requires the payment of compensation as a necessary condition for the expropriation of property; expropriation without compensation is only permissible in certain exceptional circumstances; compensation terms are material to the assessment of whether the burden placed on a person is disproportionate and therefore in conflict with Article 1; Article 1 does not guarantee a right to full compensation in all circumstances because circumstances and the public interest may call for reimbursement that is less than full market value; and 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 1.<sup>161</sup>

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<sup>159</sup> Para 73. See further Allen T *Property and the Human Rights Act 1998* (2005) 150.

<sup>160</sup> *James v United Kingdom* (1986) 8 EHRR 123.

<sup>161</sup> Para 54. See further Sermet L *The European Convention on Human Rights and Property Rights* (1998) 39-40; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 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) 38-39; Rook D *Property Law and Human Rights* (2001) 70-73; Allen T *Property and the Human Rights Act 1998* (2005) 171-180; Van Rijn A "Right to the peaceful enjoyment of one's possessions (Article 1 of Protocol No 1)" in Van Dijk P, Van Hoof F, Van Rijn A & Zwaak L (eds) *Theory and Practice of the European Court of Human Rights* (2006) 863-893 at 881-882; 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) 7-8; Svetlana S *Protection of Property Rights under the European Convention on Human Rights and the Russian National Legislation* (LLM thesis Lund University 2008) 34; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 505; Pradouroux S *The Protection of Property Rights in Comparative Perspective* (2013) 73-74; Sluysmans J, Verbist S & Waring E (eds) *Expropriation Law in Europe* (2015) 15-23.

The standard for compensation required in Rule 2 cases is that compensation should be “reasonably related to its value”.<sup>162</sup> Allen explains that this is not a strict standard because while it suggests that national authorities must take the value of the property into account when determining the amount of compensation in a given case, it does not suggest that full value must be paid in every case.<sup>163</sup> The EHCR requires an equitable or fair balance to be struck when determining compensation, similar to the German<sup>164</sup> method of determining compensation for expropriation.<sup>165</sup>

### 3 3 5 Excessive deprivation or regulation

#### 3 3 5 1 *Constructive expropriation*

The ECHR’s position on constructive expropriation is, at this point, uncertain.<sup>166</sup>

There was initially a reasonably clear distinction made between expropriation,

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<sup>162</sup> *James v United Kingdom* (1986) 8 EHRR 123. See further Sermet L *The European Convention on Human Rights and Property Rights* (1998) 39-40; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 115; 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) 38-39; Rook D *Property Law and Human Rights* (2001) 71; Allen T *Property and the Human Rights Act 1998* (2005) 154; Van Rijn A “Right to the peaceful enjoyment of one’s possessions (Article 1 of Protocol No 1)” in Van Dijk P, Van Hoof F, Van Rijn A & Zwaak L (eds) *Theory and Practice of the European Court of Human Rights* (2006) 863-893 at 881; Pradouroux S *The Protection of Property Rights in Comparative Perspective* (2013) 75.

<sup>163</sup> Allen T *Property and the Human Rights Act 1998* (2005) 154.

<sup>164</sup> See 3 5 above.

<sup>165</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 511.

<sup>166</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 367. See further Sermet L *The European Convention on Human Rights and Property Rights* (1998) 24; Van der Walt AJ “Compensation for excessive or unfair regulation: A comparative overview of constitutional practice relating to regulatory takings” (1999) 14 SAPL 273-331 at 299-302; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 111-112; 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) 22-23; Rook D *Property Law and Human Rights* (2001) 63-64; Allen T *Property and the Human Rights Act 1998* (2005) 112-118; Van Rijn A “Right to the peaceful enjoyment of one’s

governed by the second rule, and controls on the use of property (regulation), governed by the third rule. A small number of subsequent decisions of the ECHR appear to have created space for recognition of a notion of something like constructive expropriation, but the authority for doing so is not clear.

In *Sporrong and Lönnroth v Sweden*,<sup>167</sup> the ECHR held that in the absence of a formal expropriation, it must “look behind the appearances and investigate the realities of the situation complained of”.<sup>168</sup> This statement appears to create the possibility for the recognition of constructive expropriation under Article 1.<sup>169</sup> In *Papamichalopoulos v Greece*,<sup>170</sup> the ECHR held that the interference with the applicants’ land did not constitute a control on the use of property in terms of the second paragraph of Article 1, nor were the applicants formally expropriated.<sup>171</sup> Following the reasoning in *Sporrong and Lönnroth v Sweden*, the ECHR stated that it had to determine whether the situation complained of amounted to a *de facto*

possessions (Article 1 of Protocol No 1)” in Van Dijk P, Van Hoof F, Van Rijn A & Zwaak L (eds) *Theory and Practice of the European Court of Human Rights* (2006) 863-893 at 874; 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) 10-11; Svetlana S *Protection of Property Rights under the European Convention on Human Rights and the Russian National Legislation* (LLM thesis Lund University 2008) 26; Gray K & Gray SF *Elements of Land Law* 5<sup>th</sup> ed (2009) para 11.2.22; Pradouroux S *The Protection of Property Rights in Comparative Perspective* (2013) 76-79.

<sup>167</sup> *Sporrong and Lönnroth v Sweden* (1983) 5 EHRR 35.

<sup>168</sup> Para 63.

<sup>169</sup> Rook D *Property Law and Human Rights* (2001) 63. See further Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 111-112; 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) 22-23; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 368; Pradouroux S *The Protection of Property Rights in Comparative Perspective* (2013) 76.

<sup>170</sup> *Papamichalopoulos v Greece* (1993) ECHR Series A vol 260B.

<sup>171</sup> Para 41.

expropriation.<sup>172</sup> The ECHR held that the loss of the ability to dispose of the land in question, combined with the failure of the attempts made to remedy the situation, entailed sufficiently serious consequences “for the applicants *de facto* to have been expropriated in a manner incompatible with their right to the peaceful enjoyment of their possessions”.<sup>173</sup> The ECHR also found that a *de facto* expropriation was present in the case of *Vasilescu v Romania*.<sup>174</sup> In this case, the police searched the applicant’s house without a warrant, in connection with a police investigation into her husband’s activities. The police seized 327 gold coins. The police discontinued the investigation but kept the coins.<sup>175</sup> The ECHR held that, due to the lack of any basis in law, as was recognised by both the domestic courts and the government, retention of the coins could not be interpreted as a deprivation of possessions or as a control on the use of property allowed by the first and second paragraphs of Article 1.<sup>176</sup> Following *Sporrong and Lönnroth v Sweden* and *Papamichalopoulos v Greece*, the ECHR held that it had to be ascertained whether the situation complained of amounted to a *de facto* confiscation that was incompatible with the applicant’s right to peaceful enjoyment of possessions.<sup>177</sup> The ECHR concluded that the applicant had been the victim of a *de facto* confiscation because the loss of all ability to dispose of the property in question, combined with the failure of attempts to remedy the situation through the national authorities and the courts entailed sufficiently

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<sup>172</sup> Para 42.

<sup>173</sup> Para 45.

<sup>174</sup> *Vasilescu v Romania* (1998) 28 EHRR 241.

<sup>175</sup> Para 8-10.

<sup>176</sup> Para 50.

<sup>177</sup> Para 51.

serious consequences for it to be held that a *de facto* confiscation had taken place.<sup>178</sup>

The judgment of *Fredin v Sweden*<sup>179</sup> appears to provide some support to the argument that the ECHR does recognise *de facto* or constructive expropriation. This case concerned the regulation of permits for the excavation of gravel. The ECHR held that the applicants had not been formally expropriated by this regulation, but then held that the term “deprivation” in Article 1 covered not only formal expropriations but also measures that amount to *de facto* expropriations.<sup>180</sup> The ECHR noted that the legislation in question was designed to control the use of the applicants’ property, which left untouched their ability to make formal decisions regarding the fate of their property, though it remained to be seen whether the consequences of the revocation of their permit to excavate gravel were so serious as to result in a *de facto* expropriation of property.<sup>181</sup> Therefore, the regulation did not take away all meaningful use of the applicant’s property and was considered by the ECHR to be a control of the use of property in terms of the third rule and not a deprivation of property under the second rule of Article 1.<sup>182</sup> Van der Walt points out that the implication of this decision is that a control of the use of possessions which does take away all meaningful use of an applicant’s property might be regarded as deprivation of property and judged under the second rule, which would bring the

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<sup>178</sup> Para 53.

<sup>179</sup> *Fredin v Sweden* (1991) ECHR Series A vol 192.

<sup>180</sup> Para 42 referring to *Sporrong and Lönnroth v Sweden* (1983) 5 EHRR 35 para 63.

<sup>181</sup> Para 43.

<sup>182</sup> Para 47.

ECHR's case law regarding constructive expropriation closer to the US case law on regulatory takings.<sup>183</sup>

Conflicting decisions have suggested that excessive regulatory controls of the use of property should be treated as deprivations that require compensation,<sup>184</sup> while others have expressed doubt regarding this possibility.<sup>185</sup> Adding to the uncertainty are decisions where the ECHR has found a violation of the third rule on the basis that the regulatory authority failed to establish the required fair balance between state and individual interests, and awarded compensation under Article 41 of the Convention.<sup>186</sup> Van der Walt explains that

“[t]his kind of award is arguably constitutional compensation that should be distinguished from compensation for expropriation and it should not be seen as an indication that the court has adopted the idea that compensation should be paid for constructive expropriation. In a sense it resembles the equalisation payment that is possible in German [...] law, albeit on a different basis. Constitutional compensation for regulatory action that has unfair results does not equal compensation for constructive expropriation.”<sup>187</sup>

Van der Walt concludes that the authority for the recognition of constructive expropriation in European Convention law is ambiguous at best.<sup>188</sup>

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<sup>183</sup> Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 112. See further Pradouroux S *The Protection of Property Rights in Comparative Perspective* (2013) 76.

<sup>184</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 368. See further *Erkner and Hofauer v Austria* (1987) ECHR Series A vol 117; *Poiss v Austria* (1987) ECHR Series A vol 117; *Inze v Austria* (1998) 10 EHRR 394; *Banér v Sweden* (1989) 60 DR 128; *Fredin v Sweden* (1991) ECHR Series A vol 192; *Stran Greek Refineries and Stratis Andreadis v Greece* (1994) 19 EHRR 293.

<sup>185</sup> See *Tre Traktörer AB v Sweden* (1989) ECHR Series A vol 159; *Mellacher v Austria* (1990) 12 EHRR 391; *Pine Valley Developments Ltd and Others v Ireland* (1992) 14 EHRR 319.

<sup>186</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 370.

<sup>187</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 370.

<sup>188</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 370.

### 3 3 5 2 A third category

If the interference with an applicant's possessions does not constitute an expropriation or a control of the use of property but nevertheless interferes with the applicant's possessions, the interference will be examined under the first rule. These cases appear to constitute a third category of interference with possessions, simply known as interference with the peaceful enjoyment of possessions.<sup>189</sup>

In *Banér v Sweden*,<sup>190</sup> it was held that the introduction of legislation that gave the public the right to fish in the applicant's waters, where he previously enjoyed the exclusive right to do so, without compensation, amounted to a violation of Article 1.<sup>191</sup> The Commission held that it had to be determined whether this interference had to be regarded as a deprivation in terms of the second rule, a control of the use of property in terms of the third rule, or a "third form of interference to be considered under the first rule".<sup>192</sup> The Commission held that deprivation of possessions in terms of Article 1 is not limited to cases where formal expropriation has taken place; it may also take place when the measure affects the "substance of the property to such a degree that there has been a [de facto] expropriation or where the measure

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<sup>189</sup> Rook D *Property Law and Human Rights* (2001) 88. See further Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 99-105; 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) 24-25; Van Rijn A "Right to the peaceful enjoyment of one's possessions (Article 1 of Protocol No 1)" in Van Dijk P, Van Hoof F, Van Rijn A & Zwaak L (eds) *Theory and Practice of the European Court of Human Rights* (2006) 863-893 at 872-878; 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) 11-12; Gray K & Gray SF *Elements of Land Law* 5<sup>th</sup> ed (2009) para 11.2.22; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 388.

<sup>190</sup> *Banér v Sweden* (1989) 60 DR 128.

<sup>191</sup> At 133.

<sup>192</sup> At 136.

complained of ‘can be assimilated to a deprivation of possessions’.<sup>193</sup> The Commission concluded that the interference in this case had to be determined under the third rule regarding controls of the use of property because the applicant had not been deprived of his title or his right to fish and that the restrictions placed on his rights to his property could not be assimilated into expropriation, nor were they serious enough to affect the substance of the property right.<sup>194</sup> In *Katte Klitsche de la Grange v Italy*,<sup>195</sup> the applicant complained that a prohibition against building placed on his property, for which he had not received compensation, violated Article 1.<sup>196</sup> The ECHR held that this dispute fell to be decided under the first rule dealing with the peaceful enjoyment of possessions because it did not involve a deprivation of possessions (the second rule) or a control of the use of property (the third rule).<sup>197</sup>

In *Matos e Silva, LDA and Others v Portugal*,<sup>198</sup> the applicants’ land was subject to a number of restrictions including a ban on building and a restriction on the development of the land.<sup>199</sup> The ECHR held that the applicants had suffered an interference with the right to peaceful enjoyment of their possessions because, although the measures in question left intact the applicants’ right to deal with and use their possessions, they greatly reduced the applicants’ ability to do so in practice and they affected the very substance of ownership.<sup>200</sup>

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<sup>193</sup> At 137.

<sup>194</sup> At 137-138.

<sup>195</sup> *Katte Klitsche de la Grange v Italy* (1994) Series A vol 293B.

<sup>196</sup> Para 35.

<sup>197</sup> Para 40.

<sup>198</sup> *Matos e Silva, LDA and Others v Portugal* (1997) 24 EHRR 573.

<sup>199</sup> Para 76.

<sup>200</sup> Para 79.

When determining whether this interference was justified under Article 1, the ECHR held that this case was to be decided in terms of the first rule of Article 1 due to the fact that there was no formal expropriation, nor was there a *de facto* expropriation, because the effect of the measures could not be equated with deprivation of possessions.<sup>201</sup> Therefore, the ECHR had to determine whether a fair balance had been struck between the general interest of the community and the requirements for the protection of the individual's fundamental rights.<sup>202</sup> The ECHR accepted that the measures were in the general interest but concluded that they had serious and harmful effects that hindered the applicants' ordinary enjoyment of their right for more than thirteen years and as a result, the applicants had to bear an individual and excessive burden that upset the fair balance.<sup>203</sup> Having found a lack of a fair balance between the general interest of the community and the requirements of the protection of the individual's fundamental rights, the ECHR saw fit to award to the applicants a monetary amount as just satisfaction in terms of Article 50 of the Convention.<sup>204</sup> Importantly, this award was not one of compensation for expropriation, nor can it be viewed as recognition of constructive or *de facto* expropriation, as neither of these forms of expropriation were present in this case. This award was made in terms of Article 50, which gives the ECHR the discretion to order the payment of just satisfaction to an injured party where such injury is the result of a member state's decision or where the measure is in conflict with its obligations under the Convention and the internal law of the member state only allows for partial reparation for the effects of the decision or measure. The

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<sup>201</sup> Para 85.

<sup>202</sup> Para 86, referring to *Sporrong and Lönnroth v Sweden* (1983) 5 EHRR 35 para 69.

<sup>203</sup> Para 92.

<sup>204</sup> Para 97-101.

compensation award in terms of Article 50 therefore resembles either a general award of constitutional damages or compensation in terms of the equalisation awards that are allowed in German law.

### 3 3 6 Conclusion

Article 1 is divided into three rules. The first rule deals with interferences with the right to peaceful enjoyment of possessions, the second rules deals with deprivation of possessions and the third rule deals with controls on the use of property. The term “deprived” in Article 1 is understood to mean the actual taking away or dispossession of property in the sense of expropriation. Article 1 also refers to controlling the use of property by the member states in their respective jurisdictions, which is understood as meaning the regulation of property by the member states. This three-rule structure appears to indicate that the ECHR treats deprivation (expropriation) and regulation of property as two discrete categories that do not overlap. While both must comply with the principle of lawfulness, be in the public or general interest and comply with the principle of proportionality, each constitutes a unique interference with the right to the peaceful enjoyment of possessions. To comply with the principle of lawfulness the legal basis for the interference must based on the rule of law, provide safeguards against arbitrariness and be in accordance with the law of the relevant member state, including the provisions of its Constitution. The ECHR employs a deferential approach to the public interest requirement, deferring to the national authorities’ determination of what is in the public interest. The ECHR will intervene when it is found that the determination made by the national authorities is manifestly without reasonable foundation. Regarding proportionality, the interference must strike a fair balance between the general interests of the community and the

requirements of the protection of the individual's fundamental rights. There must also be proportionality between the means employed and the aim sought to be achieved by the measure.

Article 1 does not specifically mention compensation as a requirement for deprivation (expropriation) of possessions. However, the jurisprudence of the ECHR indicates that compensation for expropriation is usually required on the basis of the proportionality principle. Article 1 does not guarantee a right to full compensation because the circumstances of the case and the public interest may call for reimbursement at less than market value. The standard is that the compensation paid should be reasonably related to the value of the expropriated property.

The ECHR is inconsistent with its classification of interferences under one of the three rules. This inconsistency has resulted in decisions that appear to constitute a third category of interference with possessions that are judged under the first rule of Article 1. If the ECHR awards compensation for interferences that fall into this third category, such compensation is not compensation for expropriation. It will most likely be an award as just satisfaction in terms of Article 50 of the Convention, which resembles a general award of constitutional damages or compensation in terms of the equalisation awards that are allowed in German law.

## 3 4 Fair balance

### 3 4 1 Introduction

The doctrine of proportionality plays a very important role in the jurisprudence of the ECHR.<sup>205</sup> The ECHR incorporated the proportionality test into its analysis of Article 1 in its *Sporrong and Lönnroth v Sweden*<sup>206</sup> and *James v United Kingdom*<sup>207</sup> decisions. In *Sporrong*, the ECHR held that:

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<sup>205</sup> Sermet L *The European Convention on Human Rights and Property Rights* (1998) 32-37; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 118-120; Greer S *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (2000) 5; 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) 26-43; Rook D *Property Law and Human Rights* (2001) 69-74 and 80-86; Allen T *Property and the Human Rights Act 1998* (2005) 101-166; De la Rasilla del Moral I “The increasingly marginal appreciation of the margin-of-appreciation doctrine” (2006) 7 *German LJ* 611-623 at 613-619; Letsas G “Two concepts of the margin of appreciation” (2006) 26 *Oxford J Legal Stud* 705-732 at 706; Van Rijn A “Right to the peaceful enjoyment of one’s possessions (Article 1 of Protocol No 1)” in Van Dijk P, Van Hoof F, Van Rijn A & Zwaak L (eds) *Theory and Practice of the European Court of Human Rights* (2006) 863-893 at 878-891; 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) 12-15; Svetlana S *Protection of Property Rights under the European Convention on Human Rights and the Russian National Legislation* (LLM thesis Lund University 2008) 32-35; Greer S “The interpretation of the European Convention on Human Rights: Universal principle or margin of appreciation?” (2010) 3 *UCL Hum Rts Rev* 1-14 at 6; Mowbray A “A study of the principle of fair balance in the jurisprudence of the European Court of Human Rights” (2010) 10 *Hum Rts LR* 289-317 at 289-290; Kratochvíl J “The inflation of the margin of appreciation by the European Court of Human Rights” (2011) 29 *Neth Q Hum Rts* 324-357 at 326; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 242, 368-370; Pradouroux S *The Protection of Property Rights in Comparative Perspective* (2013) 73-80. It should be noted that the ECHR does not always employ a proportionality standard when determining if there is a fair balance between the general interests of the community and the requirements of the protections of the individual’s fundamental rights, for example *JA Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45 (GC) para 75-85.

<sup>206</sup> *Sporrong and Lönnroth v Sweden* (1983) 5 EHRR 35.

<sup>207</sup> *James v United Kingdom* (1986) 8 EHRR 123; Allen T *Property and the Human Rights Act 1998* (2005) 123.

"For the purposes of [the first sentence of the first paragraph of Article 1], the Court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights [...]. The search for this balance is inherent in the whole of the Convention and is also reflected in the structure of Article 1 (P1 – 1)."<sup>208</sup>

Therefore, the ECHR held that the first sentence of Article 1 not only sets out the right to property, but also implicitly incorporates a fair balance (proportionality) test.<sup>209</sup> This incorporation of a fair balance test was taken further in the *James* decision, where the ECHR held that:

"The three rules are not, however, 'distinct' in the sense of being unconnected. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule."<sup>210</sup>

Allen explains that, from this statement in *James*, it follows that the fair balance test applies to all interferences with possessions.<sup>211</sup>

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<sup>208</sup> *Sporrong and Lönnroth v Sweden* (1983) 5 EHRR 35 para 69.

<sup>209</sup> Allen T *Property and the Human Rights Act 1998* (2005) 123. See further Sermet L *The European Convention on Human Rights and Property Rights* (1998) 34-35; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 118-120; 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) 69; Van Rijn A "Right to the peaceful enjoyment of one's possessions (Article 1 of Protocol No 1)" in Van Dijk P, Van Hoof F, Van Rijn A & Zwaak L (eds) *Theory and Practice of the European Court of Human Rights* (2006) 863-893 at 881; 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) 14-15; Svetlana S *Protection of Property Rights under the European Convention on Human Rights and the Russian National Legislation* (LLM thesis Lund University 2008) 32-33; Mowbray A "A study of the principle of fair balance in the jurisprudence of the European Court of Human Rights" (2010) 10 *Hum Rts LR* 289-317 at 291-292; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 242.

<sup>210</sup> *James v United Kingdom* (1986) 8 EHRR 123 para 37.

<sup>211</sup> Allen T *Property and the Human Rights Act 1998* (2005) 124. See further 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) 30; Grgić A, Mataga Z, Longar M & Vilfan A *The Right to Property under the*

The ECHR has held that an interference with the peaceful enjoyment of possessions must strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.<sup>212</sup> In particular, there must be a "reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure depriving a person of his possessions".<sup>213</sup> In determining whether these requirements are met, the ECHR recognises that the member states enjoy a wide margin of appreciation regarding both choosing the means of enforcement and ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question.<sup>214</sup> However, the ECHR cannot abdicate its power of review and must determine for itself whether the requisite balance has been established and maintained in a manner consonant with the applicants' right to the peaceful enjoyment of their possessions.<sup>215</sup>

### 3 4 2 Functions of the fair balance principle

The fair balance principle performs at least two discrete functions.<sup>216</sup> The first is that this principle allows the ECHR to assess the proportionality of a respondent state's conduct.<sup>217</sup> An example of the ECHR analysing the proportionality of an interference

*European Convention on Human Rights: A Guide to the Implementation of the European Convention on Human Rights and its Protocols* (2007) 14.

<sup>212</sup> *Jahn and Others v Germany* 46720/99, 72203/01 and 72552/01 ECHR 2005-VI para 93.

<sup>213</sup> Para 93.

<sup>214</sup> Para 93.

<sup>215</sup> Para 93.

<sup>216</sup> Mowbray A "A study of the principle of fair balance in the jurisprudence of the European Court of Human Rights" (2010) 10 *Hum Rts LR* 289-317 at 308.

<sup>217</sup> Mowbray A "A study of the principle of fair balance in the jurisprudence of the European Court of Human Rights" (2010) 10 *Hum Rts LR* 289-317 at 308. See further Sermet L *The European*

with an applicant's Convention rights in order to determine if a fair balance had been struck is *Hutten-Czapska v Poland*.<sup>218</sup> In this case, Polish legislation limited the applicant's right to increase the rent payable by her tenants and her right to terminate tenancies. The government argued that these measures were necessary to deal with the housing shortage that occurred during the transition from a Communist system to a free market system. The ECHR held that

"[n]ot only must an interference with the right of property pursue, on the facts as well as in principle, a 'legitimate aim' in the 'general interest', but there must also be a reasonable relation of proportionality between the means employed and the aim sought to be realised by any measures applied by the [s]tate, including measures designed to control the use of the individual's property. That requirement is expressed by the notion of a 'fair balance' that must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.

The concern to achieve this balance is reflected in the structure of Article 1 of Protocol No. 1 as a whole. In each case involving an alleged violation of that Article the Court must therefore ascertain whether by reason of the State's interference the person concerned had to bear a disproportionate and excessive burden."<sup>219</sup>

Regarding whether the legislation in question had a legitimate aim, the ECHR held that, as a result of the social and economic circumstances of the case, the legislation did have a legitimate aim that was in the general interest.<sup>220</sup>

*Convention on Human Rights and Property Rights* (1998) 35; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 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) 31-33; Rook D *Property Law and Human Rights* (2001) 69; Van Rijn A "Right to the peaceful enjoyment of one's possessions (Article 1 of Protocol No 1)" in Van Dijk P, Van Hoof F, Van Rijn A & Zwaak L (eds) *Theory and Practice of the European Court of Human Rights* (2006) 863-893 at 881; 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) 14.

<sup>218</sup> *Hutten-Czapska v Poland* [GC] 35014/97 ECHR 2006-VIII.

<sup>219</sup> Para 167.

<sup>220</sup> Para 178.

While the legislation in question did have a legitimate aim in the general interest, the ECHR further held that

“It is true that, as stated in the Chamber judgment, the Polish State, which inherited from the communist regime the acute shortage of flats available for lease at an affordable level of rent, had to balance the exceptionally difficult and socially sensitive issues involved in reconciling the conflicting interests of landlords and tenants. It had, on the one hand, to secure the protection of the property rights of the former and, on the other, to respect the social rights of the latter, often vulnerable individuals. Nevertheless, the legitimate interests of the community in such situations call for a fair distribution of the social and financial burden involved in the transformation and reform of the country’s housing supply. This burden cannot, as in the present case, be placed on one particular social group, however important the interests of the other group or the community as a whole.

In the light of the foregoing, and having regard to the effects of the operation of the rent-control legislation during the whole period under consideration on the rights of the applicant and other persons in a similar situation, the Court considers that the Polish State has failed to strike the requisite fair balance between the general interests of the community and the protection of the right of property.

There has accordingly been a violation of Article 1 of Protocol No. 1.<sup>221</sup>

While the aim of the legislation in question was legitimate and in the general interest, the ECHR found that the legislation placed a disproportionate burden on one particular social group, in this case landlords.

The second function performed by the fair balance principle is that it provides a mechanism that enables the ECHR to determine if the respondent state is subject to an implied positive obligation arising under the Convention.<sup>222</sup> In these instances, the ECHR must reconcile the interests of the applicant with the interests of the community as submitted by the respondent state to determine if the fair balance

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<sup>221</sup> Para 225.

<sup>222</sup> Mowbray A “A study of the principle of fair balance in the jurisprudence of the European Court of Human Rights” (2010) 10 *Hum Rts LR* 289-317 at 310.

principle requires the respondent state to act positively to fulfill the relevant Convention right of the applicant.<sup>223</sup>

### 3 4 3 The margin of appreciation

In deciding cases of violations of rights in the Convention, the ECHR has developed the notion of a margin of appreciation. This practice takes the form of deference to the member states regarding the policies they choose to implement and the manner in which they implement them.<sup>224</sup> This notion was first developed in the judgment of *Handyside v United Kingdom*,<sup>225</sup> where it was held that state authorities are in principle in a better position than the international judge to give an exact opinion on the prevalent “moral” requirements as well as on the necessity of a restriction or penalty intended to meet them.<sup>226</sup> This statement was subsequently confirmed in

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<sup>223</sup> Mowbray A “A study of the principle of fair balance in the jurisprudence of the European Court of Human Rights” (2010) 10 *Hum Rts LR* 289-317 at 311.

<sup>224</sup> Allen T *Property and the Human Rights Act 1998* (2005) 125. See further Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 106; 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) 32-33; De la Rasilla del Moral I “The increasingly marginal appreciation of the margin-of-appreciation doctrine” (2006) 7 *German LJ* 611-623 at 613-619; Van Rijn A “Right to the peaceful enjoyment of one’s possessions (Article 1 of Protocol No 1)” in Van Dijk P, Van Hoof F, Van Rijn A & Zwaak L (eds) *Theory and Practice of the European Court of Human Rights* (2006) 863-893 at 865; 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) 14; Svetlana S *Protection of Property Rights under the European Convention on Human Rights and the Russian National Legislation* (LLM thesis Lund University 2008) 30-32; Greer S “The interpretation of the European Convention on Human Rights: Universal principle or margin of appreciation?” (2010) 3 *UCL Hum Rts Rev* 1-14 at 2-5; Kratochvíl J “The inflation of the margin of appreciation by the European Court of Human Rights” (2011) 29 *Neth Q Hum Rts* 324-357 at 327.

<sup>225</sup> *Handyside v United Kingdom* (1976) 1 EHRR 737.

<sup>226</sup> Para 48.

*Ireland v United Kingdom*,<sup>227</sup> where the ECHR stated that “by reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it”.<sup>228</sup> The margin of appreciation was again confirmed and applied in *James v United Kingdom*,<sup>229</sup> where it was held that the national authorities were better placed than the international judge to appreciate what is in the public interest and that it is for the national authorities to make the initial assessment both of a problem of public concern warranting measures of deprivation of property and the remedial action to be taken.<sup>230</sup> Therefore, when dealing with deprivations of possessions in terms of the second rule, the ECHR will defer to the national authorities and allow them to make the initial assessment as to what is in the public interest and whether the measure that causes the deprivation of possessions is in line with that public interest. The ECHR will respect the determination made by the national authorities, unless it finds the determination to be manifestly without reasonable foundation.<sup>231</sup> This means that the ECHR will not substitute its own determination of what is in the general interest for that of the national authorities, but it will review the contested measures in question to make

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<sup>227</sup> *Ireland v United Kingdom* 5310/71 18 January 1978.

<sup>228</sup> Para 201. See further Kratochvíl J “The inflation of the margin of appreciation by the European Court of Human Rights” (2011) 29 *Neth Q Hum Rts* 324-357 at 326.

<sup>229</sup> *James v United Kingdom* (1986) 8 EHRR 123.

<sup>230</sup> Para 46.

<sup>231</sup> Para 46.

sure that they are lawful, in the general interest and strike a fair balance of proportionality between the public interest and the private interest involved.<sup>232</sup>

The notion of a margin of appreciation to the member states' designation of what is in the public interest is also applied in cases concerning the third rule of Article 1, namely controls of the use of property, in the same manner as it applies to the requirement of the general or public interest requirement set in the second rule of Article 1.<sup>233</sup> As in cases under the second rule, the member states make the initial determination of what is in the general interest, but the ECHR will inquire whether the limitation or interference is lawful, in the general interest and whether a fair balance of proportionality is struck between the public interest served and the private interest affected.<sup>234</sup>

According to commentators, the margin of appreciation doctrine has two primary uses: firstly, it is used as a doctrine of deference that ensures that the ECHR will not usurp the power of the member states to decide on how to apply the rights in

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<sup>232</sup> Para 46. See further *Sporrong and Lönnroth v Sweden* (1983) 5 EHRR 35; *Holy Monasteries v Greece* (1995) ECHR Series A No 301A; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 113; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 488-489.

<sup>233</sup> Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 106-107. See further 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) 26-31; Rook D *Property Law and Human Rights* (2001) 32-33; Allen T *Property and the Human Rights Act 1998* (2005) 125; Van Rijn A "Right to the peaceful enjoyment of one's possessions (Article 1 of Protocol No 1)" in Van Dijk P, Van Hoof F, Van Rijn A & Zwaak L (eds) *Theory and Practice of the European Court of Human Rights* (2006) 863-893 at 887-888; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 226-227.

<sup>234</sup> See *X v Austria* (1979) 17 DR 27; *Sporrong and Lönnroth v Sweden* (1983) 5 EHRR 35; *James v United Kingdom* (1986) 8 EHRR 123; *Mellacher v Austria* (1990) 12 EHRR 391; *Tre Traktörer AB v Sweden* (1989) ECHR Series A vol 159; Van der Walt AJ *Constitutional Property Clauses: A Comparative Analysis* (1999) 106-107; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 226-227.

the Convention to concrete factual circumstances; and secondly, it can be used to affect the definitions of the rights themselves and thereby affect the extent of the obligations placed on member states by the Convention.<sup>235</sup>

Allen explains that the degree of deference depends on a number of factors. The first question is whether the decision is one made by the parliament of a member state or one made by administrative authorities. Greater deference will be shown to the decisions of parliament than to those made by administrative authorities. Secondly, greater deference is required when the Convention requires a balance to be struck, as it does with Article 1. The fact that Article 1 is so heavily qualified means that greater deference should be shown in property disputes than when dealing with complaints grounded in other, less qualified articles. Thirdly, the nature of the subject matter of the dispute is an important factor in deciding which degree of deference is appropriate. In *International Transport Roth GmbH v Secretary of State for the Home Department*,<sup>236</sup> it was held that “greater or lesser deference will be due according to whether the subject matter lies more readily within the actual or potential expertise of the democratic powers of the courts”.<sup>237</sup>

Other factors that have been considered by the ECHR when determining the degree of deference include the legitimate aims pursued by the restriction on the right or rights in question or non-compliance with a positive object to secure a right or rights; whether an emergency situation is present; the seriousness of the interference as a consideration for narrowing the deference allowed and the

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<sup>235</sup> Kratochvíl J “The inflation of the margin of appreciation by the European Court of Human Rights” (2011) 29 *Neth Q Hum Rts* 324-357 at 328; Letsas G “Two concepts of the margin of appreciation” (2006) 26 *Oxford J Legal Stud* 705-732 at 706; Greer S *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (2000) 5.

<sup>236</sup> *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728.

<sup>237</sup> Para 87.

“European consensus” standard.<sup>238</sup> The “European consensus” standard is a “generic label used to describe the Court’s inquiry into the existence or non-existence of a common ground, mostly in the law and practice of the member States of the Council of Europe [...].”<sup>239</sup>

### 3 4 4 Conclusion

The ECHR has held that the first sentence of Article 1 not only sets out the right to property but also implicitly incorporates a fair balance (proportionality) test and that this fair balance test applies to all interferences with possessions. Any interference with possessions must strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights. In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved by the interference. The ECHR has developed a notion of a margin of appreciation, which takes the form of deference to the member states regarding the policies they choose to implement and the manner in which they are implemented. When dealing with deprivations of possessions in terms of the second rule, the ECHR will defer to the national authorities and allow them to make the initial assessment as to what is

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<sup>238</sup> De la Rasilla del Moral I “The increasingly marginal appreciation of the margin-of-appreciation doctrine” (2006) 7 *German LJ* 611-623 at 615-619. See further Rook D *Property Law and Human Rights* (2001) 35-36; Allen T *Property and the Human Rights Act 1998* (2005) 128-130; Van Rijn A “Right to the peaceful enjoyment of one’s possessions (Article 1 of Protocol No 1)” in Van Dijk P, Van Hoof F, Van Rijn A & Zwaak L (eds) *Theory and Practice of the European Court of Human Rights* (2006) 863-893 at 888-889; 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) 14-15.

<sup>239</sup> De la Rasilla del Moral I “The increasingly marginal appreciation of the margin-of-appreciation doctrine” (2006) 7 *German LJ* 611-623 at 617.

in the public interest and whether the measure that causes the deprivation of possessions is in line with that public interest. The ECHR will respect the determination made by the national authorities, unless it finds the determination to be manifestly without reasonable foundation. The margin of appreciation operates in the same way regarding controls on the use of property under the third rule.

### **3 5 Conclusion**

The ECHR has a special relationship with the member states of the European Union, especially the Central Eastern European members. It acts as a court of appeal regarding matters concerning the rights provided for in the Convention. Countries who want to become members of the European Union must ratify the Convention and recognise the ECHR's authority as protector of these rights. The Convention was not intended to supplant the existing law of countries that seek membership in the European Union. Therefore, the legislature of a country must amend or add to the existing law to safeguard these rights by providing mechanisms for the protection of these rights. The existing law of Central Eastern European countries that seek to become members of the European Union in the aftermath of the fall of Communism may be influenced by the principles and case law of the ECHR.

In order to deal with potentially conflicting existing law of the member states of the European Union, particularly in the case of property disputes, the ECHR has developed the autonomous meaning doctrine regarding the definition of "possessions" for the purposes of Article 1. This doctrine was initially developed with a focus on Article 6 but was later used in property disputes. This doctrine allows the ECHR to determine for itself whether a particular interest constitutes a possession

for the purposes of Article 1 without being restricted to the relevant domestic law. This prevents the member states from legislating that a particular interest is not property so as to frustrate or prevent potential applicants' claims from being brought before the ECHR. If the interest is regarded as property in the relevant domestic law, it will be regarded as a possession for the purpose of Article 1. If the interest is not recognised as property in the relevant domestic law, the ECHR will apply the autonomous meaning doctrine to determine if the interest in question is a possession for the purposes of Article 1 or not.

The ECHR has also developed a distinction between deprivation (regulation) and expropriation of property. In this regard, the ECHR has interpreted the term "deprived" in Article 1 to mean expropriation of property. This expropriation must be in line with some public interest and subject to any conditions on expropriation in the domestic law of the member state as well as the principles of international law. In the third paragraph of Article 1, provision is made for the individual member states to control the use of property within their own jurisdictions. This provision allows the member states to control the use of property through any regulations that they deem necessary. A wide degree of deference is provided to the member states regarding the measures that they may implement for this purpose. However, this degree of deference is not unlimited. The ECHR will intervene when a measure implemented by a member state to control the use of property is manifestly unreasonable in the circumstances. The three-rule structure of Article 1 appears to indicate that the ECHR treats deprivation (expropriation) and regulation of property as two discrete categories that do not overlap. While both must comply with the principle of lawfulness, be in the public or general interest and comply with the principle of proportionality, each constitutes a unique interference with the right to the peaceful

enjoyment of possessions. In the context of deprivation (expropriation), the first rule of Article 1 does not explicitly state that compensation is required for deprivations to be valid, though the ECHR has stated that compensation is required for deprivations in order to maintain a fair balance.

As mentioned above, it is uncertain whether the ECHR recognises something like a notion of constructive expropriation. A small number of decisions appear to have created the space for something like constructive expropriation but the authority for doing so is not clear. The ECHR's inconsistency in classifying interferences under the three rules in Article 1 has led to decisions that appear to constitute a third category of interference with possessions. The interferences in this category are judged under the first rule of Article 1. If the ECHR awards compensation for interferences judged under the first rule, for example a monetary amount as just satisfaction under Article 50, then that compensation will not be compensation for expropriation. Rather, this compensation would resemble either a general award of constitutional damages or compensation in terms of the equalisation awards that are allowed in German law.

When there is an interference with a right in the Convention, the ECHR must determine whether a fair balance has been struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. Proportionality analysis has been incorporated into the fair balance inquiry and is described as playing a central role in the jurisprudence of the ECHR. An important aspect of the fair balance inquiry is the margin of appreciation afforded to member states. The ECHR will defer to the member states regarding the implementation of legislation and policy within their jurisdictions. The rationale for this level of deference is that the legislatures of the member states are

in the best position to legislate on matters in the jurisdiction than the international judge. This margin of appreciation further enforces the ECHR's supervisory role in that the ECHR cannot dictate to the legislatures of the member states how to protect property rights or other rights in their respective jurisdictions.

The ECHR is a supervisory body aimed at enforcing the protection of the rights in the Convention and to ensure that member states provide for this protection. While it cannot directly dictate to the member states what principles they should adopt and how they should do so, the ECHR can influence the existing law of the member states to bring it in line with the principles developed by the ECHR. This influence is most notable in member states such as Bosnia and Herzegovina, whose use of ECHR principles and case law is incredibly prolific and used to provide content to their right to property. Other Central Eastern European member states, such as the Russian Federation, make use of ECHR principles and case law to a more limited extent, while others, such as Hungary, do not use them at all. Nonetheless, the ECHR's doctrine could potentially influence the developmental direction that an emerging democracy's laws and policies take if it wishes to be a member of the European Union and to have access to the ECHR.

# Chapter 4

## Central Eastern European jurisdictions: Analysis of constitutional texts and case law

### 4 1 Introduction

“Constitutional law grows out of a nation’s history. It reflects the nation’s culture and its aspirations, its tragedies and its miseries.”<sup>1</sup>

The above quote rings true for most constitutional democracies, both old and new. It is especially significant in the context of the developing constitutional democracies of Central Eastern Europe. In the years since the fall of Communism in Central and Eastern Europe, many of the countries in this region have set out on a course of constitutional transformation, beginning with the creation of new constitutions.<sup>2</sup> The

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<sup>1</sup> Schwartz H “The bill of rights in America and Central East Europe” (1992) 15 *Harv J L & Pub Pol'y* 93-98 at 93. For further reading in this regard, see generally Ludwikowski R “Searching for a new constitutional model for East-Central Europe” (1991) 17 *Syracuse J Int'l L & Comm* 92-170; Preuss UK “The politics of constitution making: Transforming politics into constitutions” (1991) 13 *Law & Pol'y* 107-123; Klingsberg E “Judicial review and Hungary’s transition from communism to democracy: The Constitutional Court, the continuity of law and the redefinition of property rights” (1992) 41 *BYU LR* 41-144; Visegrády A “Transition to democracy in Central and Eastern Europe: Experiences of a model country – Hungary” (1992-1993) 1 *Wm & Mary Bill Rts J* 245-265; Yee S “The new constitution of Bosnia & Herzegovina” (1996) 7 *Eur J Int'l L* 176-192; Sajó A “Constitution without the constitutional moment: A view from the new member states” (2005) 3 *Int'l J Const L* 243-261; Lach K & Sadurski W “Constitutional courts of Central and Eastern Europe: Between adolescence and maturity” (2008) 3 *J Comp L* 212-233.

<sup>2</sup> Schweisfurth T & Alleweldt A “New constitutional structures in Central and Eastern Europe” (1998) 24 *Rev Cent & E Eur L* 289-328 at 290. See further Ludwikowski R “Searching for a new constitutional model for East-Central Europe” (1991) 17 *Syracuse J Int'l L & Comm* 92-170 at 92; Klingsberg E “Judicial review and Hungary’s transition from communism to democracy: The Constitutional Court, the continuity of law and the redefinition of property rights” (1992) 41 *BYU LR* 41-144 at 43-47; Schwartz H “The bill of rights in America and Central East Europe” (1992) 15 *Harv J L & Pub Pol'y* 93-98 at 95-96; Schwartz H *The Struggle for Constitutional Justice in Post-Communist Europe* (2002) 1-6; Karadjova M “Property restitution in Eastern Europe: Domestic and international

process of reconstructing constitutions yielded the advantages of allowing the people and politicians of the Central Eastern European countries to get accustomed to pluralistic structures and the time needed to construct new constitutions without being forced to continue living under the old socialist constitution or to live in a constitutional vacuum.<sup>3</sup> However, the negative effect of the short time that was available to construct new constitutions were revisions that were halfhearted and which led to inconsistencies and even contradictions in some cases.<sup>4</sup> Instead of revising the existing socialist constitution, some countries simply stopped applying the old constitutions.<sup>5</sup> For example, Romania and Lithuania replaced their socialist constitutions with interim constitutional laws and an interim basic law respectively, until these interim measures were replaced by full-fledged constitutions.<sup>6</sup>

In drafting their new constitutions, most Central Eastern European countries looked to examples and models both within the region and abroad. An advantage of looking beyond a country's own border is that the dissemination of constitutional experience makes it possible for well-established and tested constitutional principles

human rights law responses" (2004) 29 *Rev Cent & E Eur L* 325-363 at 326; Sajó A "Constitution without a constitutional moment: A view from the new member states" (2005) 3 *Int'l J Const L* 243-261 at 243-244; Lach K & Sadurski W "Constitutional courts of Central and Eastern Europe: Between adolescence and maturity" (2008) 3 *J Comp L* 212-233 at 213.

<sup>3</sup> Schweisfurth T & Alleweldt A "New constitutional structures in Central and Eastern Europe" (1998) 24 *Rev Cent & E Eur L* 289-328 at 290.

<sup>4</sup> Schweisfurth T & Alleweldt A "New constitutional structures in Central and Eastern Europe" (1998) 24 *Rev Cent & E Eur L* 289-328 at 291. Schweisfurth and Alleweldt use Russia as an example, specifically where the new separation of powers principle collided with the principle that powers are consolidated in the hands of parliament. See further Sajó A "Constitution without a constitutional moment: A view from the new member states" (2005) 3 *Int'l J Const L* 243-261 at 247.

<sup>5</sup> Schweisfurth T & Alleweldt A "New constitutional structures in Central and Eastern Europe" (1998) 24 *Rev Cent & E Eur L* 289-328 at 292.

<sup>6</sup> Schweisfurth T & Alleweldt A "New constitutional structures in Central and Eastern Europe" (1998) 24 *Rev Cent & E Eur L* 289-328 at 292.

to be adopted quickly.<sup>7</sup> The drafting of the sections dealing with human rights was heavily influenced by the conditions and negotiations regarding the Council of Europe's procedure for admission.<sup>8</sup> Membership of the European Union, specifically the influence that such membership has on the development of constitutional law in Central Eastern European countries, is an important aspect to consider. Sajó argues that membership of the European Union increases constitutional pre-commitment at the national level, since many constitutional elements that exist in the domestic constitution are now beyond the reach of national majorities and European institutions that are independent of national politics protect many constitutional elements as well.<sup>9</sup> Most of the constitutions that have emerged from the Central Eastern European jurisdictions contain bills of rights, either in the constitution itself<sup>10</sup> or in a separate document.<sup>11</sup> A number of these constitutions also contain provisions that entrench which type of economy the country will have. For example, Article 11 of the Constitution of the Republic of Albania<sup>12</sup> states that Albania's economic system

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<sup>7</sup> Ludwikowski R "Searching for a new constitutional model for East-Central Europe" (1991) 17 *Syracuse J Int'l L & Comm* 92-170 at 92. See further Lach K & Sadurski W "Constitutional courts of Central and Eastern Europe: Between adolescence and maturity" (2008) 3 *J Comp L* 212-233 at 213-216; Schwartz H "The bill of rights in America and Central East Europe" (1992) 15 *Harv J L & Pub Pol'y* 93-98 at 93-94; Schweißfurth T & Alleweldt A "New constitutional structures in Central and Eastern Europe" (1998) 24 *Rev Cent & E Eur L* 289-328 at 294.

<sup>8</sup> Schweißfurth T & Alleweldt A "New constitutional structures in Central and Eastern Europe" (1998) 24 *Rev Cent & E Eur L* 289-328 at 294. See further Lach K & Sadurski W "Constitutional courts of Central and Eastern Europe: Between adolescence and maturity" (2008) 3 *J Comp L* 212-233 at 215.

<sup>9</sup> Sajó A "Constitution without a constitutional moment: A view from the new member states" (2005) 3 *Int'l J Const L* 243-261 at 251-252.

<sup>10</sup> For example, Albania, Belarus, Bosnia and Herzegovina, Bulgaria, Croatia, Estonia, Hungary, Moldova, Poland and the Russian Federation.

<sup>11</sup> For example, the Czech Republic.

<sup>12</sup> Constitution of the Republic of Albania, 1998 (text approved by referendum on 22 November 1998 and promulgated on 28 November 1998; changes to articles 109/1 and 154/1, /2 made by law no 9675 of 13 January 2007; changes to articles 64, 65, 67, 68, 87, 88, 104, 105 and 149 and the repeal

is based on public and private ownership, a market economy as well as freedom of economic activity (Article 11(1)); Article 19(1) of the Constitution of the Republic of Bulgaria<sup>13</sup> states that the economy of Bulgaria shall be based on free economic initiative; Article M(1) of the Fundamental Law of Hungary<sup>14</sup> states that the economy of Hungary is based on “work that creates value and freedom of enterprise”; Article 9 of the Constitution of Moldova<sup>15</sup> states that “the market, free economic initiative and fair competition shall represent the main elements of the economy”. These provisions indicate a shift away from the socialist economic structure that these countries endured in favour of promoting economic growth. Another reason for entrenching free market economies, or economies with elements thereof, is that such changes are required by the European Union for a country to be considered for membership and the advantages that such membership entails.

After the fall of Communism in Central Eastern Europe, the need for constitutional review was obvious and apparent. As a result, constitutional courts soon became a permanent and uncontroversial element of the legal and political landscape of Central Eastern Europe.<sup>16</sup> These constitutional courts have been both

of Part Twelve made by law no 9904 of 21 April 2008; changes to articles 73, 126 and 137 made by law no 88/2012 of 18 September 2012).

<sup>13</sup> Constitution of the Republic of Bulgaria, 1991 (amended SG 85/26 Sep 2003, SG 18/25 Feb 2005, SG 27/31 Mar 2006, SG 78/26 Sep 2006 - Constitutional Court Judgment No 7/2006, SG 12/6 Feb 2007).

<sup>14</sup> Fundamental Law of Hungary (effective as of 1 April 2013).

<sup>15</sup> Constitution of the Republic of Moldova (adopted on 29 July 1994, amended and supplemented on 5 July 2000).

<sup>16</sup> Lach K & Sadurski W “Constitutional courts of Central and Eastern Europe: Between adolescence and maturity” (2008) 3 *J Comp L* 212-233 at 213. See further Ludwikowski R “Searching for a new constitutional model for East-Central Europe” (1991) 17 *Syracuse J Int'l L & Comm* 92-170 at 169-170; Schweisfurth T & Alleweldt A “New constitutional structures in Central and Eastern Europe” (1998) 24 *Rev Cent & E Eur L* 289-328 at 313-314.

present and effective in their interventions in the decisions of the executive and the legislature, deciding on the constitutionality of statutes concerning economic and social policy, past injustices, communist political crimes and public morality.<sup>17</sup> Schwartz explains that the emerging democracies in Central and Eastern Europe had the same civil law tradition as Western Europe and were very unfamiliar with the American system of judicial review, and therefore it was natural for these new democracies to opt for the European model practiced by the Western European constitutional courts.<sup>18</sup>

The focus of this chapter is the development of constitutional property law in Central Eastern Europe following the fall of Communism in the region. The aim of the investigation is to determine, as far as possible based on the sources available in English, whether the developments in Central Eastern European constitutional property law follow a particular approach generally and whether the development of constitutional property law in this region relating to the constitutional definition of property, the distinction between deprivation and expropriation of property and the application of the proportionality principle as a means of legitimising interferences with property resembles either the German or the US approach to these three issues.<sup>19</sup> It must be noted that this investigation is based on sources that are available in English, therefore it is likely that certain areas will perhaps be more

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<sup>17</sup> Lach K & Sadurski W "Constitutional courts of Central and Eastern Europe: Between adolescence and maturity" (2008) 3 *J Comp L* 212-233 at 213.

<sup>18</sup> Schwartz H *The Struggle for Constitutional Justice in Post-Communist Europe* (2002) 23.

<sup>19</sup> See chapter 2 above.

detailed than others and this will necessarily affect the generality of conclusions regarding the research questions investigated in this chapter.<sup>20</sup>

## 4 2 Property

### 4 2 1 Introduction

Given the recent history of the Central Eastern European jurisdictions regarding property rights violations, it is unsurprising that many new constitutions in this region protect property rights in some form or another. The constitutions of Albania,<sup>21</sup> Belarus,<sup>22</sup> Bosnia and Herzegovina,<sup>23</sup> Bulgaria,<sup>24</sup> Croatia,<sup>25</sup> the Czech Republic,<sup>26</sup> Estonia,<sup>27</sup> Hungary,<sup>28</sup> Moldova,<sup>29</sup> Poland<sup>30</sup> and the Russian Federation<sup>31</sup> have

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<sup>20</sup> Certain Central Eastern European jurisdictions, for example Estonia and the Czech Republic, are not discussed in relation to all of the themes investigated in this chapter. This is due to the inaccessibility of sources relating to these themes and this affects the detail of the discussions of the Central Eastern European jurisdictions and whether they can be discussed regarding a particular theme at all.

<sup>21</sup> Article 41(1) of the Constitution of the Republic of Albania, 1998 (text approved by referendum on 22 November 1998 and promulgated on 28 November 1998; changes to articles 109/1 and 154/1, /2 made by law no 9675 of 13 January 2007; changes to articles 64, 65, 67, 68, 87, 88, 104, 105 and 149 and the repeal of Part Twelve made by law no 9904 of 21 April 2008; changes to articles 73, 126 and 137 made by law no 88/2012 of 18 September 2012).

<sup>22</sup> Article 44 of the Constitution of the Republic of Belarus of 1994 (with alterations and amendments adopted at the republican referendums of November 24, 1996 and October 17, 2004).

<sup>23</sup> Article II (3)(k) of the Constitution of Bosnia and Herzegovina, 1995 (as amended in 2009).

<sup>24</sup> Article 17 of the Constitution of the Republic of Bulgaria, 1991 (amended SG 85/26 Sep 2003, SG 18/25 Feb 2005, SG 27/31 Mar 2006, SG 78/26 Sep 2006 - Constitutional Court Judgment No 7/2006, SG 12/6 Feb 2007).

<sup>25</sup> Article 48 of the Constitution of the Republic of Croatia, 6 July 2010.

<sup>26</sup> Article 11 of the Charter of Fundamental Rights and Basic Freedoms of 16 December 1992 (forming part of the Constitution of the Czech Republic of 16 December 1992).

<sup>27</sup> §32 of the Constitution of the Republic of Estonia, 3 July 1992.

<sup>28</sup> Article XIII of the Fundamental Law of Hungary (effective as of 1 April 2013).

clauses directed at protecting property rights, although the wording of these clauses varies. Some of the clauses state that the right to property is protected,<sup>32</sup> while others protect the right of possession or ownership of property.<sup>33</sup> While not much really turns on this difference in wording, what is important is that each of these constitutions makes a deliberate effort to promote and protect the private ownership of property. Furthermore, these clauses mostly take the form of positive guarantees of the right to property. Most place an obligation on the state to guarantee the right of private property. A further similarity between these property clauses is that none of them attempts to define property for the purposes of their respective constitutions or specify what the content of ownership is. This is perhaps the better route to take because formulating a strict definition of property or ownership may end up limiting the protection provided by the property clause in the future and may limit the development of the constitutional property law in the region. In what follows a brief overview is provided of the property provision in some of the Central Eastern European constitutions and the indications in their case law regarding the content and scope of constitutional property.

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<sup>29</sup> Article 46 of the Constitution of the Republic of Moldova (adopted on 29 July 1994, amended and supplemented on 5 July 2000).

<sup>30</sup> Article 21 of the Constitution of the Republic of Poland of 2<sup>nd</sup> April 1997.

<sup>31</sup> Article 35 of the Constitution of the Russian Federation (with the Amendments and Additions of 30 December 2008).

<sup>32</sup> For example, Albania, Belarus, Bosnia and Herzegovina, Bulgaria, Hungary and the Russian Federation.

<sup>33</sup> For example, Croatia, the Czech Republic, Moldova and Poland.

### a) Bosnia and Herzegovina

Article II (3)(k) of the Constitution of Bosnia and Herzegovina<sup>34</sup> states that “[a]ll persons within the territory of Bosnia and Herzegovina shall enjoy human rights and fundamental freedoms [...] including the right to property.” The Constitution says nothing about the substance or the limitations of the right to property and therefore the Constitutional Court of Bosnia and Herzegovina had to find guidelines for the interpretation of the provision elsewhere. The Constitutional Court refers to Article 1 of Protocol No 1 (Article 1 ECHR) to provide the necessary substance to the right to property provided by Article II (3)(k) and also to set out the limits of the protection that the right to property in Article II (3)(k) provides. The Constitutional Court has held that both Article II (3)(k) and Article 1 ECHR protect the right to property, but the protection of the right to property by Article II (3)(k) does not extend beyond the protection granted under Article 1 ECHR, thereby implying that the ambit of protection of property is limited by the interpretation of what constitutes property in terms of Article 1 ECHR.<sup>35</sup>

The Constitutional Court has stated that the right to property applies only to assets, either corporeal or incorporeal, to which a person is entitled and does not protect the right to assets to which the person is not already entitled.<sup>36</sup> The Constitutional Court has also held that the term “property” includes a wide range of property interests that represent an economic value<sup>37</sup> and shall be taken to include various acquired rights such as monetary claims and other rights of economic

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<sup>34</sup> Constitution of Bosnia and Herzegovina, 1995 (as amended in 2009).

<sup>35</sup> Case No U12/01 para 34.

<sup>36</sup> Case No AP – 292/06 para 45.

<sup>37</sup> Case No AP – 298/07 para 28; Case No AP – 2157/08 para 42; Case No AP – 1908/06 para 30.

value.<sup>38</sup> According to the Constitutional Court, the notion of “property” should not be interpreted too restrictively but ought to be seen as having an autonomous meaning, so that it may be sufficient to show that the established economic interest exists in order to ascertain that it establishes the protected right to property.<sup>39</sup>

A recent decision of the Constitutional Court<sup>40</sup> shows how the right to property protected by Article II (3)(k) and Article 1 ECHR is only applicable in respect of property to which the party claiming to enforce the right is already entitled. This case turned on whether the contract purporting to transfer ownership in the disputed real property had been entered into voluntarily as an expression of the free will of the plaintiff in the initial court action. The lower courts concluded that, based on the circumstances, the plaintiff had indeed acted voluntarily and of his own free will in entering into the contract with the appellant and that the contract was not the product of coercion, threat or duress within the meaning of Article 21(a) of the Law Amending the Law on the Transfer of Real Estate.<sup>41</sup> Article 21(a) states that unilateral expressions of will or other legal transactions entered into under duress, deceit or force by which the right of ownership is transferred to another person or persons by the owner of the real property or those having the right to dispose of the real property shall be null and void and shall not represent the basis for the acquisition of the right of ownership of the real estate in question. Furthermore, any registration of ownership in real property registers on the basis of a unilateral expression of will or other legal transaction referred to above shall be null and void and have no legal effect.

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<sup>38</sup> Case No U12/01 para 28.

<sup>39</sup> Case No AP – 1908/06 para 30.

<sup>40</sup> Case No AP – 292/06.

<sup>41</sup> *Official Gazette of SRBiH* Nos 21/92, 3/93 and 18/94.

The Supreme Court found that, under the facts established by the lower courts, at the time the contract was entered into a state of war was prevailing in the region where the real property was situated and that the plaintiff's decision to sell the real property and leave the region was influenced by war circumstances, the presence of armed forces and anonymous threatening phone calls the plaintiff had received. Therefore, the court held that the lower courts were incorrect in finding that the plaintiff had entered into the contract as an expression of his own free will and not as a result of coercion, threat or duress within the meaning of Article 21(a).<sup>42</sup> The Supreme Court further held that the lower courts had failed to take into account the fact that the will expressed at the time of the conclusion of the contract may have been brought into question if it occurred in an urgent situation or while the plaintiff was under substantial pressure or in serious danger. Consequently, the Supreme Court found that such circumstances must be taken into account when determining whether the plaintiff might be deemed to have voluntarily concluded the contract and in determining whether or not the plaintiff validly transferred his right to the other person.<sup>43</sup> The Supreme Court concluded that based on the prevailing war circumstances, the presence of armed forces and the threatening anonymous phone calls and the incredibly low price paid for the real property in question, it was necessary to apply Article 21(a) and declare that the contract for the sale of the property was null and void.<sup>44</sup>

The result was that the appellant was no longer entitled to the real property, because the transfer of the right of ownership and the registration of the appellant as co-owner of the real property in question were invalid for being in conflict with Article

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<sup>42</sup> Case No AP – 292/06 para 11.

<sup>43</sup> Case No AP – 292/06 para 11.

<sup>44</sup> Para 12.

21(a). In determining whether the appellant's right to property had been infringed by the Supreme Court's ordering of the appellant to return the real property to the plaintiff, the Constitutional Court adopted the reasoning of the Supreme Court regarding the status of the appellant's right to the real property in question, namely that the appellant had no such right as a matter of law. The Constitutional Court reiterated that the right to property protected by Article II (3)(k) of the Constitution and Article 1 ECHR only applies in respect to property to which the party claiming infringement of the right is entitled. The Constitutional Court concluded that the Supreme Court's order required the appellant to return the property to the plaintiff and consequently the appellant had no right to the property and thus was not entitled to it. Therefore, the appellant could not successfully argue that his right to the property had been violated by the Supreme Court's order requiring him to return the property to the plaintiff because the appellant had no right to the property as a matter of law.<sup>45</sup>

In another decision<sup>46</sup> concerning the term "property" in Article II (3)(k), the appellants filed a request with the Town Planning Service for the cessation of originally socially owned, and subsequently state-owned, construction land that had not been used for its intended purposes. The appellants pointed out in their request that they were registered as users of a one-third portion of the land. They proposed that the land in question should cease to be socially owned property and that they, the appellants, should be *ex officio* registered as co-owners of the land. The Town Planning Service dismissed the request.<sup>47</sup> In their appeal against the decisions

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<sup>45</sup> Para 45.

<sup>46</sup> Case No AP – 298/07.

<sup>47</sup> Para 6-7.

associated with the dismissal the appellants alleged a violation of the right to property in Article II (3)(k) of the Constitution and Article 1 ECHR.<sup>48</sup>

The Constitutional Court held that where there is an allegation that the right to property has been violated, the Court must first establish whether Article II (3)(k) and Article 1 ECHR safeguard the property concerned.<sup>49</sup> In this respect the Court emphasised that the word “property” includes a wide range of property interests that represent an economic value.<sup>50</sup> The Court concluded that the appellants had the right to use the construction land in question and that this right constituted an economic value representing “property” of the appellants within the meaning of Article 1 ECHR and therefore Article 1 ECHR was applicable to the matter.<sup>51</sup> Judging by the approach followed by the Constitutional Court, namely that both Article II (3)(k) of the Constitution and Article 1 ECHR apply to property cases, it can be inferred that a finding that Article 1 ECHR is applicable to a particular matter means that Article II (3)(k) is also applicable.

The Constitutional Court applied the principles regarding the protection of property formulated by the European Court of Human Rights (ECHR) in deciding whether a particular interest is indeed “property” or a “possession” so as to qualify for protection under either Article II (3)(k) or Article 1 ECHR. Therefore, it seems as though Article 1 ECHR is applied together with Article II (3)(k) and provides substance and direction in adjudicating disputes regarding the meaning of property under the Constitution. It also appears from the case law that if a particular interest could be characterised as a possession for the purposes of Article 1 ECHR, it is

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<sup>48</sup> Para 11.

<sup>49</sup> Para 28.

<sup>50</sup> Para 28.

<sup>51</sup> Para 28.

likely that the Constitutional Court will conclude that the interest would constitute property under Article II (3)(k) as well.

In another case that illustrates this approach, a court ordered an insurance company to pay the appellant compensation for non-pecuniary damage, including the legally prescribed default interest accrued thereon until payment had been made in full.<sup>52</sup> The appellant later instituted enforcement proceedings against the insurance company and the court decided to allow enforcement against the insurance company.<sup>53</sup>

The Constitutional Court held that the issues in this case were the lawfulness and constitutionality of a final ruling in the enforcement proceedings concerning the collection of damage compensation awarded in the legally binding decision relating to an insurance case. It was held that there were two questions that had to be answered with reference to the proceedings, the first of which is important for the purposes of this chapter: in addition to the principal debt amount, the question is whether the legally prescribed default interest constitutes property within the meaning of Article II (3)(k) and Article 1 ECHR.<sup>54</sup>

In this regard, the Constitutional Court concluded that the appellant had legitimate expectations (both at the time of the accident and at the adoption of the legally binding judgment) to receive the default interest due to the late payments and therefore these expectations to receive the legally prescribed default interest from the insurance company constituted a claim amounting to property under both Article

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<sup>52</sup> Case No AP – 1311/06 para 6.

<sup>53</sup> Para 7.

<sup>54</sup> Para 22.

II (3)(k) and Article 1 ECHR.<sup>55</sup> The Constitutional Court made use of the “legitimate expectation” doctrine formulated by the ECHR (for determining whether a claim constitutes a possession) in order to determine whether the claim for the default interest would constitute property for the purposes of both Article II (3)(k) and Article 1 ECHR. The Constitutional Court applied the principles formulated by the ECHR as a matter of routine, which makes sense because Bosnia and Herzegovina is a signatory to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

From the case law of the Constitutional Court of Bosnia and Herzegovina, it is clear that when the court is faced with a matter concerning the right to property provided for in Article II (3)(k) of the Constitution, the Constitutional Court will apply both Article II (3)(k) and Article 1 ECHR. The latter is used to provide substance to the right to property provided for in the former and the Constitutional Court applies the principles formulated by the ECHR routinely in order to adjudicate a matter involving property. Accordingly, if an interest is found to constitute a possession under Article 1 ECHR, the Constitutional Court will most likely find that the interest is also property for the purposes of Article II (3)(k).

## b) Croatia

Article 48 of the Constitution of the Republic of Croatia<sup>56</sup> states that the right of ownership shall be guaranteed and that ownership implies obligations, including that the holders of the right of ownership and its users shall contribute to the general welfare. The Constitutional Court of Croatia has held that ownership within the

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<sup>55</sup> Para 23.

<sup>56</sup> Constitution of the Republic of Croatia, 6 July 2010.

meaning of Article 48 “includes, in principle, all proprietary rights, including economic interests, which, by the nature of things, pertain to property but also the legitimate expectations of the parties that their property rights, founded on legal acts, will be respected and their exercise protected”.<sup>57</sup>

### c) Moldova

Article 46 of the Constitution of the Republic of Moldova<sup>58</sup> states that the right to possess private property shall be guaranteed (Article 46(1)) and that no one may be expropriated unless it is for a matter of public utility, established under law and against the payment of fair and previously determined compensation (Article 46(2)). The Constitutional Court of Moldova also applies the principles and case law of the ECHR regarding Article 1 of Protocol No 1 (Article 1 ECHR) when determining whether a particular interest is protectable as private property under Article 46(1). The Constitutional Court has stated that a property right guaranteed by Article 46 is “[...] in its substance, a person’s right to respect for his or her movable and immovable property”.<sup>59</sup> This appears similar to the positive guarantee in the first sentence of Article 1 ECHR, which states that everyone is entitled to the peaceful enjoyment of his or her possessions.<sup>60</sup>

Similar to the Constitutional Court of Bosnia and Herzegovina, the Constitutional Court of Moldova refers to ECHR’s principles and case law in deciding

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<sup>57</sup> Decision U-III-3871/2009.

<sup>58</sup> Constitution of the Republic of Moldova (adopted on 29 July 1994, amended and supplemented on 5 July 2000).

<sup>59</sup> Judgment No 15 of 13.09.2011 para 40.

<sup>60</sup> See 3.2.2 above.

constitutional property disputes.<sup>61</sup> In a case regarding social rights, the complainants argued that newly implemented legislation restricting the social rights, particularly the pension rights, of public sector employees caused prejudice to the right of ownership.<sup>62</sup> The Constitutional Court stated that, in its assessment of the conformity of the legislation with the guarantee of ownership laid down in Article 46, it would take into account the provisions of the Convention and the case law of the ECHR.<sup>63</sup> The Constitutional Court referred to its own earlier case law<sup>64</sup> in which the status of social rights in the case law of the ECHR was canvassed and concluded that a social right could be the object of constitutional protection guaranteed by Article 46 and Article 1 ECHR only in cases when the social right is acquired and has an economic value.<sup>65</sup> Therefore, the Constitutional Court held that the right to a pension in payment would be protected under Article 1 ECHR as long as it is an acquired right with economic value.<sup>66</sup> This case shows that the Constitutional Court makes ready use of the ECHR's case law regarding what constitutes a possession for the purposes of Article 1 ECHR to inform and provide content to the constitutional definition of property for the purposes of Article 46 of the Constitution.

Another interesting case<sup>67</sup> concerning the meaning of property in terms of Article 46 of the Constitution dealt with legislation that required persons to graduate from the National Institute of Justice in order to run for a position as a judge or a prosecutor. The complainant in this case argued that the limitation of the right of

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<sup>61</sup> See, for example, Judgment No 15 of 13.09.2011; Judgment No 27 of 20.12.2011; Judgment No 5 of 10.04.2012.

<sup>62</sup> Judgment No 27 of 20.12.2011 para 22.

<sup>63</sup> Para 77. See further 3 2 above.

<sup>64</sup> Judgment No 19 of 19.10.2011.

<sup>65</sup> Judgment No 27 of 20.12.2011 para 79.

<sup>66</sup> Para 79.

<sup>67</sup> Judgment No 15 of 13.09.2011.

graduates from the National Institute of Justice to run for the position of judge or prosecutor to a period of three years, commencing from the date of graduation, is incompatible with a number of constitutional provisions including Article 46. The Constitutional Court first investigated whether the diploma received by the graduates of the National Institute of Justice constituted an “asset” for the purposes of Article 46 and Article 1 ECHR.<sup>68</sup> The Court noted that the ECHR has consistently held that a licence to conduct an activity is an asset within the meaning of Article 1 ECHR, including the licence of a lawyer.<sup>69</sup> Applying the reasoning of the ECHR, the Constitutional Court concluded that the expectation of obtaining a paid job as a result of holding a diploma from the National Institute of Justice was a property right in terms of Article 46 and Article 1 ECHR.<sup>70</sup> Furthermore, the Constitutional Court held that graduates had a legitimate expectation to access the office of a judge or prosecutor because the law stated that such a right existed and that this legitimate expectation involved a material interest, thus making it an asset in the sense of the rights protected by Article 46 and Article 1 ECHR.<sup>71</sup>

From the few available English-translated cases, it appears that the Constitutional Court’s approach to the case law of the ECHR is similar to that of the Constitutional Court of Bosnia and Herzegovina in that both of these constitutional courts consistently apply ECHR principles and case law as a means of providing content to the concept of constitutional property.

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<sup>68</sup> Paras 44-52.

<sup>69</sup> Paras 46-47.

<sup>70</sup> Para 48-50.

<sup>71</sup> Para 51.

d) The Russian Federation

Article 35 of the Constitution of the Russian Federation<sup>72</sup> provides that, firstly, the right to property shall be protected by law (Section 1); secondly, everyone shall have the right to have property and to possess, use and dispose of property both personally and jointly with other people (Section 2); and thirdly, no one may be deprived of property other than by a court decision and forced confiscation of property for state needs may be carried out only with the condition of preliminary and complete compensation (Section 3).

The Constitutional Court of the Russian Federation (the Constitutional Court) refers to Article 1 of Protocol No 1 (Article 1 ECHR) but such references are not as prolific as that of the Constitutional Court of Bosnia and Herzegovina. The Constitutional Court makes use of its own constitutional provisions to resolve property disputes and while there are references to Article 1 ECHR in case law, it is not automatically applied by the Court in conjunction with Article 35. Rather, Article 35 and other relevant provisions of the Russian Constitution are applied first and while Article 1 ECHR might sometimes be referred to in order to provide clarity on a particular point, its application is not given as much priority as it is by the Constitutional Court of Bosnia and Herzegovina.

In a decision<sup>73</sup> regarding the meaning of “property” in Article 35, the Constitutional Court reiterated that, pursuant to the Constitution, everyone has the

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<sup>72</sup> Constitution of the Russian Federation (with the Amendments and Additions of 30 December 2008). See further Svetlana S *Protection of Property Rights under the European Convention on Human Rights and the Russian National Legislation* (LLM thesis Lund University 2008) 39-41.

<sup>73</sup> Judgment of 6 June 2000 No 9-II. See further Svetlana S *Protection of Property Rights under the European Convention on Human Rights and the Russian National Legislation* (LLM thesis Lund University 2008) 41-46.

right to have property and to possess, use and dispose of property either individually or jointly with others as encapsulated in Article 35(2).<sup>74</sup> The Constitutional Court held further that within the meaning of Article 35 the term “property” comprises any possessions related to the exercise of the right of private or other forms of property, including proprietary rights, in particular the rights to possess, use and dispose of property, if these rights were lawfully acquired by the owner. The Constitutional Court further stated that the rights to possess, use and dispose of property, including determination of the grounds and the procedure for its creation, alteration and termination, as well as the scope of its protection and legitimate restrictions, shall be regulated by law as it follows from Articles 71(c) and 76(1) of the Constitution.<sup>75</sup>

In another decision,<sup>76</sup> the Constitutional Court dealt with a case concerning the review of the constitutionality of certain provisions of Section 4, Article 104 of the Federal Law “On Insolvency (Bankruptcy”).<sup>77</sup> Article 104 regulates the legal regime of a debtor’s possessions that shall not be included in the bankruptcy estate and provides, *inter alia*, that social housing funds, pre-school institutions and municipal service infrastructure, which are vitally important for the region, shall be transferred to the municipality with no additional conditions. The complainant argued that taking property out of the bankrupt estate and transferring possession thereof to the municipality in effect hinders complete satisfaction of the creditor’s claims, depriving him of his entitlements, in violation of Article 35.<sup>78</sup> In determining whether Article 35 was applicable in the matter, the Constitutional Court stated that the term “property”

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<sup>74</sup> Judgment of 6 June 2000 No 9-II at 3.

<sup>75</sup> Judgment of 6 June 2000 No 9-II at 3.

<sup>76</sup> Judgment of 16 May 2000 No 8-II.

<sup>77</sup> Federal Law “On Insolvency (Bankruptcy)” of 8 January 1998.

<sup>78</sup> Judgment of 16 May 2000 No 8-II at 2.

in Article 35 includes particular real rights (rights *in rem*) and enforceable claims, including those belonging to creditors. Therefore enforceable creditors' claims and lawful interests in insolvency proceedings are subject to the protection of Article 35.<sup>79</sup>

The right to property provided for in Article 35 of the Constitution is far more detailed than that of Article II (3)(k) of the Constitution of Bosnia and Herzegovina. This is perhaps the reason why the Russian Constitutional Court finds it less necessary to rely on interpretations of, and the conclusions reached, regarding the right to property by the ECHR. While the Constitutional Courts of Bosnia and Herzegovina and Moldova apply their own constitutional property clauses and Article 1 ECHR together, using the latter to provide substance to the former, the Constitutional Court of the Russian Federation applies Article 35 of its Constitution independently and makes use of Article 1 ECHR only where necessary to resolve a particular question but its application is not necessarily guaranteed.

#### e) Hungary

Section 1 of Article XIII of the Fundamental Law of Hungary<sup>80</sup> states that everyone shall have the right to property and succession and that property shall entail social responsibility. Section 2 states that property may be expropriated exceptionally, in the public interest and in cases and ways provided for by an Act, subject to full, unconditional and immediate compensation. While the Constitutional Courts of Bosnia and Herzegovina and (to a lesser extent) the Russian Federation refer to Article 1 of Protocol No 1 (Article 1 ECHR) and apply it, the Hungarian Constitutional Court (the Constitutional Court) prefers to apply its own constitutional decisions

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<sup>79</sup> At 3.

<sup>80</sup> Fundamental Law of Hungary (effective as of 1 April 2013).

regarding disputes involving property rather than relying on the principles of the ECHR. From the case law available in English, it appears that the Constitutional Court does not mention Article 1 ECHR at all when it adjudicates property disputes, instead choosing to rely solely on its own previous decisions that are relevant to the particular matter.

As the Fundamental Law only became effective as of April 2013, the case law dealing with property disputes prior to this date still refers to Article 13 of the Constitution of the Republic of Hungary. Article 13 is quite similar to that of Article XIII of the Fundamental Law, but Article XIII is more detailed regarding what the right to property entails, when expropriation is permitted and what compensation must be paid in the event of expropriation. Paragraph 1 of Article 13 simply states that the Republic of Hungary protects the right of property. In contrast, Section 1 of Article XIII states that everyone shall have the right to property and succession and that property shall entail social responsibility, thus providing more substance to the right to property. The Fundamental Law of 2013 repealed the Constitution of the Republic of Hungary because it states in Article R that the Fundamental Law shall be the foundation of the Hungarian legal system.<sup>81</sup>

There are as yet no translated decisions of the Constitutional Court involving Article XIII of the Fundamental Law, but there are translated decisions available involving Article 13 of the Constitution of the Republic of Hungary. These decisions are still relevant because the basic premise of these two articles is the same, and therefore the principles created by the case law under Article 13 may still be useful when adjudicating disputes under Article XIII, especially in terms of what may, or may not, be included in the right to property. In these decisions, where the Court

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<sup>81</sup> Article R(1) of the Fundamental Law of Hungary (effective as of 1 April 2013).

actually discusses the issue of an infringement of the right to property, the Court does not expressly state what it regards as property for the purposes of Article 13. This issue is often bypassed and the Court moves on to determining whether the infringement of the right to property was authorised and therefore constitutional. Therefore, the emphasis appears to be on protection against the limitation of the right rather than what forms of property the right applies to. The Constitutional Court has held that the right to property constitutes a fundamental right which is, however, not immune to restriction.<sup>82</sup>

It appears that the Constitutional Court adopts a broad view of what constitutes property for the purposes of Article 13, although the emphasis may be on protection against the limitation of the right to property rather than on what constitutes property. In a decision<sup>83</sup> regarding the right to property, the Constitutional Court has held that under Article 13(1) of the Constitution, the Republic of Hungary guarantees the right to property as a fundamental right and protects it accordingly. The Court reiterated that the right to property is given constitutional protection as a means of securing an economic basis for the autonomy of individuals.<sup>84</sup> The Court stated that the extent of the protection of the right to property depends on three factors.<sup>85</sup> Firstly, it depends on the restrictions applicable to the right to property under public and private law.

This factor is similar to the approach in German and US law. For example, in German and US law, the mere fact that an intangible interest has value does not automatically qualify it as property for constitutional purposes.<sup>86</sup> The meaning of

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<sup>82</sup> Decision 1/2004 (II. 12.) AB at 7.

<sup>83</sup> Decision 29/2006 (VI. 21.) AB.

<sup>84</sup> At 16.

<sup>85</sup> At 16.

<sup>86</sup> See 2 2 above.

possessions in Article 1 ECHR is not subject to restrictions imposed by public or private law.<sup>87</sup> The ECHR developed the autonomous meaning doctrine in order to prevent the interpretation of possessions being restricted to property rights existing under the private law of the member state in question.<sup>88</sup> This allows for Article 1 ECHR to be applied to interests that would ordinarily not be classified as property under private law.

Secondly, protection under Article 13(1) of the Hungarian Constitution depends on the subject, object and function of the property. Thirdly the protection depends on the nature of the restriction. The Court has held that Article 13(1) of the Constitution applies not only to the right to property but to other valuable rights as well. For instance, the application of Article 13(1) has been extended to protect entrepreneurial activities. When examining the rules governing the licence to pursue construction design activities, the Court established that the protection of the right to property was applicable to profitable entrepreneurial activities. In this case, the Court held that the purpose of the operation licence in question was related to the pursuit of medical activities as an enterprise and therefore the constitutional protection of the right to property was applicable to the operation licence as the licence constituted a valuable right.<sup>89</sup>

From the limited sources available, it appears that the Hungarian Constitutional Court focuses less on the issue of what constitutes “property” for the purpose of protection under the Constitution prior to its replacement by the Fundamental Law. The focus seems to fall on the protection against the limitation of the right to property

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<sup>87</sup> See 3.2 above.

<sup>88</sup> See 3.2 above.

<sup>89</sup> Decision 29/2006 (VI. 21.) AB at 15.

as a fundamental right and whether this right has been disproportionately restricted. This approach is not novel. It corresponds with the practice in German and US law and also relates to Theunis Roux's theory of a telescoping effect where other issues that might have been addressed in the property clause inquiry are drawn into the test for the arbitrariness of the limitation.<sup>90</sup>

#### 4 2 2 Conclusion

All of the Central Eastern European jurisdictions discussed in this chapter provide protection for property rights in their respective constitutions. While the wording of these provisions differs, what matters is the deliberate effort to promote and protect the private ownership of property. Similar to German and US law, the Central Eastern European jurisdictions recognise a wide concept of property for constitutional purposes and their constitutional property clauses do not attempt to exhaustively define what constitutes property for constitutional purposes.

### 4 3 Distinction between deprivation and expropriation

#### 4 3 1 Terminology

##### a) *Bosnia and Herzegovina*

Article II (3)(k) of the Constitution of Bosnia and Herzegovina<sup>91</sup> states that all persons within the territory of Bosnia and Herzegovina shall have the right to property. The Constitution itself does not provide any content to this right but the

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<sup>90</sup> See Roux T "Property" in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* vol 3 2<sup>nd</sup> ed (OS 2003) ch 46 2-5,9-11, 23-25.

<sup>91</sup> Constitution of Bosnia and Herzegovina, 1995 (as amended in 2009).

Constitutional Court makes use of Article 1 of Protocol No 1 (Article 1 ECHR) and the accompanying principles developed by the ECHR to provide the necessary content to the right to property in Article II (3)(k). This was observed in the context of determining what constitutes property for the purposes of Article II (3)(k), but case law indicates that this is also the case when dealing with interferences with property rights. When adjudicating matters of alleged interference with property the Constitutional Court both refers to and applies the three rules in Article 1 ECHR formulated by the ECHR.<sup>92</sup>

*b) Croatia*

Article 48 of the Constitution of the Republic of Croatia states that the right of ownership shall be guaranteed and that such ownership shall entail obligations. Article 50 states that in the interest of the Republic of Croatia, ownership may be restricted or rescinded by law, subject to indemnification equal to the market value of the pertinent property. Article 50 does not define what is meant by the terms “restricted” or “rescinded”. The restriction of ownership appears to entail the regulation of property and the rescinding of ownership the expropriation of property for a purpose that promotes the interests of the Republic of Croatia against indemnification in the sense of compensation.<sup>93</sup>

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<sup>92</sup> See for example Case No AP – 298/07; Case No AP – 619/08. See 3 1 above.

<sup>93</sup> Decision U-I-236/1996.

c) *Estonia*

§ 32(1) of the Constitution of the Republic of Estonia<sup>94</sup> states that property may be taken from an owner without consent, but only in the public interest, in cases and through procedures provided for by law, and for fair and immediate compensation. § 32(2) states that everyone has the right to freedom from interference in possessing or using their property or making dispositions regarding their property, though the law may limit this right. The Supreme Court of Estonia has held that a situation where a person's right to freely use his property is restricted amounts to an interference with the right of ownership guaranteed by § 32.<sup>95</sup> Interferences with the right of ownership are divided into two categories, namely expropriation of property without the consent of the owner (regulated under § 32(1)) and interferences regulated under the second sentence of § 32(2), dealing with the limitation of the right of ownership.<sup>96</sup>

d) *Moldova*

Article 46 of the Constitution of the Republic of Moldova guarantees the right to possess private property (Article 46(1)) and states that no one may be expropriated unless such expropriation is for a public utility, established under law and against the payment of fair and previously determined compensation (Article 46(2)). Article 46 does not specifically mention the regulation of property.

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<sup>94</sup> Constitution of the Republic of Estonia, 3 July 1992.

<sup>95</sup> Supreme Court judgment of 17 April 2012 in matter no 3-4-1-25-11 para 35.

<sup>96</sup> Para 35.

e) *The Russian Federation*

Article 35(3) of the Constitution of the Russian Federation<sup>97</sup> specifically refers to deprivation of property by stating that “[n]o one may be deprived of property other than by a court decision”. Deprivations of property can be divided into four categories, namely confiscation (of property as a sanction for the commission of a crime or other violation of law),<sup>98</sup> requisition, nationalisation and expropriation.<sup>99</sup> Therefore, the reference to “deprivation” in Article 35(3) includes, among other things, expropriation. Article 35(3) embodies a different requirement for the deprivation of property than most other property clauses, namely that deprivation is effected through a court decision. Article 35(3) states that “forced confiscation of property for state needs may be carried out only with the condition [of] preliminary and complete compensation”. Article 35(3) does not refer to expropriation but rather to deprivation and “forced confiscations of property.” The Constitutional Court has held that the term “deprive” means that the right of property is terminated in a coercive manner and implies the existence of a property dispute, and therefore *ex ante* or *ex post* judicial review is necessary.<sup>100</sup> The Court stated further that the second sentence of Article 35(3) stipulates that, as a general rule, property may be taken only after prior and equal compensation.<sup>101</sup> Therefore, Article 35(3) uses the term “deprive” in the same sense as Article 1 of Protocol 1 ECHR, meaning to dispossess or take away property. The term “forced confiscation” refers to the

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<sup>97</sup> Constitution of the Russian Federation (with the Amendments and Additions of 30 December 2008).

<sup>98</sup> Svetlana S *Protection of Property Rights under the European Convention on Human Rights and the Russian National Legislation* (LLM thesis Lund University 2008) 50.

<sup>99</sup> Svetlana S *Protection of Property Rights under the European Convention on Human Rights and the Russian National Legislation* (LLM thesis Lund University 2008) 49-50.

<sup>100</sup> Judgment of 24 February 2004 No 3-II at 10.

<sup>101</sup> At 10.

termination of the property rights, which may be effected only after compensation has been paid.

*f) Hungary*

Article XIII (2) of the Fundamental Law of Hungary<sup>102</sup> states that “[p]roperty may only be expropriated in exceptional cases and in the public interest, in such circumstances and manner as stipulated by an Act; expropriation shall be accompanied by full, unconditional and immediate compensation”. Like all the other property clauses Article XIII (2) requires not only a public interest to justify expropriation but also that compensation be paid for the expropriation.

Article XIII is similar to the German property clause in that these two clauses expressly require legislation authorising expropriation before it can take place.<sup>103</sup> In terms of Article 14 of the German Basic Law, in order for legislation to authorise expropriation it must specifically state the nature and extent of the compensation to be paid in the event of expropriation. Article XIII is in line with most property clauses because it requires both a public interest and compensation for expropriation. The second sentence of Article XIII (1) states that property shall entail social responsibility. This is also similar to the German Article 14, which states that property entails obligations.

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<sup>102</sup> Fundamental Law of Hungary (effective as of 1 April 2013).

<sup>103</sup> See 2 3 above.

#### 4 3 2 Characteristics

##### a) *Bosnia and Herzegovina*

The Constitutional Court of Bosnia and Herzegovina applies the three rules approach of the ECHR to determine whether an interference with property is constitutional.<sup>104</sup> As a result, the Constitutional Court makes use of the same requirements as the ECHR to determine whether an interference with the right to property in accordance with the second or third rules of Article 1 of Protocol No 1 (Article 1 ECHR) is valid, namely that the deprivation must be provided for by law, be in the public interest and be proportionate.<sup>105</sup> When any of the rules in Article 1 ECHR is invoked in a property dispute, the Constitutional Court has developed a set of questions that must be answered in considering whether there has been a violation of the right to property in Article II (3)(k) of the Constitution. Firstly, it considers whether the relevant property can be included under Article 1 ECHR; secondly, whether there has been an interference with the property; thirdly, under which of the three rules the interference may be considered; fourthly, whether the interference pursues a legitimate aim in the public or general interest; fifthly, whether the interference has satisfied the requirement of proportionality, in other words whether a fair balance has been struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental right; and finally, whether the interference has been in accordance with the principle of legal certainty and lawfulness.<sup>106</sup> The Constitutional Court appears to

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<sup>104</sup> See 3 1 above. See further Case No AP – 298/07; Case No AP – 775/08; Case No AP – 1095/07.

<sup>105</sup> Case No AP – 921/06; Case No AP – 1095/07.

<sup>106</sup> Case No AP – 1362/06; Case No AP – 775/08.

follow the same approach as the ECHR, referring to and applying the ECHR's principles when adjudicating alleged interferences with property rights.<sup>107</sup>

*b) Croatia*

Article 48 of the Constitution of the Republic of Croatia states that the right of ownership shall be guaranteed and that such ownership shall entail obligations. Article 50 states that in the interest of the Republic of Croatia, ownership may be restricted or rescinded by law, subject to indemnification equal to the market value of the pertinent property. Article 50 does not define what is meant by the terms "restricted" or "rescinded". The restriction of ownership appears to entail the regulation of property and the rescinding of ownership the expropriation of property for a purpose that promotes the interests of the Republic of Croatia against indemnification in the sense of compensation.<sup>108</sup> It also appears that compensation must be paid when either restricting ownership or expropriating property in the interest of the Republic of Croatia.<sup>109</sup> The Constitutional Court of Croatia refers to the ECHR's principles regarding the protection of possessions.<sup>110</sup> It has also stated, in addition to the payment of compensation, a restriction of ownership will be constitutional if it is introduced to realise a legitimate purpose provided for in the Constitution and it must be adequate to the purpose that it seeks to bring about.<sup>111</sup> The Constitutional Court's approach differs from that of the Constitutional Court of Bosnia and Herzegovina in that it applies the principles of the ECHR in a secondary

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<sup>107</sup> See 3.3.2 above.

<sup>108</sup> Decision U-I-236/1996.

<sup>109</sup> At 4.

<sup>110</sup> At 3-4. See further Decision U-IIIB-4366/2005.

<sup>111</sup> At 4. See further Decision U-I-1037/1995; Decision U-I-1156/1999.

manner, preferring to first resolve complaints in terms of the Constitution and then refer to the ECHR's principles to confirm the conclusion reached on the basis of the Constitution.<sup>112</sup>

c) *Estonia*

§ 32(1) of the Constitution of the Republic of Estonia<sup>113</sup> states that property may only be taken from an owner without consent if it is in the public interest, in cases and through procedures provided for by law, and for fair and immediate compensation. §32(1) appears to require authorising legislation that specifically states when expropriation of property may take place and the procedures to be followed when expropriating property, similar to the German approach.<sup>114</sup> § 32(2) states that everyone has the right to freedom from interference in possessing or using their property or making dispositions regarding their property, though the law may limit this right. The Supreme Court of Estonia has held that a situation where a person's right to freely use their property is restricted amounts to an interference with the right of ownership guaranteed by § 32.<sup>115</sup> Interferences with the right of ownership are divided into two categories, namely expropriation of property without the consent of the owner (regulated under § 32(1)) and interferences regulated under the second sentence of § 32(2), dealing with the limitation of the right of ownership.<sup>116</sup>

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<sup>112</sup> See, for example, Decision U-I-236/1996; Decision U-IIIB-4366/2005.

<sup>113</sup> Constitution of the Republic of Estonia, 3 July 1992.

<sup>114</sup> See 2 3 3 above.

<sup>115</sup> Supreme Court judgment of 17 April 2012 in matter no 3-4-1-25-11 para 35.

<sup>116</sup> Para 35.

*d) Moldova*

Article 46 of the Constitution of the Republic of Moldova guarantees the right to possess private property (Article 46(1)) and states that no one may be expropriated unless such expropriation is for a public utility, established under law and against the payment of fair and previously determined compensation (Article 46(2)). In dealing with a complaint of a restriction of property rights, the Constitutional Court will consider the matter in light of Article 46 as well as Article 54 of the Constitution.<sup>117</sup> Article 54 states that no law may be adopted that might curtail or restrict the fundamental rights and liberties of the person and citizen (Article 54(1)). Furthermore, the pursuit of rights and freedoms may not be restricted unless those restrictions are provided for by the law, which is in compliance with the unanimously recognized norms of international law and which are requested in specific cases<sup>118</sup> (Article 54(2)). Finally, the enforced restriction must be proportionate to the situation that caused it and such restriction may not affect the existence of the right or liberty so restricted (Article 54(4)). When analysing an alleged restriction of property rights, the Constitutional Court applies the principles and case law of the ECHR, as it does when determining whether a particular interest is property for the purposes of Article 46.<sup>119</sup>

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<sup>117</sup> See Judgments No 15 of 13.09.2011; No 5 of 10.04.2012.

<sup>118</sup> These specific cases are the defence of national security, territorial integrity, economic welfare of the State, public order, with the view to prevent mass revolt and felonies, protect other persons' rights, liberties and dignity, impede the disclosure of confidential information or guarantee the power and impartiality of justice.

<sup>119</sup> See Judgments No 15 of 13.09.2011; No 5 of 10.04.2012.

e) *The Russian Federation*

Article 35(3) of the Constitution of the Russian Federation states that no one may be deprived of property other than in accordance with a court order and that forced confiscation of property for state needs may be carried out only with the condition that preliminary and complete compensation be paid.<sup>120</sup> The deprivation referred to here is expropriation and not the regulation of property. Article 35(3) does not require any authorising legislation to effect an expropriation. All that is required is a valid court order. Therefore, Article 35(3) differs significantly from the other Central Eastern European constitutional property clauses. When there is termination of property rights in the form of a deprivation of property, there must be either *ex ante* or *ex post* judicial review of the deprivation. The purpose of judicial review is to provide a guarantee of the inviolability of property.<sup>121</sup>

The Russian Constitutional Court has held that in cases where the expropriation of property is necessary for public purposes and serves as a preventative measure, the way to implement the constitutional guarantee of the right to private property set out in Article 35(1) is *ex post* judicial review.<sup>122</sup> While the public purpose justifies the expropriation, the right to *ex post* judicial review of this transfer of private property cannot be restricted.<sup>123</sup> The Constitutional Court has also stated that *ex post* judicial review of the reasonableness and lawfulness of a deprivation of property will be inappropriate in, for example, cases dealing with the seizure of property that constitutes material evidence in criminal proceedings

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<sup>120</sup> Svetlana S *Protection of Property Rights under the European Convention on Human Rights and the Russian National Legislation* (LLM thesis Lund University 2008) 49-50.

<sup>121</sup> Judgment of 24 February 2004 No 3-II at 10.

<sup>122</sup> Judgment of 16 May 2000 No 8-II at 6.

<sup>123</sup> At 6.

because this is regarded as an ineffective means of guaranteeing the right to property.<sup>124</sup> In these cases, it seems that *ex ante* judicial review of the reasonableness and lawfulness of the deprivation is more appropriate.

Article 35(3) does not specifically mention the regulation of property; it only refers to deprivation of property in the sense of expropriation. The Russian Constitutional Court has held that regulation of property must not be arbitrary; in other words, any regulation of property must satisfy the proportionality principle.<sup>125</sup> Where there is an interference with property rights imposed by legislation it appears that the proportionality of the interference will be judged. If the interference is found to be disproportionate, the interference will be declared unconstitutional for violating Article 35.<sup>126</sup> The Russian Constitutional Court appears to follow a subset approach to the distinction between deprivation and expropriation because the proportionality of all interferences is first determined. If the interference is disproportionate, it will be declared unconstitutional for violating one or more of the sub-articles in Article 35.

#### *f) Hungary*

Article XIII (2) of the Fundamental Law of Hungary states that property may only be expropriated exceptionally, in the public interest, in cases and ways provided for by an Act and subject to full, unconditional and immediate compensation. Like the

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<sup>124</sup> Judgment of 16 July 2008 No 9-II at 9.

<sup>125</sup> Judgment of 6 June 2000 No 9-II at 3.

<sup>126</sup> See, for example, Judgment of 25 April 2011 No 6-II. In this case, it was held that the confiscation of an item used in the commission of an administrative offence from the owner who was not administratively answerable and not recognised as guilty of the offence amounted to a disproportionate interference with the owner's property rights which violated Articles 35(1) and 35(3).

German constitutional property clause,<sup>127</sup> Article XIII requires authorising legislation before an expropriation may take place. Similar to German law, the authorising legislation must specifically state when expropriation of property may take place and in what manner it will be carried out. Any administrative act or act of Parliament ordering expropriation that does not comply with the requirements will be in violation of the Fundamental Law.<sup>128</sup> The Hungarian Constitutional Court has emphasised that the requirements for a valid expropriation stated in Article 13 of the Hungarian Constitution, the predecessor of Article XIII and almost identical to it, are applicable to both expropriations carried out by state authorities and expropriations carried out on the basis of legislation.<sup>129</sup>

The right to property was considered a fundamental right under the now repealed Hungarian Constitution and is still considered as such under the Fundamental Law, but this right is not absolute. The Hungarian Constitutional Court has held that the burden placed on property by public law may lead either to a declaration of unconstitutionality of the intervention of the public authorities and therefore to the nullification of the legal rule on which it is based, or to acknowledgment of the constitutionality of the imposed burden and at most to the substitution of a legal remedy in the form of monetary compensation.<sup>130</sup> The singling out of expropriation for constitutional regulation perhaps indicates that the Hungarian

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<sup>127</sup> See 2.3 above.

<sup>128</sup> Decision 92/2007 (XI. 22.) AB at 6, discussing the requirements under Article 13 of the Hungarian Constitution, which has since been repealed and replaced by Article XIII of the Fundamental Law of Hungary. Articles 13 and XIII are almost identical; therefore cases and principles applicable to Article 13 may be employed when interpreting Article XIII.

<sup>129</sup> Decision 27/1991 (V. 20.) AB (Compensation Case III) at 10.

<sup>130</sup> Decision 1/2004 (II. 12.) AB at 7.

Constitutional Court follows the approach according to which deprivation and expropriation are viewed as two distinct categories that do not overlap.

#### 4 3 3 Public use/public purpose

##### a) *Bosnia and Herzegovina*

Article II (3)(k) of the Constitution of Bosnia and Herzegovina provides that everyone shall have the right to property, but nothing further is provided for in the article. As has been noted above, the Constitutional Court makes use of the case law of the ECHR to provide content to the Article II (3)(k) right to property regarding expropriations of property and has adopted the ECHR's requirements for a valid expropriation.<sup>131</sup> One of these requirements is that interferences in the form of expropriation of property must pursue a legitimate aim in the public interest.<sup>132</sup> In dealing with the requirement of public interest, the Constitutional Court follows the approach of the ECHR as set out in its *James v United Kingdom*<sup>133</sup> decision.<sup>134</sup> In *James* the ECHR held that the fact that an interference with a property right was only in the interest of certain persons and not in the interests of the community as a whole does not necessarily mean that the deprivation was not in the public interest. The Constitutional Court has held, for example, that interference with a person's property rights aimed at implementing prescribed rules of civil proceedings, which were in the interest of legal certainty and the rule of law would satisfy the public interest requirement.<sup>135</sup>

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<sup>131</sup> See, for example, Case No AP – 775/08; Case No AP – 1362/06; Case No AP – 1095/07.

<sup>132</sup> Case No AP – 775/08 para 93.

<sup>133</sup> *James v United Kingdom* (1986) 8 EHRR 123. See 3 3 3 above.

<sup>134</sup> Case No AP – 1095/07 para 35.

<sup>135</sup> See Case No AP – 1095/07.

*b) Croatia*

Article 50 of the Constitution of the Republic of Croatia provides that the restriction and rescinding of ownership is possible in the interest of the Republic of Croatia. The Constitutional Court has held that the phrase “in the interest of the Republic of Croatia” does not mean the same thing as the “general interest” and that a measure taken in the general interest will not satisfy the standard set out in Article 50 because the constitutional standard is the interest of the Republic of Croatia, and not the general interest.<sup>136</sup>

*c) The Russian Federation*

Article 35(3) of the Constitution of the Russian Federation states that deprivation (in the sense of expropriation) of property may only take place by way of a valid court order. There is no express reference to a public interest requirement. Rather, Article 35(3) refers to “state need” and where there is a “forced confiscation” of property in order to fulfill a state need, such confiscation must be accompanied by preliminary and complete compensation. The Russian Constitutional Court has stated that where property is taken in order to fulfill a state need, the property guarantee in Article 35(1) will be implemented through *ex post* judicial review.<sup>137</sup> Therefore, it seems that there is no specific public interest requirement for expropriation in the Russian context. Rather, the requirement is that of state need, which is a much broader

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<sup>136</sup> Decision U-III-437/1993.

<sup>137</sup> Judgment of 16 May 2000 No 8-II at 6. See further Judgment of 24 February 2004 No 3-II.

concept than public interest.<sup>138</sup> Where state need is invoked to justify an expropriation, *ex post* judicial review will safeguard the constitutional guarantee of the right to property. From the available case law, there does not seem to be any indication of a judicial public purpose-type requirement. The Russian Constitutional Court has stated that when property is taken from an owner effective judicial review shall be exercised as a guarantee of inviolability of property regardless of the reason for the taking.<sup>139</sup>

#### *d) Hungary*

Article XIII of the Fundamental Law of Hungary identifies public interest as one of the requirements for a valid expropriation of property. Under the now repealed Article 13 of the Hungarian Constitution (the substance of which is almost identical to Article XIII of the Fundamental Law) the right to property was, and arguably still is, considered to be a fundamental right, although this right is not inviolable.<sup>140</sup> The Hungarian Constitutional Court has held that the constitutional review of state interventions with the right to property is an adjudication of proportionality between the ends and the means of the intervention, in other words, between the public interest offered as justification for the intervention and the restriction on the property right.<sup>141</sup> Furthermore, all that the Constitution required to justify an expropriation was the public interest. If monetary compensation was provided for the expropriation, then a more compelling and justified “necessity” for the expropriation need not be

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<sup>138</sup> Svetlana S *Protection of Property Rights under the European Convention on Human Rights and the Russian National Legislation* (LLM thesis Lund University 2008) 61-63.

<sup>139</sup> Judgment of 24 February 2004 No 3-II at 9.

<sup>140</sup> Decision 4/1993 (II. 12.) AB; Decision 64/1993 (XII. 22.) AB; Decision 1/2004 (II. 12.) AB.

<sup>141</sup> Decision 64/1993 (XII. 22.) AB; Decision 1/2004 (II. 12.) AB at 8.

established for constitutional purposes.<sup>142</sup> Therefore, it appears that the public interest requirement is an easier standard to comply with than that of a necessity and need only be complied with where no compensation was paid for the expropriation. Due to the near identical content of Article 13 of the Constitution and Article XIII of the Fundamental Law, it can be argued that this ruling is still applicable to expropriations carried out in terms of Article XIII of the Fundamental Law.

#### 4 3 4 Compensation

##### a) *Bosnia and Herzegovina*

Article II (3)(k) of the Constitution of Bosnia and Herzegovina does not specifically mention compensation as a requirement for expropriation. In fact, it mentions nothing about expropriation at all. However, the Court uses Article 1 of Protocol No 1 (Article 1 ECHR) and the ECHR's jurisprudence regarding Article 1 ECHR in order to provide substance to the right to property provided for in Article II (3)(k). This practice extends to instances of compensation for expropriation. The Court applies the ECHR's case law regarding compensation and therefore requires the payment of reasonable compensation for expropriations of property as necessary to striking a fair or equitable balance between the public interest and the interest of the individual whose property has been expropriated.<sup>143</sup> Following the lead of the ECHR, the Court also recognises that there are certain limited exceptions to the requirement of compensation for an expropriation.<sup>144</sup>

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<sup>142</sup> Decision 1/2004 (II. 12.) AB at 8.

<sup>143</sup> Case No AP – 921/06. See further Case No AP – 2157/08; Case No AP – 2175/09; Case No AP – 3796/10.

<sup>144</sup> Para 37.

*b) The Russian Federation*

Article 35(3) of the Constitution of the Russian Federation specifically states that any expropriation of property is conditioned on the payment of preliminary and complete compensation. Compensation is necessary in all cases of expropriation and should cover both the market value of the expropriated property and the loss incurred by the former owner.<sup>145</sup> Furthermore, compensation may be in the form of a payment of an amount of money or equivalent property. Equivalent property as compensation is only possible with the consent of the former owner of the expropriated property. The Court has held that the legislator has to regulate the transfer of the right to property, particularly the forfeiture of this right, on the basis of legal equity and justice principles in accordance with the Constitution.<sup>146</sup> These requirements also apply to the compensation to be paid for the expropriation. Furthermore, the compensation paid should be proportionate to ensure a fair balance between public and private interests.<sup>147</sup> Again, a fair balance approach is employed in the determination of compensation for expropriation. This is very similar to the approach followed in German law<sup>148</sup> and decisions of the ECHR.<sup>149</sup> The Russian Constitutional Court even refers to ECHR decisions regarding compensation being paid in order to maintain a fair or equitable balance. While the Court does not draw its approach to compensation from the ECHR's decisions, it nonetheless finds that proportionality requires the payment of compensation. This is because proportionality is a

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<sup>145</sup> Svetlana S *Protection of Property Rights under the European Convention on Human Rights and the Russian National Legislation* (LLM thesis Lund University 2008) 63.

<sup>146</sup> Judgment of 16 May 2000 No 8-II at 4.

<sup>147</sup> At 4.

<sup>148</sup> See 2 3 5 above.

<sup>149</sup> See 3 3 4 above.

constitutional principle that applies to the limitation of any fundamental right, such as the rights listed in Article 35.

c) *Hungary*

Article XIII of the Fundamental Law of Hungary states that all expropriations of property must be accompanied by full, unconditional and immediate compensation. In deciding whether a property restriction is constitutional or not, the Hungarian Constitutional Court attempts to find a fair balance between the public interest and the property restriction.<sup>150</sup> Furthermore, compensation may be necessary in order for the property restriction to be proportionate and therefore constitutional. The payment of compensation flows not only from a specific duty provided for in both the now repealed Constitution and the Fundamental Law, but also from the Constitutional Court's finding that a fair or equitable balance between the public interest and the property restriction may require the payment of compensation.<sup>151</sup>

#### 4 3 5 Excessive deprivation/regulation

a) *Bosnia and Herzegovina*

The Constitutional Court of Bosnia and Herzegovina consistently applies the principles relating to regulation and expropriation of property laid down by the ECHR as a means of providing substance to the right to property provided for in Article II (3)(k) of the Constitution of Bosnia and Herzegovina. Therefore, the Constitutional Court applies the same distinction between regulatory controls over the use of

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<sup>150</sup> Decision 11/2005 (IV. 5.) AB at 18.

<sup>151</sup> At 18.

property and deprivation (in the sense of expropriation) as the ECHR.<sup>152</sup> The Court has held that interferences with the right to property must not go further than is necessary in order to achieve a legitimate aim, while holders of the right to property must not be subjected to arbitrary treatment or forced to bear excessive burdens in pursuance to a legitimate aim.<sup>153</sup> From the translated case law available it would appear that any interference with the right to property that does not satisfy the proportionality test would be declared unconstitutional and invalid. From the available case law it is inconclusive whether the Constitutional Court of Bosnia and Herzegovina recognises the notion of treating regulation of property that has unintended expropriatory effects as constructive expropriation, but it would seem that it does not. The available translated case law suggests that a regulation or expropriation of property that does not satisfy the proportionality test would be declared invalid.<sup>154</sup>

*b) The Russian Federation*

The Russian Constitutional Court has held that state interference with property rights shall not be arbitrary and shall not violate the balance between social interests and necessary conditions for the protection of fundamental rights.<sup>155</sup> Furthermore, excessive or disproportionate interferences with the right to property constitute arbitrary restrictions on the right to property and are therefore unconstitutional and invalid.<sup>156</sup> The available translated case law consistently reiterates that interferences

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<sup>152</sup> See 3 3 above.

<sup>153</sup> Case No AP – 619/08 para 35.

<sup>154</sup> See 4 4 a) below.

<sup>155</sup> Judgment of 16 July 2008 No 9-II at 4.

<sup>156</sup> Judgment of 16 May 2000 No 8-II at 4.

with property, both regulation and expropriation, must satisfy the proportionality principle. Failing to comply with this principle would render the interference unconstitutional. Therefore, it does not appear that the Russian Constitutional Court recognises the notion of constructive expropriation.

*c) Hungary*

The Hungarian Constitutional Court, like its counterparts in Bosnia and Herzegovina and the Russian Federation, applies the principle of proportionality when determining the constitutionality of an interference with the right to property. The Hungarian Constitutional Court has held that:

“[T]he encumbrance of property by public law may lead either to the declaration of unconstitutionality of the intervention of the public law authorities, and therefore to the nullification of the legal rule on which it was based, or to an acknowledgment of the constitutionality of the burden imposed, and at most to the substitution of legal remedy (monetary compensation)” [...].<sup>157</sup>

From this it appears that an interference with the right to property is either valid or it will be declared unconstitutional. A constitutional interference results in the availability of a legal remedy, whereas an unconstitutional interference is declared invalid. From the sources available in English it seems that constructive expropriation would not have a place in Hungarian constitutional property law because an interference with the right to property is either declared unconstitutional and invalid or it is acknowledged as a constitutional burden for which compensation is payable.

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<sup>157</sup> Decision 1/2004 (II. 12.) AB at 7.

#### 4.3.6 Conclusion

The terminology used to refer to deprivation (regulation) and expropriation varies between the Central Eastern European constitutional property clauses discussed in this chapter. Where it is referred to, the term “deprivation” is in some clauses understood to mean “regulation” but in other clauses it is understood to mean “expropriation”. Other terms are used in some clauses to refer to the regulation of property. Some of the clauses specifically refer to expropriation of property, while others use different terms that are understood to mean expropriation.

Regarding expropriation, all the Central Eastern European constitutional property clauses discussed in this chapter require that compensation be paid to the owner whose property has been expropriated. However, the other requirements for expropriation vary among the property clauses discussed. While some of the constitutional property clauses, like Croatia’s Article 50 and Hungary’s Article XIII, also require that the expropriation be for some public purpose or use, others for instance the Russian Federation’s Article 35, do not mention a public purpose requirement at all. Some of the property clauses require legislation that specifically authorises the expropriation, while others require a different form of authorisation, such as a court order. While all of the property clauses refer to expropriation of property in one way or another, not all of them refer to the regulation of property. Even those that do refer to it use different terms for it, such as “restriction” or “limitation”. Some of the Central Eastern European jurisdictions incorporate the ECHR’s principles regarding the constitutionality of controls on the use of property, while others apply their own principles regarding the regulation of property.

From the sources available, it does not appear that the Central Eastern European jurisdictions recognise something like a notion of constructive

expropriation or an excessive regulation being validated through compensation. None of the jurisdictions make provision for equalisation payments like German law does, nor do they appear to recognise something like regulatory takings in US law. Those jurisdictions that follow the ECHR's principles regarding deprivation (expropriation) and controls on the use of property do not go as far as replicating the uncertainty surrounding the validation of excessive regulation through payment of compensation. On the contrary, most of the jurisdictions specifically state that if an interference with property is disproportionate it will be unconstitutional.

The Central Eastern European jurisdictions discussed in this chapter have either developed their own approaches to regulation and expropriation or have elected to apply the principles of the ECHR regarding these two types of interferences and therefore for the most part subscribe to ECHR's constitutional framework. The Constitutional Courts of Estonia and Hungary, for example, do not refer to the ECHR's principles in the context of regulation and expropriation of property, but both end up in a similar place to those jurisdictions that do. Article XIII of the Hungarian Fundamental Law and §32(1) of Estonian Constitution contain similar requirements for the expropriation of property to those required by the ECHR and both include the additional requirement of legislation that specifically authorises expropriation. The approach adopted by these two jurisdictions to the expropriation of property is similar to that of German law, in that German law also requires legislation that specifically authorises expropriation, requires a public interest and requires compensation to be paid in the event of expropriation.

## 4 4 Proportionality

### a) Bosnia and Herzegovina

The Constitutional Court of Bosnia and Herzegovina follows the approach to proportionality of the ECHR.<sup>158</sup> This is unsurprising in light of the fact that the Court uses Article 1 of Protocol No 1 (Article 1 ECHR) and the ECHR's jurisprudence regarding Article 1 ECHR to provide substance to the right to property provided for in Article II (3)(k)<sup>159</sup> of the Constitution of Bosnia and Herzegovina. This use extends to the application of the proportionality principle when determining whether an interference with the right to property is legitimate or not.

The Constitutional Court has held that interference pursuant to the second or third rules in Article 1 ECHR must be provided by law, serve a legitimate aim and strike a fair balance between the holder of a right and the public and the general interest (the principle of proportionality).<sup>160</sup> This means that, in order for an interference to be justified, the interference must be imposed by a legal provision that meets the requirements of the rule of law and serves a legitimate aim in the public interest; it must also maintain a reasonable relationship of proportionality between the means employed and the aims sought to be realised.<sup>161</sup> Furthermore, interferences with the right to property must not go further than necessary to achieve the legitimate aim, while the holders of the right must not be subjected to arbitrary treatment or be forced to bear excessive burdens in pursuance of the legitimate aim or aims in question.<sup>162</sup>

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<sup>158</sup> See 3 4 above.

<sup>159</sup> Article II (3)(k) Constitution of Bosnia and Herzegovina, 1995 (as amended in 2009).

<sup>160</sup> Case No – AP 619/08 para 35. See further Case No AP – 921/06.

<sup>161</sup> Para 35.

<sup>162</sup> Para 35.

b) Croatia

The Constitutional Court of Croatia has held that the “ubiquitous significance” of the principle of proportionality cannot be denied, even though the Constitution does not provide for any direct norms for the regulation of the proportionality principle.<sup>163</sup> Any measures seeking to restrict the fundamental freedoms and rights of citizens must be prescribed by law and be proportionate to the legitimate goal to be achieved thereby.<sup>164</sup> Furthermore, proportionality can only exist where the measures undertaken to ensure a legitimate goal are not more restrictive than necessary.<sup>165</sup> The Constitutional Court also uses the principles and case law of the ECHR regarding proportionality and has held that “Article 1 [of Protocol No 1] [...] is an integral part of the internal legal order of the Republic of Croatia, and it is above the law in terms of its legal effect [...].”<sup>166</sup>

c) The Czech Republic

The Constitutional Court of the Czech Republic has held that Article 11(1) of the Charter of Fundamental Rights and Basic Freedoms<sup>167</sup> guarantees to everyone the right to own property but in terms of Article 11(3) this right may be restricted by statute on the grounds of protecting the rights of others or protecting the public

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<sup>163</sup> Decision U-I-1156/1999 at 4.

<sup>164</sup> At 4.

<sup>165</sup> At 4.

<sup>166</sup> At 5.

<sup>167</sup> Charter of Fundamental Rights and Basic Freedoms of 16 December 1992 (forming part of the Constitution of the Czech Republic of 16 December 1992).

interest, though rights may not be restricted beyond a proportionate degree.<sup>168</sup> The Constitutional Court has held that this interpretation is in line with the principles of property protection under Article 1 of Protocol No 1 ECHR.<sup>169</sup>

d) Estonia

§ 32(2) of the Constitution of the Republic of Estonia<sup>170</sup> states that everyone has the right to freedom from interference in possessing or using their property or making dispositions regarding their property, though the law may limit this right. The Supreme Court of Estonia has held that a situation where a person's right to freely use their property is restricted amounts to an interference with the right of ownership guaranteed by § 32.<sup>171</sup> Interferences with the right of ownership are divided into two categories, namely expropriation of property without the consent of the owner (regulated under § 32(1)) and interferences regulated under the second sentence of § 32(2), dealing with the limitation of the right of ownership.<sup>172</sup>

A situation where the interference with a fundamental right provided by law "does not have a legitimate objective or where the restriction is disproportional with regard to the objective" will constitute an interference with the fundamental right.<sup>173</sup> The second sentence of § 32 prescribes a simple statutory reservation for the restriction of the right of ownership, which means that a law may restrict the right of

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<sup>168</sup> 2004/04/08 – II. ÚS 482/02: Restrictions upon Property Rights.

<sup>169</sup> 2004/04/08 – II. ÚS 482/02: Restrictions upon Property Rights; 2004/03/09 – PI. ÚS 2/02: Basic Principles.

<sup>170</sup> Constitution of the Republic of Estonia, 3 July 1992.

<sup>171</sup> Supreme Court judgment of 17 April 2012 in matter no 3-4-1-25-11 para 35.

<sup>172</sup> Para 35.

<sup>173</sup> Para 36.

ownership for any purpose that is not in conflict with the Constitution.<sup>174</sup> A restriction on a fundamental right will be regarded as proportionate if it is “appropriate, necessary and reasonable with regard to the objective to be achieved”.<sup>175</sup> Whether a restriction is appropriate appears to be a factual question, while the question of necessity is answered by asking whether it is possible to achieve the desired goal by some other means, which is less burdensome on the person but is just as effective as the measure under review. If the answer is no, the measure under review is necessary.<sup>176</sup> In deciding whether a measure is reasonable, it is necessary to weigh up the significance of the legitimate objective on the one side and the intensity of the restriction on the owner’s property on the other.<sup>177</sup>

e) Moldova

Article 54 states that no law may be adopted that might curtail or restrict the fundamental rights and liberties of the person and citizen (Article 54(1)). Furthermore, the pursuit of rights and freedoms may not be restricted unless those restrictions are provided for by the law, which is in compliance with the unanimously recognized norms of international law and which are requested in specific cases (Article 54(2)). Finally, the enforced restriction must be proportionate to the situation that caused it and such restriction may not affect the existence of the right or liberty so restricted (Article 54(4)). Article 54(4) specifically provides for proportionality review of measures aimed at restricting any fundamental right contained in the Constitution, including the right to private property. When dealing with an alleged

<sup>174</sup> Para 37.

<sup>175</sup> Para 39.

<sup>176</sup> Para 41. See further Supreme Court judgment of 26 March 2009 in matter no 3-4-1-16-08 para 29.

<sup>177</sup> Para 42.

unconstitutional infringement of the right to property in Article 46, the Constitutional Court will investigate the infringement to determine if the interference affects the right to property in Article 46 and whether the interference is constitutional in terms of Article 54.<sup>178</sup> The Constitutional Court refers to the ECHR's principles and case law regarding when an interference with possessions would violate Article 1 of Protocol No 1 (Article 1 ECHR) to evaluate if a particular interference will violate Article 46 and Article 54 of the Constitution. The Constitutional Court implements the fair balance test developed by the ECHR to determine if a fair balance is struck between the interference and the interests of the community.<sup>179</sup> According to the Constitutional Court, a measure that is incompatible with the protection of property under Article 1 ECHR will also violate Article 46 of the Constitution.<sup>180</sup>

#### f) The Russian Federation

Article 55(3) of the Constitution of the Russian Federation specifically provides for proportionate limitation of the rights and freedoms provided for in the Constitution.

Article 55(3) states that:

“The rights and freedoms of man and citizen may be limited by federal law only to the extent necessary for the protection of the fundamental principles of the constitutional system, morality, health, the rights and lawful interests of other people, for ensuring defence of the country and security of the State.”

This broad provision appears to apply to all rights and freedoms provided for in the Constitution and therefore also to the right to property in Article 35 of the Constitution.

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<sup>178</sup> See, for example, Judgment No 15 of 13.09.2011; Judgment No 5 of 10.04.2012.

<sup>179</sup> Judgment No 15 of 13.09.2011 para 77.

<sup>180</sup> Para 77.

In the context of rights in land, specifically agricultural land, the Court has held that:

“[I]n order to provide legal protection of private property as required by Article 35 (Section 1) of the Constitution of the Russian Federation and assuming that land is the foundation of life and activities of the peoples living in the respective territory, the legislator regulating land relations, including those in the area of transactions with land plots and land shares in shared property of agricultural lands is obliged to maintain a balance of public and private interests involved in the exercise of the right of private property of land on the basis of the constitutional principle of proportionality (Section 3, Article 55).”<sup>181</sup>

This confirms that the principle of proportionality is applicable to the right to property in Article 35 and that any interference with this right by a legislator must maintain the appropriate balance between the public and private interests involved in the exercise of the right to property.

The Court has also held that an interference that does not conform to Article 55(3) will be regarded as disproportionate to the “constitutionally significant aims indicated in [Article 55(3)]”.<sup>182</sup> This seems to indicate that the significant aims listed in Article 55(3) are the only bases upon which rights and freedoms can be limited constitutionally. However, even if the interference could be characterised as falling under one of these aims, the interference must nonetheless be proportionate in its limitation of the rights and freedoms in question, in other words it must adequately balance the private and public interests involved. In determining whether a particular interference is disproportionate, the inquiry does not seem to involve a consideration of specific factors like the German approach.<sup>183</sup> Rather, the issue of proportionality is decided based on the particular facts of each case, in other words on the basis of an *ad hoc* inquiry.

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<sup>181</sup> Judgment of 30 January 2009 No 1-II at 5.

<sup>182</sup> Judgment of 27 April 2001 No 7-II at 11.

<sup>183</sup> See 2 4 above.

g) Hungary

The Hungarian Constitutional Court recognises and implements the principle of proportionality when dealing with the constitutionality of interferences with fundamental rights. According to the practice of the Court, there are three bases, referred to as legitimate objectives, on which fundamental rights may legitimately be restricted or interfered with. They are, firstly, the legitimate objective of protecting the fundamental rights of others;<sup>184</sup> secondly, the state's duty to institutionally (objectively) guarantee fundamental rights<sup>185</sup> and thirdly, the achievement of certain constitutional public objectives.<sup>186</sup>

The Court has held that the state may only restrict fundamental rights if such restriction is the only way to protect the abovementioned legitimate objectives.<sup>187</sup> Furthermore, the constitutionality of restricting a fundamental right requires that the restriction comply with the principle of proportionality. In other words, the importance of the desired objective must be proportionate to the restriction of the fundamental right in question. The legislature, when enacting a limitation, is required to use the most moderate means suitable for reaching the objective of the limiting legislation.<sup>188</sup> Therefore, the Court appears to use a two-stage approach to determining the legitimacy of interferences with property. In the first stage, the Court must determine whether the interference in question is the only way of achieving one or more of the

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<sup>184</sup> Decision 2/1990 (II. 18.) AB.

<sup>185</sup> Decision 64/1991 (XII. 17.) AB.

<sup>186</sup> Decision 56/1994 (XI. 10.) AB.

<sup>187</sup> Decision 43/2005 (XI. 14.) AB at 11.

<sup>188</sup> At 11.

legitimate objectives. If so, the Court moves to the second stage, which involves determining the proportionality of the interference.

#### h) Conclusion

Each of the Central Eastern European jurisdictions discussed in this chapter applies some form of proportionality review when determining if an interference with property is constitutional. The Constitutional Courts of Bosnia and Herzegovina, Croatia, the Czech Republic and Moldova apply the fair balance principle developed by the ECHR, while the Constitutional Courts of Estonia, Hungary and the Russian Federation could be considered outliers because they apply their own interpretations of proportionality. The Constitutions of Moldova and the Russian Federation specifically provide for proportionality review. While the Constitutional Court of Moldova uses the fair balance principle of the ECHR to give content to proportionality provided for in the Constitution, the Russian Constitutional Court does not use the fair balance principle at all and instead applies its own form of proportionality review.

The methods of application of proportionality review differ among the Central Eastern European jurisdictions but they all do something similar in that they test the interference with property to determine if it is proportionate and therefore constitutional. The jurisdictions that apply their own interpretation of the proportionality principle appear to lean more towards the German law end of the continuum than the US law end. Those jurisdictions that apply the ECHR's fair balance principle appear to be, in substance, following more of a German law approach than a US law approach without explicitly referring to German law.

## 4 5 Conclusion

The aim of this chapter was to investigate, as far as possible based on the sources available in English, the development of constitutional property law in Central Eastern Europe. The three main issues investigated were the constitutional definition of property, the distinction between deprivation and expropriation of property and the application of the proportionality principle as a means of legitimising interferences with property. The question was whether the approaches of the Central Eastern European jurisdictions discussed resemble either the German or US law approach to these three issues.

The Central Eastern European jurisdictions discussed in this chapter all opted for constitutionally democratic approaches, with emphasis on the protection of fundamental rights. A number of the constitutional courts use the principles and case law of the ECHR, which is unsurprising given the fact that they are signatories to the European Convention. The principles and the case law of the ECHR have had a major impact on the development of the constitutional law of Central Eastern Europe, with these principles being used to provide content to otherwise vague rights, or as a secondary set of norms which can be applied to test the constitutional validity of interferences with property rights. However, not all of the constitutional courts choose to rely on the principles and case law of the ECHR.

All of the Central Eastern European jurisdictions have adopted a broad concept of property for constitutional purposes that includes a number of interests, including monetary claims, pension rights, legitimate expectations and other rights having economic value. The Constitutional Courts of Bosnia and Herzegovina and Moldova

use the principles and case law regarding the definition of “possessions” developed by the ECHR, apparently to provide content to the often vague right to property or the right of ownership provided for in the jurisdictions’ property clauses. Similar to the approaches in German and US constitutional property law, no attempt has been made to exhaustively define what constitutes property for constitutional purposes.

All of the jurisdictions discussed above make provision for the restriction of property rights, either explicitly in the text of the property clause or through interpretation. Those constitutional property clauses that do refer to the restriction of property rights use varying terminology. Deprivation is referred to in some of the property clauses (Russian Federation) but this term is most often understood to mean expropriation instead of regulation of property. Other property clauses (Croatia, Estonia and Moldova) use different terms for regulation of property such as “restriction” or “limitation”. Expropriation is specifically referred to in some clauses (Hungary, Moldova) while others refer to this type of interference in different ways, such as the rescission of ownership (Croatia) or the forced confiscation of property (Russian Federation).

A consistent requirement for expropriation in all of the Central Eastern European constitutional property clauses discussed in this chapter is that compensation must be paid for expropriation of property. That being said, the other requirements for expropriation vary among the property clauses discussed. Whereas some property clauses require that the expropriation be for some public purpose or public use (for example, Croatia and Hungary), others do not mention a public purpose or public use requirement at all (Russian Federation). Similarly, not all of the property clauses require legislation that specifically authorises expropriation. Some require a different form of authorisation; for example, Article 35(3) of the Russian

Constitution requires a court order to authorise expropriation. While all of the property clauses discussed refer to expropriation in one way or another, not all of them refer to the regulation of property. Those that do refer to regulation use varying terminology, referring to the restriction or limitation of property. Regarding the regulation of property, it appears that Central Eastern European jurisdictions follow one of two paths. Whereas some will apply the ECHR's principles regarding the regulation of property (for example Bosnia and Herzegovina, Croatia, Moldova), others apply their own principles for the regulation of property (for example Estonia and Hungary). On the continuum between the German and US law approaches, those Central Eastern European jurisdictions that do not apply the ECHR's principles regarding the regulation and expropriation of property, for example Estonia and Hungary, lean more towards the German law approach end of the continuum, without explicitly following German law.

None of the Central Eastern European jurisdictions discussed in this chapter appears to recognise something like a notion of an excessive regulation being validated through compensation. Most jurisdictions specifically state that an interference that is disproportionate will be unconstitutional. No provision is made for something like the equalisation payments that are available in German law, nor does there appear to be recognition of something like regulatory takings like in US law. The Central Eastern European jurisdictions that apply the principles of the ECHR do not go so far as to apply these principles in manner that replicates the uncertainty surrounding the validation of excessive regulation through payment of compensation.

Each of the Central Eastern European jurisdictions discussed in this chapter applies some form of proportionality review when determining if an interference with property is constitutional. The Constitutional Courts of Bosnia and Herzegovina,

Croatia, the Czech Republic and Moldova apply the fair balance principle developed by the ECHR, while the Constitutional Courts of Estonia, Hungary and the Russian Federation apply their own interpretations of proportionality. The Constitutions of Moldova and the Russian Federation specifically provide for proportionality review. Whereas the Constitutional Court of Moldova uses the fair balance principle of the ECHR to give content to proportionality provided for in the Constitution, the Russian Constitutional Court does not use the fair balance principle at all and instead applies its own form of proportionality review.

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# Chapter 5

## South African law

### 5 1 Introduction

This chapter investigates how the concept of property for constitutional purposes, the distinction between deprivation and expropriation of property and the principle of proportionality as a requirement for the validity of interferences with property are approached in South African constitutional property law. The purpose of this investigation is to determine whether the South African approach to these three aspects resembles the German and/or US law approaches.

The constitutional property regime of South Africa is governed by section 25 of the Constitution.<sup>1</sup> This section is unique in the sense that it combines two seemingly contradictory elements, the first dealing with the protection of property interests against unconstitutional interference (section 25(1)-(3)) and the second providing authority for action on the part of the state to promote land and other related forms of reform (section 25(4)-(9)).<sup>2</sup>

The first issue to be considered when discussing the property clause is the question of what constitutes property for the purposes of section 25, because if the interest in question is not considered property, section 25 is not engaged. Section 25(4)(b) provides some assistance in determining what constitutes property for the purposes of section 25 by stating that property is not limited to land. This statement aligns with the private law concept of property, which includes interests other than immovable property. The Constitutional Court has held that it would be both

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<sup>1</sup> Constitution of the Republic of South Africa, 1996.

<sup>2</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 12.

“practically impossible” and “judicially unwise” to comprehensively define property for the purposes of section 25, instead opting for an incremental approach to the determination of whether a particular interest is property.<sup>3</sup> This approach has led to a number of interests being recognised as property and therefore qualifying for protection under section 25. The question of whether a particular interest can be regarded as property for the purposes of section 25 does not receive much attention in the Constitutional Court’s case law. It is often just accepted or assumed that a particular interest is property and the analysis of the possible infringement of section 25 follows from there. The Constitutional Court gives more attention to whether there has been a deprivation or an expropriation of property and if so, whether this interference is arbitrary or not.

Since the Constitutional Court initially distinguished between deprivation and expropriation,<sup>4</sup> subsequent decisions have deviated from this distinction. Examples from case law include the introduction of a state acquisition requirement for a valid expropriation;<sup>5</sup> suggesting and then deciding that a statutory, regulatory interference with property that does not mention expropriation can amount to expropriation for which compensation is payable<sup>6</sup> and that in order for deprivation to take place, the holder of the property interest must have been deprived of something legally

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<sup>3</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 51. See further Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 108; Currie I & De Waal J *The Bill of Rights Handbook* 6<sup>th</sup> ed (2013) 535; Roux T “Property” in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* vol 3 2<sup>nd</sup> ed (OS 2003) ch 46 at 46-10.

<sup>4</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 57.

<sup>5</sup> *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC).

<sup>6</sup> *Arun Property Development (Pty) Ltd v City of Cape Town* 2015 (2) SA 584 (CC).

substantial, without explaining what would make a particular interest legally substantial or not.<sup>7</sup>

Regarding proportionality, the Constitutional Court uses a two-stage approach when determining if an interference with property is valid. In the first stage, the Court determines whether the interference satisfies the specific internal requirements set out in the subsections of section 25. If it does not, then the second stage is reached. In this stage the Court determines whether the unconstitutional interference is perhaps justified in the circumstances by applying the factors listed in section 36(1) of the Constitution.<sup>8</sup> The justification enquiry under section 36(1) is a full proportionality review.<sup>9</sup>

Deprivations of property may not be arbitrary. The Court has interpreted this to mean that the law authorising the deprivation does not provide sufficient reason for it and it has formulated a test to determine this.<sup>10</sup> If the deprivation is declared arbitrary, it may still be justifiable in terms of section 36(1). Any attempt to expropriate property must comply with the requirements in sections 25(2) and 25(3). If it does not, it is unconstitutional but could possibly be justifiable under section 36(1).

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<sup>7</sup> *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* 2015 (6) SA 125 (CC).

<sup>8</sup> Roux T “Property” in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* vol 3 2<sup>nd</sup> ed (OS 2003) ch 46 at 36; Woolman S & Botha H “Limitations” in Woolman S, Roux T & Bishop M (eds) *Constitutional law of South Africa* vol 2 (2<sup>nd</sup> ed OS 2006) ch 34 at 3-6; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 74-78.

<sup>9</sup> Woolman S & Botha H “Limitations” in Woolman S, Roux T & Bishop M (eds) *Constitutional law of South Africa* vol 2 (2<sup>nd</sup> ed OS 2006) ch 34 at 69-70.

<sup>10</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100. See further Roux T “Property” in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* vol 3 2<sup>nd</sup> ed (OS 2003) ch 46 at 22; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 245.

## 5 2 Property

Section 25(1) states that “[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property”. Section 25 does not provide an exhaustive list of interests that qualify as property. The only interpretative guideline provided in section 25 is that property is not limited to land (section 25(4)). There is no standard international guideline or formulation that can be relied on to determine the meaning of property.<sup>11</sup> By stating that no one may be arbitrarily deprived of “property”, the provision allows for the development of the notion of property beyond the traditional conceptions of property. Therefore, the notion of property for the purposes of section 25 is robust and not limited to traditional private law ideas of property. Both objects and rights can qualify for protection under section 25.<sup>12</sup> Some rights, such as the right of access to housing<sup>13</sup> and socio-economic rights like pensions<sup>14</sup> will not pose a problem if they are not included in the notion of property because they are protected by other sections in the Constitution. In other jurisdictions, constitutional provisions do not specifically protect these rights so their protection becomes an issue.<sup>15</sup>

The Constitutional Court adopted a normative approach to the interpretation of property in section 25 in the decisions of *First National Bank of Ltd t/a Wesbank v*

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<sup>11</sup> *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC) para 72.

<sup>12</sup> *First National Bank of Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd v Minister of Finance* 2002 (4) SA 768 (CC) para 51.

<sup>13</sup> Section 26.

<sup>14</sup> Section 27.

<sup>15</sup> See 2 2 2, 2 2 3 and 3 2 2 above.

*Commissioner, South African Revenue Service; First National Bank of SA Ltd v Minister of Finance*<sup>16</sup> and *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape*.<sup>17</sup> In *FNB*, Ackermann J held that the subsections of section 25 must not be construed in isolation.<sup>18</sup> Each subsection must be construed in the context of the other subsections and their historical context as well as in the context of the Constitution as a whole.<sup>19</sup> Furthermore, the purpose of section 25 must be seen as both protecting existing private property rights as well as serving the public interest, including land reform, and also as striking a proportionate balance between these two functions.<sup>20</sup> Ackermann J regarded it as practically impossible to lay down a comprehensive definition of property and that it is judicially unwise to attempt to do so.<sup>21</sup>

In his majority judgment in *Shoprite*, Froneman J placed the property inquiry within a normative constitutional framework, stating that the fundamental values of dignity, equality and freedom necessitate a conception of property that allows for individual self-fulfilment in the holding of property and recognises that the holding of property also carries with it a social obligation to not harm the public good.<sup>22</sup> Based on this approach, the strength of the protection afforded to a particular interest as

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<sup>16</sup> *First National Bank of Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd v Minister of Finance* 2002 (4) SA 768 (CC).

<sup>17</sup> *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* 2015 (6) SA 125 (CC).

<sup>18</sup> *First National Bank of Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd v Minister of Finance* 2002 (4) SA 768 (CC) para 49.

<sup>19</sup> Para 49.

<sup>20</sup> Para 50.

<sup>21</sup> Para 51.

<sup>22</sup> *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* 2015 (6) SA 125 (CC) para 50.

property depends on the extent to which this interest promotes the fundamental rights of dignity, equity and freedom.

Rautenbach argues that a few aspects of Froneman J's approach to the property issue in this case are unclear.<sup>23</sup> Firstly, Froneman J's establishment of a link between the right to property and other rights such as human dignity and the right to choose a vocation is inconsistent with section 8(2) of the Constitution.<sup>24</sup> Juristic persons, such as Shoprite in this case, cannot be the beneficiaries of certain rights in the Bill of Rights, including the right to human dignity. To resolve this inconsistency, Froneman J argued that if the grocer's wine licence could objectively be regarded as constitutional property in the hands of a natural person and the legislation regulating that licence also applies to juristic persons, the absence of a link to these other rights does not preclude a grocer's wine licence belonging to a juristic person from being recognised as constitutional property as well.<sup>25</sup> This solution has the effect of elevating legislative provisions to a higher status than constitutional provisions because, while ordinary legislation may provide for more entitlements than the Constitution, those entitlements are not protected by the Constitution.<sup>26</sup> The problem with Froneman J's analysis is that it starts with the link between property and other rights as an essential characteristic of constitutional

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<sup>23</sup> Rautenbach IM "Dealing with the social dimensions of property" 2015 *TSAR* 822-833 at 826. See further Marais EJ "Expanding the contours of the constitutional property concept" 2016 *TSAR* 576-592 at 583-588.

<sup>24</sup> Rautenbach IM "Dealing with the social dimensions of property" 2015 *TSAR* 822-833 at 826.

<sup>25</sup> *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* 2015 (6) SA 125 (CC) para 61. See further Rautenbach IM "Dealing with the social dimensions of property" 2015 *TSAR* 822-833 at 826.

<sup>26</sup> Rautenbach IM "Dealing with the social dimensions of property" 2015 *TSAR* 822-833 at 826.

property, a problem that does not arise when one considers property as a stand alone right.<sup>27</sup>

Secondly, it is unclear whether Froneman J intended that the existence of this link between property and other constitutional rights and values is essential for the recognition of constitutional property.<sup>28</sup> Marais argues that the crux of the problem with this linking of the right to property with other fundamental rights is that it collapses the threshold issues (whether the affected interest can be regarded as constitutional property) with the justification issue (whether the deprivation satisfies the relevant requirements of section 25(1)).<sup>29</sup> This link is also referred to in the context of determining the “level of judicial scrutiny”<sup>30</sup> and the “level of constitutional protection”.<sup>31</sup> Rautenbach argues that it is “one thing to determine whether protection should be afforded at all by looking at the link with other rights and values, and quite another to take such a link into account in determining “the level of protection”.<sup>32</sup>

Both of these normative approaches emphasise that section 25 does not exist in a vacuum and therefore cannot be interpreted in isolation. It must be interpreted in light of all of its subsections as well as in context of the Constitution as a whole. Froneman J’s normative approach in *Shoprite* goes further than Ackermann J’s in

<sup>27</sup> Rautenbach IM “Dealing with the social dimensions of property” 2015 *TSAR* 822-833 at 826.

<sup>28</sup> Rautenbach IM “Dealing with the social dimensions of property” 2015 *TSAR* 822-833 at 827.

<sup>29</sup> Marais EJ “Expanding the contours of the constitutional property concept” 2016 *TSAR* 576-592 at 583.

<sup>30</sup> *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* 2015 (6) SA 125 (CC) para 69. See further Rautenbach IM “Dealing with the social dimensions of property” 2015 *TSAR* 822-833 at 827.

<sup>31</sup> *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* 2015 (6) SA 125 (CC) para 50. See further Rautenbach IM “Dealing with the social dimensions of property” 2015 *TSAR* 822-833 at 827.

<sup>32</sup> Rautenbach IM “Dealing with the social dimensions of property” 2015 *TSAR* 822-833 at 827.

*FNB* in that it directly links the protection of property to the promotion of other fundamental rights in the Constitution, such as dignity, equality and freedom. This approach creates a problem for the protection of the property by juristic persons because juristic persons cannot be the beneficiaries of certain fundamental rights, like dignity, equality and freedom. This appears to mean that the property of juristic persons will be given the weakest possible protection, assuming it is protected at all.

Generally, the Constitutional Court develops the notion of property for the purposes of section 25 incrementally, which means that new interests are included under the concept of property over time and on a case by case basis.<sup>33</sup> Interests considered property for the purposes of section 25 include corporeal movables,<sup>34</sup> land,<sup>35</sup> as well as limited real rights in land. In *Ex Parte Optimal Property Solutions CC*<sup>36</sup> the Western Cape High Court interpreted “property” in a purposive manner and decided that it should be read to include any right to, or in property. It held that restrictive conditions have the character of registered praedial servitudes<sup>37</sup> and concluded that restrictive conditions, like registered praedial servitudes, are real rights and thus constitute property under section 25. Therefore, any removal or deletion of these conditions constitutes a deprivation of property that must comply

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<sup>33</sup> *First National Bank of Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd v Minister of Finance* 2002 (4) SA 768 (CC) para 51. Ackermann J did not attempt to set out a comprehensive definition of property, saying that this would be practically impossible and judicially unwise. Without a conclusive definition of property, it will have to be determined in each case whether the interest in question is property for the purposes of section 25.

<sup>34</sup> Para 51.

<sup>35</sup> *First National Bank of Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd v Minister of Finance* 2002 (4) SA 768 (CC) para 51. Furthermore section 25(4)(b) states that property is not limited to land, which implies that land, at the very least, is included in the concept of property for the purposes of section 25.

<sup>36</sup> *Ex Parte Optimal Property Solutions CC* 2003 (2) SA 136 (C) paras 4-6, 19.

<sup>37</sup> Para 4.

with the requirements of section 25(1).<sup>38</sup> Based on this decision, all limited real rights, including both praedial and personal servitudes,<sup>39</sup> real security rights<sup>40</sup> and registered long-term leases would be recognised as property under section 25.<sup>41</sup> In *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd*,<sup>42</sup> the majority held that the legislation in question creates a public servitude over the land of those affected by the legislation.<sup>43</sup> Therefore, this public servitude would also be regarded as property under section 25. In *Du Toit v Minister of Transport*<sup>44</sup> the Constitutional Court concluded that a right to temporarily use land to create a quarry pit to excavate gravel for the purposes of the construction of a public road had been expropriated.<sup>45</sup> Based on this decision, a right to use land is considered property for the purposes of section 25.

Mineral rights are also recognised as property under section 25. *Lebowa Mineral Trust Beneficiaries Forum v Government of the RSA*<sup>46</sup> is worth mentioning, although it is not a Constitutional Court decision. This case concerned mineral rights. The High Court held that if the drafters of the Constitution intended to protect mineral rights, they would have done so expressly as in other jurisdictions. Since mineral rights are not protected explicitly, no right in the Bill of Rights had been infringed or

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<sup>38</sup> Para 19.

<sup>39</sup> *National Stadium South Africa (Pty) Ltd v Firstrand Bank Ltd* 2011 (2) SA 157 (SCA).

<sup>40</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC).

<sup>41</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 140.

<sup>42</sup> *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd* 2015 (6) SA 440 (CC).

<sup>43</sup> Paras 102-104.

<sup>44</sup> *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC).

<sup>45</sup> Para 54.

<sup>46</sup> *Lebowa Mineral Trust Beneficiaries Forum v Government of the RSA* 2002 (1) BCLR 27 (T); Van der Vyver JD “Nationalisation of mineral rights in South Africa” (2012) 45 *De Jure* 126-143 at 132.

threatened.<sup>47</sup> However, *Agri SA v Minister for Minerals and Energy*<sup>48</sup> also concerned mineral rights, and the alleged expropriation of those rights by the Mineral and Petroleum Resources Development Act.<sup>49</sup> The Constitutional Court held that sterilisation of minerals is not dependent on the state's conferment of the right to mine. It stems from mineral ownership and it is undoubtedly property with economic value.<sup>50</sup> The property interest in this case was the entitlement of a landowner or mineral rights holder to sterilise the minerals by not exploiting them. On the basis of this decision, intangible property in the form of mineral rights is therefore regarded as property for the purposes of section 25.

Intellectual property is another category of intangible property that is recognised as property under section 25. In *Phumelela Gaming and Leisure Ltd v Gründlingh*,<sup>51</sup> the Constitutional Court accepted that the applicant's right (the right of a company, licensed to operate totalisator betting, to its own published results or totalisator dividends) is either goodwill or intellectual property and that this right is property for the purposes of section 25, though this right is not absolute.<sup>52</sup> *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International*<sup>53</sup> concerned the alleged infringement of a registered trademark. The Constitutional Court appeared to simply accept that trademarks

<sup>47</sup> Paras 9-11.

<sup>48</sup> *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC).

<sup>49</sup> Mineral and Petroleum Resources Development Act 21 of 2002.

<sup>50</sup> *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 44.

<sup>51</sup> *Phumelela Gaming and Leisure Ltd v Gründlingh* 2007 (6) SA 350 (CC).

<sup>52</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 154-155; *Phumelela Gaming and Leisure Ltd v Gründlingh* 2007 (6) SA 350 (CC) paras 36-42.

<sup>53</sup> *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International* 2006 (1) SA 144 (CC).

qualify as property for the purposes of section 25. These two decisions confirm that intellectual property is regarded as property under section 25.

Certain rights are also regarded as property for the purposes of section 25. In *National Credit Regulator v Opperman*<sup>54</sup> the Constitutional Court held that the recognition of the right to restitution of money paid, based on unjustified enrichment, as property under section 25(1) is both logical and realistic and would be in accordance with developments in other jurisdictions where personal rights have been recognised as constitutional property.<sup>55</sup> The importance of intangible property in modern-day society means that the concept of property should not be construed so narrowly as to diminish the worth of the protection provided by section 25(1).<sup>56</sup> Therefore, an enrichment claim falls within the scope of section 25.<sup>57</sup> In *Cool Ideas 1186 CC v Hubbard*,<sup>58</sup> the Constitutional Court confirmed that the right of restitution of money paid based on unjustified enrichment constitutes property for the purposes of section 25(1).<sup>59</sup>

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<sup>54</sup> *National Credit Regulator v Opperman* 2013 (2) SA 1 (CC). For a more in-depth discussion of this case see Brits R “Arbitrary deprivation of unregistered credit provider’s right to claim restitution of performance rendered: *Opperman v Boonzaaier* (24887/2010) 2012 ZAWCHC 27 (17 April 2012) and *National Credit Regulator v Opperman* 2013 2 SA 1 (CC)” (2013) 16 PELJ 422-470 at 434-441; Marais EJ “The constitutionality of section 89(6)(c) of the National Credit Act under the property clause: *National Credit Regulator v Opperman & Others*” (2014) 131 SALJ 215-233 at 217-222; Van der Walt AJ “Constitutional property law” 2012 ASSAL 182-199 at 183-187; Van der Walt AJ “Constitutional property law” 2014 ASSAL 195-215 at 196.

<sup>55</sup> Para 63.

<sup>56</sup> Para 63.

<sup>57</sup> Para 64.

<sup>58</sup> *Cool Ideas 1186 CC v Hubbard* 2014 (4) SA 474 (CC).

<sup>59</sup> Para 38.

*Chevron SA (Pty) Limited v Wilson t/a Wilson's Transport*<sup>60</sup> dealt with the constitutionality of section 89(5)(b) of the National Credit Act (NCA).<sup>61</sup> The applicant, Chevron, extended credit to the respondent, Wilson, for the purchase of petroleum products. In 2008, the respondent contested the accuracy of the applicant's billing. In 2010, the applicant brought suit against the respondent for payment of the outstanding balance.<sup>62</sup> The applicant acknowledged that it was not registered as a credit provider as required by the NCA. Therefore, the credit agreement between the applicant and the respondent was an unlawful agreement in terms of section 40(4) of the NCA and void to the extent provided for in section 89 of the NCA.<sup>63</sup> If a credit agreement is unlawful in terms of section 89, section 89(5)(a) states that a court must declare the agreement void from the date it was entered into. Section 89(5)(b) states that a court must order that the credit provider, the applicant in this case, must refund to the consumer any money paid by the consumer under the unlawful agreement, with interest.<sup>64</sup> The Constitutional Court held that the property involved in this case was the actual money already paid to the applicant by the respondent and that money in hand constitutes a property interest protected by section 25.<sup>65</sup>

In *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape*,<sup>66</sup> the Constitutional Court had to determine whether a grocer's wine licence constituted property for the purposes of section 25. The majority judgment of Froneman J and

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<sup>60</sup> *Chevron SA (Pty) Limited v Wilson t/a Wilson's Transport* [2015] ZACC 15, 5 June 2015.

<sup>61</sup> National Credit Act 34 of 2005.

<sup>62</sup> *Chevron SA (Pty) Limited v Wilson t/a Wilson's Transport* [2015] ZACC 15, 5 June 2015 para 5.

<sup>63</sup> Para 6.

<sup>64</sup> Para 7.

<sup>65</sup> Para 16.

<sup>66</sup> *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* 2015 (6) SA 125 (CC).

the minority judgment of Madlanga J found that this licence is property for the purposes of section 25.<sup>67</sup> Therefore, a grocers wine licence is property in terms of section 25.

As is evident from the discussion above, the Constitutional Court recognises a wide variety of interests as constituting property for the purposes of section 25(1). These include immovable property in the form of land, limited real rights in land, movable property such as vehicles, intellectual property, a claim for the restitution of money paid based on unjustified enrichment and a liquor licence. The Court makes use of an incremental approach to defining property for the purposes of section 25, meaning the concept of property for constitutional purposes is developed on a case by case basis. The decision to not exhaustively define the concept of property, the incremental approach to the recognition of new interests as constitutional property and the wide interpretation of property is similar to the approach followed in German and US law<sup>68</sup> and the ECHR.<sup>69</sup>

## **5 3 Distinction between deprivation and expropriation**

### **5 3 1 Introduction**

Section 25 refers to both deprivation and expropriation of property. Deprivation of property is regulated by section 25(1) and expropriation by section 25(2). By

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<sup>67</sup> Paras 70 and 150 respectively. Madlanga J disagreed with the Froneman J's majority judgment regarding the issue of property, saying that the majority judgment's approach of linking the protection of property to the fulfilment of other fundamental rights waters down the potency of the right to property to the point where the right to property becomes secondary to other rights such as human dignity and freedom of trade, occupation and profession.

<sup>68</sup> See 2 2 2 and 2 2 3 above.

<sup>69</sup> See 3 2 2 above.

regulating deprivation and expropriation in different subsections, section 25 provides a strong textual basis for the distinction between deprivation and expropriation. The Constitutional Court initially adopted a subset approach to this distinction, describing these notions as two distinct categories of interference with property with the narrower category of expropriation being included in the wider category of deprivations.<sup>70</sup> However, subsequent decisions by the Court have created uncertainty regarding whether the subset approach to this distinction is still followed. Some decisions like *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset v Buffalo City Municipality; Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing, Gauteng*<sup>71</sup> threatened to cause uncertainty regarding the Court's approach to the distinction but ultimately had no such effect. Other decisions, for instance *Arun Property Development (Pty) Ltd v City of Cape Town*<sup>72</sup> and *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd*<sup>73</sup> have created uncertainty regarding which approach the Court follows in distinguishing these notions.

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<sup>70</sup> *First National Bank of Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd v Minister of Finance* 2002 (4) SA 768 (CC) para 57.

<sup>71</sup> *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset v Buffalo City Municipality; Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing, Gauteng* 2005 (1) SA 530 (CC).

<sup>72</sup> *Arun Property Development (Pty) Ltd v City of Cape Town* 2015 (2) SA 584 (CC).

<sup>73</sup> *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd* 2015 (6) SA 440 (CC).

### 5.3.2 Terminology

In *First National Bank of Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd v Minister of Finance*,<sup>74</sup> the Constitutional Court interpreted the term “deprivation” in section 25(1) widely so that “[i]n a certain sense any interference with the use, enjoyment or exploitation of private property [...]” would be included in the meaning of deprivation.<sup>75</sup> Therefore, “deprivation” encompasses all forms of interference with property with “expropriation” being a specific form of interference that is included in the larger category of deprivation.<sup>76</sup> This wide interpretation of deprivation seemed to be restricted in *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset v Buffalo City Municipality; Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing, Gauteng*.<sup>77</sup> It was held that the existence of a deprivation “[...] depends on the extent of the interference with or the limitation of use, enjoyment or exploitation [and] at the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation.”<sup>78</sup> This new definition of deprivation looked as though it would diminish the clarity brought about by *FNB*. However, this was not the case because this new definition was not applied in subsequent decisions.

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<sup>74</sup> *First National Bank of Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd v Minister of Finance* 2002 (4) SA 768 (CC).

<sup>75</sup> Para 57.

<sup>76</sup> Para 57. See further Van der Walt AJ *Constitutional Property* 3<sup>rd</sup> ed (2011) 203-204.

<sup>77</sup> *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset v Buffalo City Municipality; Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing, Gauteng* 2005 (1) SA 530 (CC).

<sup>78</sup> Para 32.

Regarding expropriation, a claimant must “establish that the state has acquired the substance or the core content of what it was deprived of” to prove expropriation.<sup>79</sup> Therefore, an interference with property that does not involve the state acquiring the property will be regarded as a deprivation of property, rather than expropriation. Once state acquisition has been established, the interference will constitute expropriation.<sup>80</sup> It appears from these decisions of the Constitutional Court that deprivation and expropriation refer to two distinct types of interferences with property.

Whereas deprivation refers to any interference with property that does not involve the state acquiring the property, expropriation refers to the narrow category of interferences with property where the state acquires the property for a public purpose or in the public interest against payment of compensation. The state does not usually pay compensation for an interference with property that amounts to a deprivation. Only expropriations must be compensated according to section 25(2). Therefore, the term “deprivation” in section 25(1) is understood to mean the regulation of property in terms of the police power principle.<sup>81</sup> The term “expropriation” in section 25(2) is in turn understood to mean interferences that result in the acquisition of property by the state for a public purpose or in the public interest and must always be compensated.

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<sup>79</sup> *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 58.

<sup>80</sup> Clause 1 of the Expropriation Bill of 2015 (B4D-2015) defines expropriation as the compulsory acquisition of property by an expropriating authority or an organ of state upon request to an expropriating authority.

<sup>81</sup> *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 (6) SA 391 (CC) para 33; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 213-215.

### 5.3.2 Characteristics

The decision of *Harksen v Lane NO*<sup>82</sup> dealt with the distinction between deprivation and expropriation in terms of section 28 of the Interim Constitution.<sup>83</sup> Goldstone J stated that expropriation involves the acquisition of rights in property by a public authority for a public purpose, while deprivation of rights in property falls short of such acquisition.<sup>84</sup> According to Van der Walt,<sup>85</sup> the Constitutional Court in *Harksen* assumed that the distinction between deprivation and expropriation was categorical in the sense that they are distinct entities with characteristics that distinguish them from each other clearly and exhaustively. Furthermore, this conceptual dichotomy means that any state interference with property has to be either deprivation or expropriation, with no room for grey areas in between. Moreover, a prospective litigant would have to choose between these two forms of interferences and argue either on the grounds of an unconstitutional expropriation or that there was an unconstitutional deprivation. By implication, the Court would not consider the other option of its own accord. On the basis of this categorical approach, the Court based the distinction on permanent acquisition of property by the state: if the property is not acquired by the state, or if the acquisition is not permanent, there is no expropriation.<sup>86</sup> This approach to the distinction does not allow for any overlap at all

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<sup>82</sup> *Harksen v Lane NO* 1998 (1) SA 300 (CC). See further Van der Walt AJ & Botha H “Coming to grips with the new constitutional order: Critical comments on *Harksen v Lane NO*” (1998) 13 SAPL 17-41 at 19-26.

<sup>83</sup> Constitution of the Republic of South Africa, Act 200 of 1993.

<sup>84</sup> *Harksen v Lane NO* 1998 (1) SA 300 (CC) para 33.

<sup>85</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 339-340

<sup>86</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 339-341. See further Van der Walt AJ “Striving for a better interpretation – A critical reflection on the Constitutional Court’s *Harksen* and *FNB* decisions on the property clause” (2005) 123 SALJ 854-878 at 862.

because deprivation and expropriation are kept separate and distinct, each having validity requirements that the other does not, much like the German approach.<sup>87</sup>

The decision of *First National Bank of Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd v Minister of Finance*<sup>88</sup> introduced a significant methodological shift regarding the distinction between deprivation and expropriation and resolved much of the initial uncertainty surrounding section 25 of the Final Constitution.<sup>89</sup> Regarding the distinction between deprivation and expropriation, Ackermann J stated that:

“In a certain sense any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned. If section 25 is applied to this wide *genus* of interference, ‘deprivation’ would encompass all species thereof and ‘expropriation’ would apply only to a narrower species of interference.”<sup>90</sup>

The *FNB* methodology centres on the fact that expropriation is viewed as a subset of deprivation.<sup>91</sup> Van der Walt explains that if expropriation is regarded as a subset of

<sup>87</sup> See 2.3.3 above.

<sup>88</sup> *First National Bank of Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd v Minister of Finance* 2002 (4) SA 768 (CC).

<sup>89</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 203. See further Roux T “Property” in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* vol 3 2<sup>nd</sup> ed (OS 2003) ch 46 at 2-5; Van der Walt AJ “Striving for a better interpretation – A critical reflection on the Constitutional Court’s *Harksen* and *FNB* decisions on the property clause” (2005) 123 SALJ 854-878 at 867-875; Marais EJ “When does state interference with property (now) amount to expropriation? An analysis of the *Agri SA* court’s state acquisition requirement (Part I)” (2015) 18 PELJ 2983-3031 at 2984-2985.

<sup>90</sup> *First National Bank of Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd v Minister of Finance* 2002 (4) SA 768 (CC) para 57.

<sup>91</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 341. See further Van der Walt AJ “Striving for a better interpretation – A critical reflection on the Constitutional Court’s *Harksen* and *FNB* decisions on the property clause” (2005) 123 SALJ 854-878 at 867; Van der Walt AJ “Retreating from the FNB arbitrariness test already? *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government and*

deprivation, the section 25(1) test for deprivation also applies to expropriation, in addition to the more specific requirements in section 25(2) and (3). On this basis, an investigation into the constitutional validity of any limitation of property should always start with the requirements in section 25(1).<sup>92</sup> This is a serious departure from the conceptual understanding of the distinction between deprivation and expropriation explained in *Harksen*. The difference between these two decisions is that the *FNB* methodology postpones the distinction between deprivation and expropriation to a later stage in the process; in many cases it may not even feature at all.<sup>93</sup>

This results from the fact that the Constitutional Court in *FNB* followed an approach of a smaller category (expropriations) that is wholly incorporated into a larger one (deprivations). Expressed differently, all expropriations are deprivations but not all deprivations are expropriations.<sup>94</sup> This interpretation does not allow for a

*Housing, Gauteng (CC)*" (2005) 123 SALJ 75-89 at 77; Marais EJ "When does state interference with property (now) amount to expropriation? An analysis of the *Agri SA* court's state acquisition requirement (Part I)" (2015) 18 PELJ 2983-3031 at 2985.

<sup>92</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 341-342. See further Roux T "Property" in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* vol 3 2<sup>nd</sup> ed (OS 2003) ch 46 at 3; Brits R *Mortgage Foreclosure under the Constitution: Property, Housing and the National Credit Act* (LLD dissertation Stellenbosch University 2012) 302; Van der Walt AJ "Striving for a better interpretation – A critical reflection on the Constitutional Court's *Harksen* and *FNB* decisions on the property clause" (2005) 123 SALJ 854-878 at 868; Marais EJ "When does state interference with property (now) amount to expropriation? An analysis of the *Agri SA* court's state acquisition requirement (Part I)" (2015) 18 PELJ 2983-3031 at 2985.

<sup>93</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 342. See further Van der Walt AJ "Striving for a better interpretation – A critical reflection on the Constitutional Court's *Harksen* and *FNB* decisions on the property clause" (2005) 123 SALJ 854-878 at 867.

<sup>94</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 57. See further Van der Walt AJ "Striving for a better interpretation – A critical reflection on the Constitutional Court's *Harksen* and *FNB* decisions on the property clause" (2005) 123 SALJ 854-878 at 867; Roux T "Property" in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* vol 3 2<sup>nd</sup> ed (OS 2003) ch 46 at 18; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 204; Brits R

grey area of overlap between deprivations and expropriation, where deprivation could shade into expropriation based on its effects.<sup>95</sup> The methodology under *FNB* regarding deprivation and expropriation is to first test whether the deprivation in question infringes upon section 25(1). If it does, it must be determined whether the infringing deprivation is justified under section 36 of the Constitution, the general limitation clause. If it cannot be justified under section 36, the provision authorising the deprivation is unconstitutional. However, if the deprivation does not infringe section 25 or is a justified limitation, the question arises as to whether it is an expropriation. If the deprivation amounts to an expropriation it must satisfy the requirements under section 25(2)(a) and make provision for compensation in terms of section 25(2)(b).<sup>96</sup>

In *Agri SA v Minister for Minerals and Energy*,<sup>97</sup> Mogoeng CJ stated that:

“Deprivation within the context of section 25 includes extinguishing a right previously enjoyed, and expropriation is a subset thereof. Whereas deprivation always takes place when property or rights therein are either taken away or significantly interfered with, the same is not necessarily true of expropriation. Deprivation relates to sacrifices that

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*Mortgage Foreclosure under the Constitution: Property, Housing and the National Credit Act* (LLD dissertation Stellenbosch University 2012) 303; Marais EJ “When does state interference with property (now) amount to expropriation? An analysis of the *Agri SA* court’s state acquisition requirement (Part I)” (2015) 18 *PELJ* 2983-3031 at 2985.

<sup>95</sup> Van der Walt AJ “Striving for a better interpretation – A critical reflection on the Constitutional Court’s *Harksen* and *FNB* decisions on the property clause” (2005) 123 *SALJ* 854-878 at 867. See further Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 204.

<sup>96</sup> *First National Bank of Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd v Minister of Finance* 2002 (4) SA 768 (CC) para 58-59. See further Roux T “Property” in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* vol 3 2<sup>nd</sup> ed (OS 2003) ch 46 at 2-5; Brits R *Mortgage Foreclosure under the Constitution: Property, Housing and the National Credit Act* (LLD dissertation Stellenbosch University 2012) 302-303; Van der Walt AJ “Constitutional property law” 2013 *ASSAL* 216-230 at 225-230; Marais EJ “When does state interference with property (now) amount to expropriation? An analysis of the *Agri SA* court’s state acquisition requirement (Part I)” (2015) 18 *PELJ* 2983-3031 at 2985.

<sup>97</sup> *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC).

holders of private property rights may have to make without compensation, whereas expropriation entails state acquisition of that property in the public interest and must always be accompanied by compensation. There is therefore more required to establish expropriation although there is an overlap and no bold line of demarcation between sections 25(1) and 25(2). Section 25(1) deals with all property and all deprivations, including expropriation, although additional requirements must be met for deprivation to rise to the level of expropriations.”<sup>98</sup>

In this paragraph, Mogoeng CJ initially agrees with the *FNB* decision regarding the distinction between deprivation and expropriation by saying that expropriation is included in the larger category of deprivations, but then moves to an approach that treats deprivation and expropriation as two discrete categories of interference, like the Court in *Harksen* did, making state acquisition the element that distinguishes expropriation. Mogoeng CJ then moves again from the discrete categories approach to one where there is an overlap between deprivation and expropriation. Saying that these two categories of interference overlap allows for the possibility of recognising a grey area where deprivation shades into expropriation. This resembles the US approach to this distinction and the grey area manifests itself in US law as the problematic category of regulatory takings.<sup>99</sup> Mogoeng CJ seems to say that expropriation is a smaller category included in the larger category of deprivation, that deprivation and expropriation are two discrete categories of interference and that there is an overlap between these two categories, which allows for the possibility of a grey area between them. This is contradictory because the distinction between deprivation and expropriation cannot simultaneously allow and not allow for a grey area between them. The result is that it is now uncertain which approach the Court follows regarding the characteristics that distinguish deprivations from expropriations.

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<sup>98</sup> Para 48 (footnotes omitted).

<sup>99</sup> See 2 3 6 above.

Further problems arise when Mogoeng CJ discussed the requirements that have to be proven in order to establish expropriation. In order for the claimant to prove that expropriation has taken place, it must establish that the state has acquired the substance or core content of what the claimant was deprived of, but the rights acquired by the state do not have to be exactly the same as the rights that were lost. While exact correlation in this regard is not required, there must be sufficient congruence or substantial similarity between what was lost and what was acquired.<sup>100</sup> Stating that state acquisition is a requirement for expropriation brings some clarity but it also creates new uncertainties. Marais argues that state acquisition is more a consequence of expropriations validly performed pursuant to authorising legislation than a requirement for expropriation.<sup>101</sup> Finally, there can be no expropriation in circumstances where deprivation does not result in property being acquired by the state.<sup>102</sup> What is problematic, firstly, is that the yardsticks of “sufficient congruence” or “substantial similarity” are not defined in the judgment. Marais argues that focusing on the effect-based nature of the acquisition requirement to determine if expropriation has taken place is unable to produce

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<sup>100</sup> *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 58. See further Marais EJ “When does state interference with property (now) amount to expropriation? An analysis of the *Agri SA* court’s state acquisition requirement (Part II)” (2015) 18 *PELJ* 3033-3069 at 3061.

<sup>101</sup> Marais EJ “When does state interference with property (now) amount to expropriation? An analysis of the *Agri SA* court’s state acquisition requirement (Part II)” (2015) 18 *PELJ* 3033-3069 at 3061-3062.

<sup>102</sup> *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 59. Van der Walt AJ “Constitutional property law” 2014 ASSAL 195-215 at 201 explains that this statement could create the erroneous impression that every state acquisition of property amounts to expropriation that requires compensation in terms of section 25(2), including for example development contributions and criminal forfeiture.

reliable results in all cases.<sup>103</sup> Secondly, the requirement of state acquisition to establish expropriation raises questions relating to property expropriated by the state but then transferred to third parties. Based on the decision in *Agri SA*, it seems that there will be no expropriation in this situation because the state does not acquire the property that is transferred to third parties.<sup>104</sup>

The decision of *Arun Property Development (Pty) Ltd v City of Cape Town*<sup>105</sup> creates further uncertainty regarding the Court's approach to the distinction between deprivation and expropriation. The issue in this case was whether a local authority that has acquired land, by operation of legislation, from a private owner in a planning approval process for a residential development, is obliged to pay compensation for the land so acquired.<sup>106</sup> Arun (Pty) Ltd claimed compensation from the City of Cape Town for the value of the land that the City acquired in this manner on the ground that the land in question was unrelated to the normal need for the provision of public streets and public places for the residential development but was required for a future road network planned for the region as a whole.<sup>107</sup> The Constitutional Court had to decide whether the legislation in question, section 28 of the Land Use

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<sup>103</sup> Marais EJ "When does state interference with property (now) amount to expropriation? An analysis of the *Agri SA* court's state acquisition requirement (Part II)" (2015) 18 *PELJ* 3033-3069 at 3062.

<sup>104</sup> For an in-depth discussion of these two issues in *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC), see Marais EJ "When does state interference with property (now) amount to expropriation? An analysis of the *Agri SA* court's state acquisition requirement (Part I)" (2015) 18 *PELJ* 2983-3031; Marais EJ "When does state interference with property (now) amount to expropriation? An analysis of the *Agri SA* court's state acquisition requirement (Part II)" (2015) 18 *PELJ* 3033-3069.

<sup>105</sup> *Arun Property Development (Pty) Ltd v City of Cape Town* 2015 (2) SA 584 (CC). See further Slade BV "Compensation for what? An analysis of the outcome in *Arun Property Development (Pty) Ltd v Cape Town City*" (2016) 19 *PELJ* 1-25 at 5; Van Wyk J "Planning and Arun's (not so straight and narrow) roads" (2016) 19 *PELJ* 1-29 at 2-6.

<sup>106</sup> Para 1.

<sup>107</sup> Para 1.

Planning Ordinance (LUPO),<sup>108</sup> vests all public streets and public spaces shown in an approved subdivision in the local authority with jurisdiction and if so, whether the property developer is entitled to compensation for land that so vests if the public streets and public spaces are more than the normal needs of the development and whether the vesting of land in the local authority amounts to expropriation.<sup>109</sup>

The Court stated that the text of section 28 vests ownership of all public streets and places in the local authority without compensation, so long as the provision of land is within the normal needs of the development or is allowed in terms of a policy determined by the Premier. Therefore, the vesting of ownership without compensation is permissible only to cater for the normal needs of the subdivision.<sup>110</sup> Ownership of all land designated as public streets on the subdivision application will vest in the local authority, but the vesting of excess land attracts a claim for compensation.<sup>111</sup> The property that is required for public streets and places vests in the public authority without compensation because they are integral to the development.<sup>112</sup> The vesting of ownership in the local authority of excess land beyond the reasonable and normal needs of the development must be regarded as a legislative acquisition of the developer's land without compensation, occurring by operation of law after confirmation of the subdivision or a part thereof.<sup>113</sup> The compulsory taking away of excess land without compensation is not properly related

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<sup>108</sup> Land Use Planning Ordinance 15 of 1985 (Western Cape).

<sup>109</sup> *Arun Property Development (Pty) Ltd v City of Cape Town* 2015 (2) SA 584 (CC) para 29.

<sup>110</sup> Para 31. See further Van Wyk J "Planning and Arun's (not so straight and narrow) roads" (2016) 19 *PELJ* 1-29 at 19.

<sup>111</sup> Para 32, referring to the minority judgment in *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2008 (6) SA 12 (SCA).

<sup>112</sup> Para 40.

<sup>113</sup> Para 40.

to the purpose of developing a township with adequate public roads and spaces.<sup>114</sup> Rather than declare the provision (or the use of it to acquire excess land) unconstitutional, the Court gave the provision a meaning that accords with section 25(2) by stating that “excess land, properly so established, must attract compensation [...].”<sup>115</sup>

The Court next considered whether the vesting of ownership in terms of section 28 of LUPO is an expropriation. Though the issue of the distinction between a deprivation and an expropriation was not fully argued in this case, the Court was prepared to accept that an expropriation “occurs by state coercion and without the consent of the affected owner”.<sup>116</sup> The Court held that section 28 requires that ownership of land be given over to the local authority upon the granting of a subdivision; this loss of ownership is compelled by law and not by the decision of the local authority; a land developer would know from the start of the process for rezoning and subdivision that it has to give up the public streets and spaces that comprise the normal needs of the development, but not those that are not reasonably required for the normal needs of the development.<sup>117</sup> The Court held that, to the extent that section 28 vests public places and streets beyond the normal need arising from a particular subdivision, the owner of the land may claim for compensation.<sup>118</sup> Furthermore, section 28 does not authorise any deprivation beyond the normal needs and it follows that any deprivation beyond the normal

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<sup>114</sup> Para 40.

<sup>115</sup> Para 41.

<sup>116</sup> Para 58. The Court also cited with approval the definition of expropriation in the minority judgment of *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2008 (6) SA 12 (SCA) para 40, which defined expropriation as “the compulsory deprivation of ownership or rights usually by a public authority for a public purpose”.

<sup>117</sup> Para 59.

<sup>118</sup> Para 59.

needs would take place outside of legislative authority and would therefore be arbitrary.<sup>119</sup> The Court concluded that under section 28 an *ex lege* transfer of ownership occurs and that transfer has the same effect as an expropriation.<sup>120</sup> The recognition of an interference with property having the same effect as an expropriation is not possible under a categorical approach to the distinction between deprivation and expropriation. Therefore, this decision creates uncertainty as to whether the Court actually follows a categorical approach to the distinction between deprivation and expropriation apparently adopted in *Agri SA*.

Further uncertainty is created by the majority decision in *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd*.<sup>121</sup> This case concerned licences issued under the Electronic Communications Act (ECA).<sup>122</sup> These licences entitle the holder to construct an electronic communications network or facility on the land of another person.<sup>123</sup> The main issue in this case was whether these licences permit arbitrary deprivation of property. In a decision written by Cameron J and Froneman J, the Court held that the granting of an electronic communications service licence in terms of the ECA creates a public servitude, a type of servitude granted by force of law and not by consent between the parties and that this type of servitude rebuts the challenge to the validity of the impugned provisions of the ECA.<sup>124</sup> The question to be answered regarding the validity of the impugned provisions is what the common law position is if the owner of the servient property is confronted with a servitude

<sup>119</sup> Para 60.

<sup>120</sup> Para 73.

<sup>121</sup> *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd* 2015 (6) SA 440 (CC).

<sup>122</sup> Electronic Communications Act 36 of 2005 (as amended by the Electronic Communications Amendment Act 37 of 2007 and the Electronic Communications Amendment Act 1 of 2014).

<sup>123</sup> *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd* 2015 (6) SA 440 (CC) para 2.

<sup>124</sup> Paras 104-109.

created by law.<sup>125</sup> The common law provides flexible and equitable principles that protect the servient owner and therefore section 22 does not inflict arbitrary deprivation of property.<sup>126</sup> Section 22 could be read as authorising arbitrary deprivation if the licence holders, in terms of section 22(1), are allowed to exercise their rights granted pursuant to the licence in any manner that they choose. To avoid this interpretation, the majority held that section 22 creates a public servitude that must be exercised in terms of servitude law; therefore the deprivation is not arbitrary.<sup>127</sup> The Court raised the issue of a public servitude *mero motu*, as none of the parties raised this point in argument before the Court. It also remarked that servitudes imposed by law without the consent of the landowner are treated as a kind of expropriation and must be compensated.<sup>128</sup> Herein lies the difficulty with the decision in terms of the distinction between deprivation and expropriation. No explanation was given in this decision as to what kind of expropriation this is or why it is possible to recognise different kinds of expropriation. This does not seem to be possible because state acquisition is required for expropriation and this public servitude does not transfer any property to the state. Treating an interference with property as a kind of expropriation contradicts the categorical approach to the distinction between deprivation and expropriation. The Court again does not follow the apparent categorical approach adopted in *Agri SA* and this creates uncertainty regarding how the distinction between deprivation and expropriation is approached in South African law.

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<sup>125</sup> Para 110.

<sup>126</sup> Para 110.

<sup>127</sup> Para 127.

<sup>128</sup> Para 149, referring to *Van Rensburg v Coetzee* 1979 (4) SA 655 (A) at 677H.

In *FNB*, the Court adopted a subset approach to the distinction between deprivation and expropriation. Deprivation was interpreted widely as any interference with the use, enjoyment and exploitation of property with expropriation being a narrower category of interference that is included in the larger category of deprivations. Some decisions since *FNB* have created uncertainty about this distinction, especially *Arun* and *City of Tshwane*, while others seemed to but ended up not having that effect like *Mkontwana*. Some decisions managed to bring some clarity to issues left open by the Court in *FNB*, but also created new uncertainties. *Agri SA* is an example of that. The Court appears to view the distinction between deprivation and expropriation as two categories with state acquisition required for expropriation. However, the possibility of an interference with property that does not satisfy the state acquisition requirement being regarded as a kind of expropriation is also recognised. Such recognition may indicate that the approach to the distinction between deprivation and expropriation has shifted again to the view that these two forms of interference overlap but the Court did not expressly state this in either *Arun* or *City of Tshwane*. For now, the end result seems to be that deprivation and expropriation are viewed as two distinct categories of interferences with property with state acquisition as a requirement for expropriation. On the continuum between the German and US law approaches to this distinction, the South African law approach appears to be closer to the German law approach.<sup>129</sup>

### 5 3 3 Public purpose/public interest

Section 25(2) of the Constitution states that property may be expropriated for a public purpose or in the public interest. Section 25(4)(a) further provides that for the

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<sup>129</sup> See 2 3 above.

purposes of section 25, “public interest” includes the nation’s commitment to land reform, and to reforms to bring about equitable access to all South Africa’s natural resources.<sup>130</sup> Van der Walt argues that this requirement may end up playing a relatively insignificant role in constitutional property cases dealing with expropriation if Roux’s prediction regarding the “telescoping” effect of the *FNB* case comes to pass and all property issues are decided on the basis of the arbitrary deprivation test.<sup>131</sup> However, it remains necessary to examine how this requirement will most likely be interpreted should courts be confronted by it.

In the pre-constitutional era, public purpose was interpreted in both a narrow sense and a broad sense. The Appellate Division of the Supreme Court in *Administrator, Transvaal v J van Streepen (Kempton Park) (Pty) Ltd*<sup>132</sup> distinguished between expropriation in the public interest and expropriation for a public purpose.<sup>133</sup> Van der Walt explains that expropriation in the public interest could accommodate a lenient interpretation that would allow for expropriation for purposes other than actual state or public use and that expropriations for a public purpose would not allow

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<sup>130</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 458 argues that the possibility that the public purpose requirement will be interpreted so narrowly as to frustrate expropriations for land reform purposes can probably be discounted. See further Eisenberg A “Public purpose’ and expropriation: Some comparative insights and the South African bill of rights” (1995) 11 SAJHR 207-221 at 208-209; Roux T “Property” in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* vol 3 2<sup>nd</sup> ed (OS 2003) ch 46 at 33.

<sup>131</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 458-459 explains that, if this is the case, “issues about the public purpose of an expropriation might perhaps never come to the court’s attention in terms of section 25(2), as they would be decided at an earlier stage as arbitrary deprivation issues in terms of section 25(1)”. See further Roux T “Property” in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* vol 3 2<sup>nd</sup> ed (OS 2003) ch 46 at 2-5.

<sup>132</sup> *Administrator, Transvaal v J van Streepen (Kempton Park) (Pty) Ltd* 1990 (4) SA 644 (A).

<sup>133</sup> At 660I-661I. See further Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 461; Slade BV *The Justification of Expropriation for Economic Development* (LLD dissertation Stellenbosch University 2012) 33-35.

expropriations for purposes other than actual state or public use.<sup>134</sup> In any given case during this time, the approach the courts would follow was dictated by the wording of the statutory provision that authorised the expropriation. Therefore, depending on the wording of the authorising statute and the context, the courts were willing to follow either a more lenient approach that corresponds with the wider notion of public interest or a narrow approach that corresponds with the notion of public purpose.<sup>135</sup>

In the constitutional era, the public purpose requirement can be said to serve a dual function, firstly to control the justification and authority for expropriations, and secondly to ensure that the ordinary functioning of the property clause in protecting property does not frustrate or impede expropriations that constitute a part of land or similar reforms to which the Constitution has committed itself.<sup>136</sup> This dual interpretation of the public purpose requirement is incorporated within a lenient

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<sup>134</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 461. See further Eisenberg A “Public purpose’ and expropriation: Some comparative insights and the South African bill of rights” (1995) 11 SAJHR 207-221 at 201; Gildenhuys A *Onteieningsreg* 2<sup>nd</sup> ed (2001) 95; Nginase XH *The Meaning of “Public Purpose” and “Public Interest” in Section 25 of the Final Constitution* (LLM thesis Stellenbosch University 2009) 27; Slade BV *The Justification of Expropriation for Economic Development* (LLD dissertation Stellenbosch University 2012) 35; Slade BV “Public purpose or public interest’ and third party transfers” (2014) 17 PELJ 167-206 at 183.

<sup>135</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 461. See further Nginase XH *The Meaning of “Public Purpose” and “Public Interest” in Section 25 of the Final Constitution* (LLM thesis Stellenbosch University 2009) 27; Slade BV *The Justification of Expropriation for Economic Development* (LLD dissertation Stellenbosch University 2012) 36.

<sup>136</sup> Roux T “Property” in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* vol 3 2<sup>nd</sup> ed (OS 2003) ch 46 at 2-5. See further Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 459; Slade BV *The Justification of Expropriation for Economic Development* (LLD dissertation Stellenbosch University 2012) 48; Slade BV “The less invasive means argument in expropriation law” 2013 TSAR 199-216 at 199; Slade BV “Less invasive means: The relationship between sections 25 and 36 of the Constitution of the Republic of South Africa, 1996” in Hoops B, Marais EJ, Mostert H, Sluysmans JAMA & Verstappen LCA (eds) *Rethinking Expropriation Law I: Public Interest in Expropriation* (2015) 331-347 at 331.

approach; an approach that does not involve complete deference to legislative or executive decisions regarding the public purpose of expropriation nor frustrates land reform.<sup>137</sup>

A problematic area with regard to the public purpose requirement in South African law is that of the transfer of expropriated property to others, specifically those involving transfers of property to other private parties. The Appellate Division in *Van Streepen* held that the expropriation of property for the benefit of a third party cannot be considered a public purpose, but since the third party's business in that case was important to the public, it was accepted under the ambit of public interest and declared valid.<sup>138</sup> Similarly, in *Bartsch Consult (Pty) Ltd v Mayoral Committee of the Maluti-a-Phofung Municipality*<sup>139</sup> the High Court accepted that the expropriation of property for the benefit of a third party could not be for a public purpose. However, the court stated further that it could qualify as a valid act of expropriation if it could be "brought within the realm of an act performed in the public interest".<sup>140</sup> Slade argues that, on the basis of these decisions, the public purpose cannot justify an expropriation that is undertaken for the sole benefit of a third party. Furthermore, expropriations undertaken for the sole benefit of third parties must be distinguished

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<sup>137</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 460. See further Slade BV *The Justification of Expropriation for Economic Development* (LLD dissertation Stellenbosch University 2012) 49.

<sup>138</sup> Slade BV *The Justification of Expropriation for Economic Development* (LLD dissertation Stellenbosch University 2012) 51. See further Slade BV "Public purpose or public interest' and third party transfers" (2014) 17 *PELJ* 167-206 at 187.

<sup>139</sup> *Bartsch Consult (Pty) Ltd v Mayoral Committee of the Maluti-a-Phofung Municipality* [2010] ZAFSHC 11, 4 February 2010.

<sup>140</sup> Para 5 2. See further Van der Walt AJ "Constitutional property law" 2010 ASSAL 251-294 at 282-287; Slade BV *The Justification of Expropriation for Economic Development* (LLD dissertation Stellenbosch University 2012) 51; Slade BV "Public purpose or public interest' and third party transfers" (2014) 17 *PELJ* 167-206 at 187.

from situations where the expropriated property is transferred to a third party in order to enable the third party to realise or achieve a public purpose.<sup>141</sup> In *Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd*<sup>142</sup> the Supreme Court of Appeal stated that

"[t]he expropriation of land in order to enable a private developer to construct low-cost housing is as much an expropriation for public purposes as it would be if the municipality or province had undertaken the task itself, using the same contractors. I do not think it can be said in our modern conditions and having regard to the Constitution that an expropriation can never be for a public purpose merely because the ultimate owner of the land after expropriation will be a private individual or company."<sup>143</sup>

Slade states that, when property is expropriated and subsequently transferred to a third party to realise a public purpose, the expropriation and subsequent transfer will be for a public purpose and the mere fact that the property is transferred to a third party will not automatically invalidate the expropriation.<sup>144</sup> Van der Walt explains that the Supreme Court of Appeal's decision in *Offit* indicates that South Africa would follow the international trends on the public purpose requirement in the context of third party transfers of expropriated property.<sup>145</sup>

The South African approach to the public purpose requirement seems to be based less on deference, thus more strict than the US approach, but is not as strict

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<sup>141</sup> Slade BV *The Justification of Expropriation for Economic Development* (LLD dissertation Stellenbosch University 2012) 51. See further Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 490; Slade BV "Public purpose or public interest' and third party transfers" (2014) 17 *PELJ* 167-206 at 187.

<sup>142</sup> *Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd* 2010 (4) SA 242 (SCA).

<sup>143</sup> Para 15.

<sup>144</sup> Slade BV *The Justification of Expropriation for Economic Development* (LLD dissertation Stellenbosch University 2012) 51-52. See further Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 490-492; Slade BV "Public purpose or public interest' and third party transfers" (2014) 17 *PELJ* 167-206 at 187.

<sup>145</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 464-465.

in its application as the German approach, because of the reform commitments of section 25. The South African approach seems to sit in the middle of the US total deference approach and the strict German approach.<sup>146</sup>

### 5 3 4 Compensation

Section 25(2) of the South African Constitution requires that just and equitable compensation be paid for the expropriation of property; those affected by the expropriation must agree on the amount, time and manner of payment of the compensation or these factors must be decided or approved by a court. Section 25(3) states that the amount, time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all the relevant circumstances including, but not limited to, the factors listed in section 25(3)(a)-(e). The factors are the current use of the property; the history of the acquisition and use of the property; the market value of the property; the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and the purpose of the expropriation.

The time and manner of payment of compensation should be just and equitable, taking into account all relevant circumstances. Prompt payment of compensation would usually follow an expropriation, but sections 25(2) and 25(3) do allow for delayed payment of compensation in circumstances where this would be just and

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<sup>146</sup> See 2 3 4 above.

equitable.<sup>147</sup> In *Haffejee NO v eThekweni Municipality*<sup>148</sup> the Constitutional Court held that section 25 does not require that the amount of compensation always be determined prior to expropriation taking place. While prior compensation may be required in certain circumstances, such circumstances were not present in this case and thus the subsequent determination of compensation was deemed to be just and equitable. A determination of the amount of compensation under section 25 requires a “contextualised judgment with due regard for individual property interests and for the history of land rights in the pre-constitutional era, the new constitutional framework and the legitimate land reform efforts of the state”.<sup>149</sup> Van der Walt explains that “[w]hat is adjudged just and equitable has to reflect the sensitivity of that context and cannot simply be based on [an] abstract value attached to the property in question”.<sup>150</sup> The South African just and equitable approach to the determination of compensation required in section 25(3) is very similar to Article 14.3 of the German Basic Law, which requires that an equitable balance be reflected between the interests of those affected and the public interest.<sup>151</sup>

The payment of just and equitable compensation is a factor that can be used to distinguish between deprivations and expropriations of property because it is a requirement for expropriations but not deprivations. Therefore, deprivations are

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<sup>147</sup> Roux T “Property” in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* vol 3 2<sup>nd</sup> ed (OS 2003) ch 46 at 35. See further Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 509.

<sup>148</sup> *Haffejee NO v eThekweni Municipality* 2011 (3) SA 608 (CC).

<sup>149</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 509.

<sup>150</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 509-510. See further Budlender G “The constitutional protection of property rights” in Budlender G, Latsky J & Roux T (eds) *Juta’s New Land Law* (OS 1998) ch 1 at 48-55, 57; Du Plessis WJ *Compensation for Expropriation under the Constitution* (LLD dissertation Stellenbosch University 2009) 99-100.

<sup>151</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 510. See further 2 3 5 above; Eisenberg A “Different constitutional formulations for compensation clauses” (1993) 9 SAJHR 412-421 at 421.

usually not compensated but expropriations are.<sup>152</sup> However, it is possible that expropriation without compensation may be justifiable under section 36 of the Constitution.<sup>153</sup>

### 5 3 5 Excessive deprivation

The South African Constitutional Court adopted what has been described as an “oversimplified categorical distinction”<sup>154</sup> between deprivation and expropriation in its *Harksen*<sup>155</sup> decision. However, in its *FNB*<sup>156</sup> decision, the Court replaced this approach with a methodology that subverts the categorical distinction.<sup>157</sup> Van der Walt points out that both the categorical distinction formulated in *Harksen* and the subset-approach proposed in *FNB* seem to exclude the possibility of recognising a grey area between deprivation and expropriation.<sup>158</sup> However, there is still no clarity as to whether South African constitutional property law recognises the notion of constructive expropriation. An example of an area where the notion of constructive expropriation should never arise is taxation.<sup>159</sup> Van der Walt argues that, while

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<sup>152</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 196.

<sup>153</sup> *Nhlabati v Fick* 2003 (7) BCLR 806 (LCC), where it was held that even if the provision resulted in expropriation without compensation, this outcome would be justified in terms of section 36(1). However, the Court did not decide that expropriation took place. See further Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 274, 297-299.

<sup>154</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 347.

<sup>155</sup> *Harksen v Lane NO* 1998 (1) SA 300 (CC).

<sup>156</sup> *First National Bank of Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd v Minister of Finance* 2002 (4) SA 768 (CC).

<sup>157</sup> Para 57. See further Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 347.

<sup>158</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 347. See further Roux T “Property” in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* vol 3 2<sup>nd</sup> ed (OS 2003) ch 46 at 33; Bezuidenhout K *Compensation for Excessive but Otherwise Lawful Regulatory State Action* (LLD dissertation Stellenbosch University 2015) 105.

<sup>159</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 347-349.

taxation appears to be both a deprivation and an expropriation of property, it would be senseless to think of taxation as a limitation that could be rectified by the payment of compensation. Furthermore, it is highly unlikely that a law imposing or enforcing an unfair or excessive tax will successfully found a claim for compensation under the expropriation clause: such a law will most likely be declared unconstitutional because it amounts to an arbitrary deprivation and therefore is invalid.<sup>160</sup> According to *Agri SA*, state acquisition of the property in question must be established in order to prove expropriation. This state acquisition requirement implies a categorical approach to the distinction between deprivation and expropriation, meaning that each form of interference is a distinct category and they do not overlap. A categorical approach does not allow for the recognition of a notion like constructive expropriation because the interference must be either a deprivation or an expropriation. If the interference does not fit into one of these categories, it is unconstitutional. On the basis of the *FNB* and *Agri SA* decisions, constructive expropriation seems to be inappropriate in South African law.<sup>161</sup> However, certain statutes do provide for compensation for excessive regulation of property.<sup>162</sup> These instances of excessive regulation are not expropriations and the compensation awarded is not expropriatory

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<sup>160</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 347-348.

<sup>161</sup> Bezuidenhout K *Compensation for Excessive but Otherwise Lawful Regulatory State Action* (LLD dissertation Stellenbosch University 2015) 211. See further Roux T “Property” in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* vol 3 2<sup>nd</sup> ed (OS 2003) ch 46 at 33; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 347.

<sup>162</sup> For examples see Bezuidenhout K *Compensation for Excessive but Otherwise Lawful Regulatory State Action* (LLD dissertation Stellenbosch University 2015) 210-231; *Minister of Agriculture v Bluelilliesbush Dairy Farming (Pty) Ltd* 2008 (5) SA 522 (SCA).

in nature. These statutes provide for equalisation-type measures, often monetary in nature, similar to the approach in German law.<sup>163</sup>

However, the *Arun* and *City of Tshwane* decisions complicate the question of accepting the notion of constructive expropriation in the context of excessive deprivations. In these decisions, as well in the *Agri SA* decision, the Court was willing to treat a statutory interference with private property as expropriation and therefore bypassing the section 25(1) analysis and heading directly into the expropriation analysis based on section 25(2)-(3),<sup>164</sup> in circumstances where the legislation involved did not clearly state the intention or the authority to expropriate and where it must have been questionable whether expropriation was indeed possible and legitimate.<sup>165</sup> It is not clear that judicially bypassing the deprivation inquiry and moving straight into the expropriation inquiry is jurisprudentially wise or even doctrinally possible in these instances.<sup>166</sup>

The *Arun* decision raises the question of what kind of expropriation, if expropriation was even applicable at all, was being compensated for.<sup>167</sup> One option is that the Court wanted to award compensation for statutory expropriation. Statutory expropriation involves the promulgation of a law that brings about expropriation of

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<sup>163</sup> See 2 3 5 above. See further Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 276; Bezuidenhout K *Compensation for Excessive but Otherwise Lawful Regulatory State Action* (LLD dissertation Stellenbosch University 2015) 212.

<sup>164</sup> Van der Walt AJ "Section 25 vortices (Part 2)" 2016 *TSAR* (forthcoming November 2016) at 46.

<sup>165</sup> Van der Walt AJ "Section 25 vortices (Part 2)" 2016 *TSAR* (forthcoming November 2016) at 46.

<sup>166</sup> Van der Walt AJ "Section 25 vortices (Part 2)" 2016 *TSAR* (forthcoming November 2016) at 46.

<sup>167</sup> Slade BV "Compensation for what? An analysis of the outcome in *Arun Property Development (Pty) Ltd v Cape Town City*" (2016) 19 *PELJ* 1-25 at 18.

certain property automatically, without any administrative or judicial intervention.<sup>168</sup> However, the question remains whether statutory expropriation can or should be recognised in South African law.<sup>169</sup> Section 25(2) weighs against the recognition of statutory expropriation because it states that property may only be expropriated in terms of law of general application and not by law of general application.<sup>170</sup> Slade argues that the alleged expropriation in *Arun* does not meet the requirements for statutory expropriation because the legislation in this case made no provision for the expropriation of specified properties to be effected upon its promulgation.<sup>171</sup> Furthermore, the acquisition of the property in this case was caused by an administrative decision to approve a subdivision plan, not to expropriate.<sup>172</sup> Therefore, statutory expropriation is not applicable in *Arun* because the property was not automatically transferred to the state by the promulgation of the law in question. Another option is that the kind of expropriation being compensated here is constructive expropriation. According to this notion, a deprivation that has an excessive or unfair effect on an individual owner is saved from invalidity due to the importance of the regulation by treating it as an expropriation that requires

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<sup>168</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 433. See further Slade BV "Compensation for what? An analysis of the outcome in *Arun Property Development (Pty) Ltd v Cape Town City*" (2016) 19 PELJ 1-25 at 4.

<sup>169</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 433-436.

<sup>170</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 434. See further Slade BV "Compensation for what? An analysis of the outcome in *Arun Property Development (Pty) Ltd v Cape Town City*" (2016) 19 PELJ 1-25 at 19.

<sup>171</sup> Slade BV "Compensation for what? An analysis of the outcome in *Arun Property Development (Pty) Ltd v Cape Town City*" (2016) 19 PELJ 1-25 at 19.

<sup>172</sup> Slade BV "Compensation for what? An analysis of the outcome in *Arun Property Development (Pty) Ltd v Cape Town City*" (2016) 19 PELJ 1-25 at 19.

compensation.<sup>173</sup> The Constitutional Court never regarded the vesting of the excess land in the local authority as a regulatory measure, which counts against the recognition of constructive expropriation in this case.<sup>174</sup> Van Wyk argues that the vesting of ownership of a public road in a municipality upon subdivision or township establishment cannot amount to an expropriation.<sup>175</sup> Instead, this vesting amounts to a deprivation of property.<sup>176</sup> This conclusion is reached after considering a number of factors,<sup>177</sup> including the distinction made in conveyancing practice between vesting transfers, private sales and expropriation transfers and section 26(3) of the Expropriation Act, which states that the compensation for land declared to be a road by an ordinance or acquired for a road without such land being expropriated payable to the owner shall be calculated in terms of section 12 of the act, as if the land had been expropriated.

In *City of Tshwane* it was held that the imposition of a public servitude is a kind of expropriation that must be compensated.<sup>178</sup> The Constitutional Court did not elaborate on what it meant by “kind of expropriation” or what kind of expropriation this could be. This does not appear to be expropriation because state acquisition of the property is required for expropriation and there was no state acquisition in this case. It does not appear to be statutory expropriation either because the land was not transferred to the state by promulgation of the legislation in question. One

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<sup>173</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 350. See further Slade BV “Compensation for what? An analysis of the outcome in *Arun Property Development (Pty) Ltd v Cape Town City*” (2016) 19 PELJ 1-25 at 20.

<sup>174</sup> Slade BV “Compensation for what? An analysis of the outcome in *Arun Property Development (Pty) Ltd v Cape Town City*” (2016) 19 PELJ 1-25 at 21.

<sup>175</sup> Van Wyk J “Planning and Arun’s (not so straight and narrow) roads” (2016) 19 PELJ 1-29 at 19.

<sup>176</sup> Van Wyk J “Planning and Arun’s (not so straight and narrow) roads” (2016) 19 PELJ 1-29 at 20.

<sup>177</sup> Van Wyk J “Planning and Arun’s (not so straight and narrow) roads” (2016) 19 PELJ 1-29 at 19-21.

<sup>178</sup> *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd* 2015 (6) SA 440 (CC) para 149.

possibility, although it was not specifically mentioned in the case is that the kind of expropriation in this case could be something like constructive expropriation because there was no legislative authority or intention to expropriate but the effect of the regulatory action is in fact expropriatory.

The *Agri SA* decision appears to indicate that the Court follows a categorical approach to the distinction between deprivation and expropriation with the requirement of state acquisition distinguishing expropriation from deprivation. Therefore, in theory, the notion of constructive should not be recognised in South African law. However, the *Arun* and *City of Tshwane* decisions cast doubt on whether this is actually the case. Both of these decisions make statements regarding different kinds of expropriation but under the categorical approach state acquisition is required to prove expropriation. Without establishing state acquisition, there is no expropriation. This approach does not allow for something like the notion of constructive expropriation. The notion of constructive expropriation is not expressly recognised in South African law but there is still uncertainty regarding whether it will perhaps be recognised in the future.

### 5 3 6 Conclusion

In *Harksen*, the Court assumed that the distinction between deprivation and expropriation of property was a categorical one, meaning that these two forms of interference with property are distinct entities with characteristics that distinguish them from each other clearly and exhaustively. It was held that expropriation involves the acquisition of rights in property by a public authority for a public purpose, while deprivation of rights in property falls short of such acquisition. Therefore, property acquired by the state for a public purpose is expropriation, while

any interference that does not result in acquisition of the property by the state is a deprivation of property. This categorical approach does not allow for any overlap between expropriation and deprivation, negating the possibility of recognising constructive expropriation.

In *FNB*, the Court moved away from this categorical approach in *Harksen* towards a subset approach. According to this approach, expropriations are a smaller category of interferences with property that fall into the larger category of deprivations of property. The Court also set out a methodology for determining the constitutional validity of interferences with property. Since expropriations are a subset of deprivations, the investigation into the constitutionality of an interference must necessarily begin with section 25(1), which sets out the requirements for constitutional deprivations of property. If the interference passes scrutiny under section 25(1) or it is justified under section 36, then the question arises whether the interference is an expropriation. If the interference amounts to expropriation, it must pass scrutiny under section 25(2)(a) and provide for compensation under section 25(2)(b).

This methodology makes a notion like constructive expropriation impossible because a deprivation that goes too far will be declared unconstitutional under section 25(1) and will never reach the expropriation stage. However, subsequent decisions have not followed this methodology. The Court has in some cases jumped immediately to the expropriation inquiry in a matter without first considering whether the interference in question is a deprivation in terms of section 25(1). This is not very problematic in cases where the interference is clearly an expropriation. *Agri SA* makes it clear that the interference is an expropriation if there is state acquisition of the property. If state acquisition is not established, the interference is a deprivation.

*Agri SA* seemed to confirm the subset approach of *FNB*, but then moved back towards a categorical distinction and then mentioned that deprivation and expropriation overlap. There was no clear finding regarding this overlap. The Court focused its attention on the state acquisition requirement, which seems to indicate that it adopted a categorical distinction between deprivation and expropriation. The introduction of state acquisition as a requirement for expropriation has the effect of creating some certainty regarding the distinction between deprivation and expropriation and is reminiscent of the *Harksen* decision, in that there will be no expropriation where deprivation of property does not result in property being acquired by the state.

In *Arun*, it was held that the legislation in question brought about an *ex lege* transfer of ownership that had the same effect as an expropriation and that compensation was therefore payable. The Court did not say that this was an expropriation of property but rather an interference that had the same effect as an expropriation. This decision creates confusion because this should not have been an expropriation case. The Court characterised the interference as an expropriation of sorts and then held that it attracted a claim for compensation. In *City of Tshwane*, the majority flirted with the notion of an interference with property that is something like expropriation by saying that the imposition of a public servitude is a kind of expropriation. Statements that interferences with property can have the same effect as an expropriation or are a kind of expropriation contradict the categorical distinction established in *Agri SA*. These decisions create uncertainty regarding which approach to the distinction between deprivation and expropriation the Court uses. In light of the state acquisition requirement for expropriation laid down in *Agri SA*, the approach to the distinction between deprivation and expropriation appears to

be, in theory, a categorical one. On the continuum between the German and US law approaches to this distinction, the South African law categorical approach appears to be closer to the German law approach.<sup>179</sup>

## 5 4 Proportionality

Proportionality comes into play when adjudicating the constitutional validity of limitations on the rights of an individual. The South African Constitution<sup>180</sup> contains an express limitation clause in section 36. Section 36(1) provides that any right in the Bill of Rights, including the right to property, may be limited as long as such limitation is authorised by law of general application, and to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including: the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.<sup>181</sup> The Constitutional Court has indicated that it follows a two-stage approach when inquiring into the constitutional validity of a statute that limits a fundamental right.<sup>182</sup> The Court first establishes whether there

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<sup>179</sup> See 2 3 above.

<sup>180</sup> Constitution of the Republic of South Africa, 1996.

<sup>181</sup> Section 36(1)(a)-(e). For an in-depth discussion of these factors see Woolman S & Botha H “Limitations” in Woolman S, Roux T & Bishop M (eds) *Constitutional law of South Africa* vol 2 (2<sup>nd</sup> ed OS 2006) ch 34 at 70-93.

<sup>182</sup> *S v Makwanyane* 1995 (3) SA 391 (CC). See further Woolman S & Botha H “Limitations” in Woolman S, Roux T & Bishop M (eds) *Constitutional law of South Africa* vol 2 (2<sup>nd</sup> ed OS 2006) ch 34 at 2-6; Liebenberg S *Socio-Economic Rights Adjudication under a Transformative Constitution* (2010) 93-97; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 74-75; Slade BV “Less invasive means: The relationship between sections 25 and 36 of the Constitution of the Republic of South

has been an infringement of a right protected in the Bill of Rights. The matter proceeds to the second stage only if an affirmative answer is achieved in the first enquiry. Secondly, the Court establishes whether the infringement can be justified under section 36 of the Constitution. In the cases of an interference of the right to property, the interference will first be judged under the requirements of section 25. If the Court finds that the right has been infringed, then the proportionality test will be used to establish whether the infringement is justified.<sup>183</sup>

The decision of *S v Makwanyane*<sup>184</sup> dealt with the interpretation and application of the predecessor to section 36, namely section 33 of the Interim Constitution.<sup>185</sup> There are important differences between these two provisions. Section 33 required that limitations of certain rights had to be necessary to be valid and that such limitations should not negate the essential content of the right in question.<sup>186</sup> Section 36 no longer contains these requirements and thus they are no longer relevant. However, the limitation-of-rights analysis of Chaskalson P is still relevant to understanding section 36 of the final Constitution. In *Makwanyane*, Chaskalson P held that the “limitation of constitutional rights for a purpose that is reasonable and

Africa, 1996” in Hoops B, Marais EJ, Mostert H, Sluysmans JAMA & Verstappen LCA (eds) *Rethinking Expropriation Law I: Public Interest in Expropriation* (2015) 331-346 at 335-336.

<sup>183</sup> Roux T “Property” in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* vol 3 2<sup>nd</sup> ed (OS 2003) ch 46 at 26; Woolman S & Botha H “Limitations” in Woolman S, Roux T & Bishop M (eds) *Constitutional law of South Africa* vol 2 (2<sup>nd</sup> ed OS 2006) ch 34 at 5-6; Liebenberg S *Socio-Economic Rights Adjudication under a Transformative Constitution* (2010) 94; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 74-75; Slade BV “Less invasive means: The relationship between sections 25 and 36 of the Constitution of the Republic of South Africa, 1996” in Hoops B, Marais EJ, Mostert H, Sluysmans JAMA & Verstappen LCA (eds) *Rethinking Expropriation Law I: Public Interest in Expropriation* (2015) 331-347 at 335.

<sup>184</sup> *S v Makwanyane* 1995 (3) SA 391 (CC).

<sup>185</sup> Constitution of the Republic of South Africa, Act 200 of 1993.

<sup>186</sup> Section 33(1)(a)-(b) of the Constitution of the Republic of South Africa, Act 200 of 1993.

necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality.”<sup>187</sup> There is no absolute standard that could be laid down and applied in every case. While guiding principles can be established, the application of those principles will depend on the circumstances of each case. Furthermore, Chaskalson P set out the relevant considerations to be taken into account when determining whether a particular limitation is reasonable and necessary. These considerations are now written into section 36. Finally, Chaskalson P emphasised that it is not the role of the courts to “second-guess the wisdom of policy choices made by legislators” in establishing the balance of interests inherent in proportionality analysis. This means, according to Van der Walt, that the application of the proportionality test concerns the “constitutional stability of a limitation and not the application of a subjective substantive due process standard in the sense of testing the political wisdom of a law”.<sup>188</sup>

In *FNB*, the Court interpreted what the term “arbitrary” means in the context of section 25. After considering comparative law regarding deprivation of property, Ackermann J concluded that a deprivation of property would be arbitrary for the purposes of section 25 when the law referred to in section 25(1) “does not provide sufficient reason for the particular deprivation in question or is procedurally unfair”.<sup>189</sup> Ackermann J then set out a comprehensive test to establish whether there is sufficient reason for the deprivation:

- “(a) It is to be determined by evaluating the relationship between means employed, namely the deprivation in question, and ends sought to be achieved, namely the

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<sup>187</sup> *S v Makwanyane* 1995 (3) SA 391 (CC) para 104.

<sup>188</sup> Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) 358 (emphasis removed).

<sup>189</sup> *First National Bank of Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

purpose of the law in question.

- (b) A complexity of relationships has to be considered.
- (c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected.
- (d) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.
- (e) Generally speaking, where the property in question is ownership of land or a corporeal moveable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation, than in the case when the property is something different, and the property right something less extensive. This judgment is not concerned at all with incorporeal property.
- (f) Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.
- (g) Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by section 36(1) of the Constitution.
- (h) Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind that the enquiry is concerned with ‘arbitrary’ in relation to the deprivation of property under section 25.”<sup>190</sup>

The methodology set out in *FNB* is geared towards determining substantive and not procedural arbitrariness. Having created the dichotomy between substantive and procedural arbitrariness, only substantive arbitrariness was considered.<sup>191</sup> Roux

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<sup>190</sup> Para 100.

<sup>191</sup> The Court did not provide any further content to the concept of procedural arbitrariness, though it appears to constitute an independent ground for finding that a deprivation is arbitrary. See further Van

observed that this methodology leaves much room for judicial discretion, which means that the factors that will be taken into account and the level of scrutiny will vary according to the circumstances.<sup>192</sup> Therefore, the level of scrutiny “will vacillate between two fixed poles: rationality review at the lower end of the scale, and something just short of a review for proportionality at the other”.<sup>193</sup> Regarding the application of the section 36(1) justification analysis, it was assumed that infringements of section 25(1) are also subject to the provisions of section 36.<sup>194</sup> It was unnecessary to embark on a detailed section 36(1) justification analysis in this case because a brief application of the factors listed under section 36(1) yielded the same conclusion as that reached after applying the arbitrariness test.<sup>195</sup>

Proportionality review features in both the first and second stage of a constitutional challenge based on section 25. In the section 25(1) stage, it takes the form of an arbitrariness review. In the section 36(1) stage, it takes the form of a full proportionality review. The kind of review required in section 25(1) is more than mere rationality, yet not quite the full proportionality review required by section 36(1). The standard of review in section 25(1) can be located on a continuum between thin rationality review and something just short of full proportionality review required in

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der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 264-265; Van der Walt AJ “Procedurally arbitrary deprivation of property” (2012) 23 *Stell LR* 88-94 at 88.

<sup>192</sup> Roux T “Property” in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* vol 3 2<sup>nd</sup> ed (OS 2003) ch 46 at 24.

<sup>193</sup> Roux T “Property” in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* vol 3 2<sup>nd</sup> ed (OS 2003) ch 46 at 24.

<sup>194</sup> *First National Bank of Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd v Minister of Finance* 2002 (4) SA 768 (CC) para 110.

<sup>195</sup> Paras 111-113.

section 36(1).<sup>196</sup> The difference between the arbitrariness standard in section 25(1) and the proportionality test in section 36(1) is that the arbitrariness standard in section 25(1) will fluctuate between standards of rationality and something just short of proportionality due to the high level of discretion the *FNB* methodology allows judges, while the proportionality test in section 36(1) is a strict proportionality test and its standard does not fluctuate at all, regardless of circumstances. Applying both the section 25(1) arbitrariness test and the section 36(1) proportionality test confirms that the Court follows a two stage approach when inquiring into the constitutional validity of a deprivation of property. This two-stage approach is also applied when determining the validity of expropriation property. In the first stage, the expropriation must comply with the requirements in section 25(2)-(3). The second stage is reached if the expropriation does not comply with the requirements and the inquiry becomes whether the expropriation is nonetheless justifiable in terms of section 36(1). It is improbable that a deprivation or expropriation that is conflict with section 25 could be justified under section 36 and therefore any limitation of property that does not comply with the specific requirements in section 25 will most likely always be unconstitutional.<sup>197</sup>

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<sup>196</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 243. See further Roux T “Property” in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* vol 3 2<sup>nd</sup> ed (OS 2003) ch 46 at 22; Van der Walt AJ “Striving for a better interpretation – A critical reflection on the Constitutional Court’s *Harksen* and *FNB* decisions on the property clause” (2005) 123 SALJ 854-878 at 871-872.

<sup>197</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 79. There have been instances that suggest that this will not always be the case. An example is the decision of *Nhlabati v Fick* 2003 (7) BCLR 806 (LCC), where it was said, without actually deciding that expropriation was involved, that there can be circumstances where the absence of a right to compensation for expropriation would be reasonable and justifiable in terms of section 36(1).

In *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset v Buffalo City Municipality; Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing, Gauteng*,<sup>198</sup> the Court used the wide judicial discretion reserved for itself in *FNB* “to locate the level of scrutiny on the rationality side of the continuum rather than the proportionality side”.<sup>199</sup> It thus proved Roux correct in his observation that the Court had created for itself a wide discretion to vacillate between the proportionality-like test used in *FNB* and something closer to mere rationality in terms of section 25(1).<sup>200</sup> Proportionality review under section 36(1) was not resorted to in this case because the deprivation in question was regarded as constitutionally valid based on the lower level of scrutiny opted for during the section 25(1) arbitrariness review. In *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government*,<sup>201</sup> the Court decided that a proportionality-type analysis was appropriate and considered the purpose of the law in question, the nature of the property involved, the extent of the deprivation and whether there were any less restrictive means available to achieve

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<sup>198</sup> *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset v Buffalo City Municipality; Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing, Gauteng* 2005 (1) SA 530 (CC).

<sup>199</sup> Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 256. See further Roux T “Property” in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* vol 3 2<sup>nd</sup> ed (OS 2003) ch 46 at 24; Van der Walt AJ “Retreating from the FNB arbitrariness test already? *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government and Housing, Gauteng*” (2005) 123 SALJ 75-89 at 87-88.

<sup>200</sup> Roux T “Property” in Woolman S, Roux T & Bishop M (eds) *Constitutional Law of South Africa* vol 3 2<sup>nd</sup> ed (OS 2003) ch 46 at 24. See further Van der Walt AJ “Retreating from the FNB arbitrariness test already? *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government and Housing, Gauteng*” (2005) 123 SALJ 75-89 at 82; Van der Walt AJ *Constitutional Property Law* 3<sup>rd</sup> ed (2011) 250.

<sup>201</sup> *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 (6) SA 391 (CC).

the purpose in question.<sup>202</sup> The Court did not engage in a section 36(1) proportionality review because the deprivation in this case was deemed to be constitutionality valid under the section 25(1) proportionality-type analysis.

In *National Credit Regulator v Opperman*,<sup>203</sup> it was held that the deprivation was not of a partial nature. Rather, it removed an unregistered credit provider's right to restitution and that there had to be convincing reasons for this removal.<sup>204</sup> Furthermore, given the fact that the deprivation in this case was far reaching, the purpose for it should be stated clearly and the means chosen to accomplish it must be narrowly framed. The means chosen were disproportionate to the purpose to be achieved and therefore section 89(5)(c) resulted in arbitrary deprivation of property in breach of section 25(1) of the Constitution.<sup>205</sup>

Having determined that the deprivation in this case was indeed arbitrary, the Court, in accordance with the test set out in *FNB*, analysed whether the arbitrary deprivation could be justified in terms of section 36(1) of the Constitution. To begin with, the Court once again referred to *FNB* where it was assumed that it must be determined whether or not the deprivation is justified under section 36 when it is found to be arbitrary.<sup>206</sup> Furthermore, many of the factors employed under the

<sup>202</sup> Para 49.

<sup>203</sup> *National Credit Regulator v Opperman* 2013 (2) SA 1 (CC). See further Van der Walt AJ "Constitutional property law" 2012 ASSAL 182-199 at 183-187; Brits R "Arbitrary deprivation of unregistered credit provider's right to claim restitution of performance rendered: *Opperman v Boonzaaier* (24887/2010) 2012 ZAWCHC 27 (17 April 2012) and *National Credit Regulator v Opperman* 2013 2 SA 1 (CC)" (2013) 16 PELJ 422-470 at 434-441; Marais EJ "The constitutionality of section 89(6)(c) of the National Credit Act under the property clause: *National Credit Regulator v Opperman & Others*" (2014) 131 SALJ 215-233 at 217-232.

<sup>204</sup> Para 70.

<sup>205</sup> Paras 71-72.

<sup>206</sup> Para 74 referring to *First National Bank of Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd v Minister of Finance* 2002 (4) SA 768 (CC) para 110.

arbitrariness test to determine sufficiency of reasons yield the same conclusion when considering whether a limitation is reasonable and justifiable under section 36.<sup>207</sup> Laws impacting on constitutional rights may not use disproportionate means to achieve their purpose.<sup>208</sup> The failure to allow a court the discretion to distinguish between credit providers who intentionally exploit consumers and those who fail to register due to ignorance and lend money to a friend on an *ad hoc* basis is an example of a disproportionate means of achieving the section's purpose.<sup>209</sup> The Court concluded that all the factors under section 36(1) had already been taken into account when determining whether the deprivation in this case was arbitrary. Therefore, the Court was not persuaded that section 89(5)(c) could be saved as a reasonable and justifiable limitation on the right not to be arbitrarily deprived of property.<sup>210</sup>

In *Chevron SA (Pty) Limited v Wilson t/a Wilson's Transport*,<sup>211</sup> only the second stage proportionality test was employed because in the first stage the Court held that the deprivation was procedurally arbitrary under section 25(1).<sup>212</sup> The Court had to determine whether the deprivation could be considered reasonable and justifiable under section 36(1).<sup>213</sup> The Court considered if there were any less restrictive means available to achieve the purpose. The most obvious is to grant a court the discretion to make a just and equitable order, thus allowing for individualised justice.

Furthermore:

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<sup>207</sup> Para 75.

<sup>208</sup> Para 76.

<sup>209</sup> Para 76.

<sup>210</sup> Para 80.

<sup>211</sup> *Chevron SA (Pty) Limited v Wilson t/a Wilson's Transport* [2015] ZACC 15, 5 June 2015.

<sup>212</sup> Para 24.

<sup>213</sup> Paras 31-34.

"It is excessive, unfair, inequitable and arbitrary to compel, *in all circumstances*, an unregistered credit provider to refund monies paid by the consumer for goods or services it *actually* received or enjoyed, simply because that credit provider is not registered. The operative words are 'in all circumstances'. This is not to suggest that in some circumstances this may not be acceptable. The problem is that section 89(5)(b) does not admit of exceptions to make it possible for courts to exercise a discretion."<sup>214</sup>

Therefore, the Court concluded that the arbitrary deprivation constituted an unjustifiable limitation on the property right in section 25(1) and is constitutionally invalid.<sup>215</sup>

In the *Shoprite* decision,<sup>216</sup> Froneman J acknowledged that the standard of arbitrariness could range from rationality to proportionality.<sup>217</sup> The lighter standard may be applicable if the nature of the right to property is not strong and the deprivation is not too heavy.<sup>218</sup> The strongest protection of property will be invoked where the protection of the property best enhances or protects other fundamental values or rights under the Constitution or where the right to property is extinguished completely.<sup>219</sup> If the deprivation is of property that is closely connected to fundamental rights and constitutional values, sufficient reason for the deprivation should approximate proportionality and if not, rationality might suffice.<sup>220</sup> Since the

<sup>214</sup> Para 33.

<sup>215</sup> Para 34.

<sup>216</sup> *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* 2015 (6) SA 125 (CC).

<sup>217</sup> Para 77. See further Rautenbach IM "Dealing with the social dimensions of property" 2015 *TSAR* 822-833 at 830.

<sup>218</sup> Para 77, citing with approval *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset v Buffalo City Municipality; Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing, Gauteng* 2005 (1) SA 530 (CC) paras 34-35. See further Rautenbach IM "Dealing with the social dimensions of property" 2015 *TSAR* 822-833 at 830.

<sup>219</sup> Para 79, 83. See further Rautenbach IM "Dealing with the social dimensions of property" 2015 *TSAR* 822-833 at 830.

<sup>220</sup> Para 80.

deprivation did not extinguish any fundamental rights, rationality would suffice to avoid a finding of arbitrariness and on this standard the deprivation was held to not be arbitrary.<sup>221</sup> The Court did not apply the second stage proportionality test because the deprivation was regarded as non-arbitrary, stating that “[o]nce an interest is identified and the *FNB* approach to arbitrariness is applied, there can be no further independent infringement that would require further justification under section 36”.<sup>222</sup>

Rautenbach argues that Froneman J’s cut-off point that proportionality will be required if other rights are affected and if not, rationality might suffice is unrealistic and too rigid.<sup>223</sup> This is so because there may be instances in which the other rights are so slightly affected or the purposes of the limitation so overwhelmingly compelling that mere rationality will be sufficient, and there could, on the other hand, also be instances in which other rights are not affected at all, but the extent of the limitation of the right to property is so serious that more than rationality is required.<sup>224</sup> Froneman J concluded in this case that rationality would be a sufficient reason to avoid a finding of arbitrariness because the regulatory regime introduced by the relevant legislation did not extinguish any fundamental rights of the holders of grocer’s wine licences or fundamental constitutional values.<sup>225</sup>

In *City of Tshwane*<sup>226</sup> the majority and minority differed on both the level of scrutiny and the outcome of the first stage arbitrariness test. The minority, focusing on the fact that the deprivation in this case was extensive and that it affected

<sup>221</sup> Para 83, 86.

<sup>222</sup> Para 87.

<sup>223</sup> Rautenbach IM “Dealing with the social dimensions of property” 2015 *TSAR* 822-833 at 830.

<sup>224</sup> Rautenbach IM “Dealing with the social dimensions of property” 2015 *TSAR* 822-833 at 830.

<sup>225</sup> *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* 2015 (6) SA 125 (CC) para 83.

<sup>226</sup> *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd* 2015 (6) SA 440 (CC).

ownership of land, concluded that a rational connection between the intrusions authorised by the legislation and the goal sought to be achieved is insufficient to avoid a finding of non-arbitrariness and that compelling reasons for the scale of deprivation authorised are required in this case.<sup>227</sup> The minority also emphasised the lack of information placed before the court to justify such an extensive limitation of property rights.<sup>228</sup> The above two considerations led the minority to conclude that the deprivation is substantively arbitrary.<sup>229</sup> The majority adopted a completely different approach to the arbitrariness issue, arguing that the deprivation is not substantively or procedurally arbitrary because the impugned provision has to be interpreted in a way that least changes the common law and that is the least invasive of fundamental rights.<sup>230</sup> The majority held that it is reasonable to interpret the impugned provision as giving effect to the common law, which means that any actions taken under the impugned provision has to comply with the common law and therefore the provision is neither substantively nor procedurally arbitrary.<sup>231</sup>

Regarding the second stage, the minority did not embark on a detailed section 36(1) justification inquiry. It held that it is unlikely that an arbitrary deprivation may still be justified under section 36 because both the arbitrariness and justification enquiries involve the same analysis and consideration of similar factors.<sup>232</sup> The majority did not apply the proportionality test in section 36(1) because it held that the deprivation was not arbitrary and therefore a justification inquiry is unnecessary.

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<sup>227</sup> Para 61.

<sup>228</sup> Para 62.

<sup>229</sup> Para 63.

<sup>230</sup> Para 153.

<sup>231</sup> Para 153-154.

<sup>232</sup> Para 77.

From the discussion above, it is evident that the Constitutional Court follows a two-stage approach when inquiring into whether an interference with property is valid. In the context of deprivations of property, the Court first inquires into whether the deprivation is arbitrary using the arbitrariness test formulated in *FNB*. Due to the wide scope for judicial discretion that the *FNB* arbitrariness test allows for, the standard of the arbitrariness test can vary and can be placed somewhere on a continuum between rationality on the one end and just short of full proportionality review on the other. If the deprivation is not found to be arbitrary the inquiry ends there but if the deprivation is arbitrary, the inquiry moves to the second stage where it must be determined whether the arbitrary deprivation is justifiable under section 36(1). The standard for the justification inquiry is full proportionality review and does not vary.

A two-stage approach is also employed when determining the validity of expropriations. The Court first determines if the requirements for a valid expropriation in terms of section 25(2) are satisfied. If not, the Court moves to the second stage and applies the same full proportionality review as it does in the second stage of the deprivation enquiry. Only one proportionality test is applied when determining the validity of an expropriation of property.<sup>233</sup>

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<sup>233</sup> In the context of expropriation, the Court appears to first determine whether the expropriation complies with the requirements for a valid expropriation. If it does, then the inquiry ends there. If it does not, the Court inquires in the second stage whether the expropriation is justifiable in terms of section 36(1). There have been very few cases in which the Court has inquired into the justifiability of an expropriation that does not meet the requirements of section 25(2). In *Nhlabati v Fick* 2003 (7) BCLR 806 (LCC), the Land Claims Court decided that even if the effect of the provision in question is seen as expropriation without compensation, that outcome would be justifiable under section 36(1). However, the Land Claims Court did not decide that expropriation took place.

On the continuum between German and US law, the South African law approach to determining the legitimacy of interferences with property appears to be closer to the German law approach in this regard.<sup>234</sup> German and South African law use a contextual approach when determining whether a specific interference is unconstitutional. Both the *FNB* arbitrariness test and the section 36(1) justification inquiry consider factors similar to those considered under the German law proportionality analysis.

However, even if the deprivation is found to be arbitrary after applying the arbitrariness test, the Court does not always engage in a detailed section 36(1) justification inquiry because both the arbitrariness and justification enquiries involve the same analysis and consideration of similar factors and therefore the outcome is unlikely to be different under the section 36(1) justification inquiry. If the deprivation is found to not be arbitrary, then there is no need for a justification enquiry. If an expropriation does not satisfy one or more of the requirements it is unconstitutional and will probably not be justifiable. Therefore it seems that the justification enquiry in terms of section 36(1) is not really significant for the purposes of section 25 because limitation of property that does not satisfy the specific requirements in section 25 will most likely always be unconstitutional.

The circumstances of the case are important in determining whether the section 36(1) justification inquiry will be valuable or not. The section 36(1) justification inquiry could be more valuable when the discretion afforded by the arbitrariness test is exercised in favour of mere rationality review. The justification inquiry could add another layer of more intense scrutiny to ensure that the interference is justified. Only arbitrariness review that is situated towards the

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<sup>234</sup> See 2.4.2 above.

proportionality end of the spectrum between rationality and proportionality could be said to take the form of a full proportionality review and could make the section 36(1) justification inquiry unnecessary because similar factors are considered during the arbitrariness review and the outcome would arguably not be different under a subsequent section 36(1) inquiry.

## 5 5 Conclusion

Section 25 of the Constitution does not contain a definition of property, nor has the Constitutional Court attempted to exhaustively define what property is for the purposes of section 25. The Court interprets property very widely and has recognised a number of interests as constituting property for the purposes of section 25, including limited real rights in land, movable property such as vehicles, intellectual property, a claim for the restitution of money paid based on unjustified enrichment and a liquor licence on a case by case basis, thereby defining the concept of property over time and on an incremental basis. This means that the concept of property is flexible can be expanded as the need for such expansion becomes necessary. The Court's approach of interpreting property widely and incrementally adding interests to the concept of property is similar to the German, ECHR and US law approach to the interpretation of the concept of property. On a doctrinal level, the construction the South African Constitutional Court uses is probably the most similar to German law even if not explicitly followed.<sup>235</sup> In other

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<sup>235</sup> With the above being said, it is worth mentioning that Froneman J in his majority judgment in *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* 2015 (6) SA 125 (CC) did rely on German constitutional property jurisprudence (paras 52-55) in his argument for how the South African

words, the private law, narrow notion is used as the starting point and incrementally a wider constitutional notion is developed by the courts.

Regarding the distinction between deprivation and expropriation, the Court initially adopted a subset approach to this distinction, viewing expropriation as a smaller category of interference wholly included in the larger category of deprivation. However, the Court appears to have now adopted a categorical approach and requiring state acquisition of the property in order to establish expropriation. Subsequent decisions have called this into question by referring to interferences with property that have the same effect as an expropriation or are treated as a kind of expropriation. Interferences like this exist when the categories of deprivation and expropriation overlap but a categorical approach does not allow for such an overlap. Based on the state acquisition requirement, the approach to the distinction between deprivation and expropriation appears to be a categorical one for now. On the continuum between the German and US law approaches to this distinction, the South African law categorical approach is closer to the German law approach.<sup>236</sup> The South African law approach to the public purpose requirement seems to sit in the middle of the strict German law approach and the deferential US law approach. Compensation is required only for expropriations and not for deprivations of property, though it is possible that expropriation without compensation could be justifiable under section 36 of the Constitution. The recognition of a notion like constructive expropriation seems inappropriate, given the apparent categorical approach to the distinction between deprivation and expropriation adopted by the Constitutional Court in *Agri SA*. This approach does not allow for something like constructive

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constitutional concept should be construed, which indicates that German law was followed to an extent.

<sup>236</sup> See 2 3 above.

expropriation. However, the *Arun* and *City of Tshwane* decisions raise questions about whether the Constitutional Court actually follows a categorical approach. While the notion of constructive expropriation is not expressly recognised in South African law, there is uncertainty regarding whether it will be recognised in the future.

The Constitutional Court follows a two-stage approach when inquiring into whether an interference with property is valid. In the first stage, the Court determines whether the interference satisfies the internal requirements of the subsection of section 25 that regulates it. The second stage is reached if the interference does not satisfy the relevant requirements of section 25. In this stage, the Court applies a proportionality test set out in section 36(1) to determine if the interference is justifiable, despite failing to meet the necessary validity requirements. Deprivations of property are first subjected to arbitrariness review, the standard of which can vary between rationality and just short of proportionality due to the wide judicial discretion that this test allows for. A finding of arbitrariness moves the inquiry to the second stage, which involves the application of full proportionality review in order to determine if the arbitrary deprivation is justifiable in the circumstances. The standard of review in this second stage does not vary. Therefore, two tests are employed when determining the validity of a deprivation of property. A two-stage approach is also employed when determining the validity of expropriations. The Court first determines if the requirements for a valid expropriation are satisfied. If not, the Court moves to the second stage and applies the same full proportionality review as it does in the second stage of determining whether a deprivation is justifiable. Only one proportionality test is applied when determining the validity of an expropriation of property. The South African law approach to determining the legitimacy of interferences with property appears to be closer to the German law approach in this

regard than the US law approach.<sup>237</sup> German and South African law use a contextual approach when determining whether a specific interference is unconstitutional. Both the *FNB* arbitrariness test and the justification inquiry consider factors similar to those considered under the German law proportionality analysis.

Case law has indicated that the Court does not always engage in a detailed justification inquiry when the interference does not satisfy the specific internal requirements because, in the case of deprivations, both the arbitrariness and justification enquiries involve the same analysis and consideration of similar factors and therefore the outcome is unlikely to be different under the justification inquiry. If the deprivation is found to not be arbitrary, there is no need for a justification enquiry because the deprivation is valid. If an expropriation does not satisfy one or more of the requirements it is unconstitutional and will probably not be justifiable. Therefore it seems that the section 36(1) justification enquiry is not really significant for the purposes of section 25 because limitation of property that does not satisfy the specific requirements in section 25 will most likely always be unconstitutional.

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<sup>237</sup> See 2.4.2 and 2.4.3 above. It should be mentioned that there have been instances where the Constitutional Court has exercised its judicial discretion to place the standard of review of deprivations of property more towards the rationality end of the spectrum, instead of the proportionality end. See for example Froneman J's judgment in *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* 2015 (6) SA 125 (CC) and Yacoob J's judgment in *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset v Buffalo City Municipality; Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing, Gauteng* 2005 (1) SA 530 (CC).

# Chapter 6

## Conclusion

### 6.1 Introduction

The primary aim of this dissertation was to investigate the state of constitutional property law in certain jurisdictions in Central Eastern Europe. Constitutional property law in South Africa was also investigated because South Africa can also be characterised as a relatively young constitutional democracy, similar to the Central Eastern European jurisdictions discussed. The investigation focused on three main themes: the concept of property for constitutional purposes; the distinction between deprivation and expropriation and the application of the proportionality principle as a means of determining the legitimacy of interferences with property. The selected jurisdictions of Central Eastern Europe and South Africa were chosen because they represent relatively new democracies that are still in the process of refining their approaches to constitutional property law. German and US constitutional property law were briefly described in order to determine if the approaches of either of these more established constitutional democracies could be seen in the approaches adopted by the Central Eastern European jurisdictions and South Africa. In this regard, it was not the purpose to determine whether German or US law were specifically cited or deliberately followed by the Central Eastern European jurisdictions or South Africa, but rather to assess whether the approaches adopted in these “new democracies” resembled German or US law. The European Court of Human Rights’ (ECHR) principles regarding the protection of property were also discussed because they represent another framework that might influence the development of specifically the Central Eastern European jurisdictions’ constitutional

property law, especially since all the Central Eastern European jurisdictions discussed in chapter 4 are members of the Council of Europe and signatories to the Convention on the Protection of Human Rights and Fundamental Freedoms.

Another aim of this investigation was to determine what sources are available in English that could assist in investigating constitutional property law in Central Eastern Europe. This was the main difficulty that I encountered during this investigation. Certain regions had considerable case law translated into English, whereas others had only a handful of useful cases translated or simplified media summaries translated into English. While these were still useful to my investigation, they would often state principles without explaining what those principles mean or how they are applied. This has inevitably led to certain discussions being more brief than others due to a lack of sources. In this regard, it was challenging to further elaborate on particular aspects because of a lack of sources. Be that as it may, a number of quite specific conclusions can nonetheless be drawn in relation to the three themes in the respective jurisdictions.

## 6 2 Conclusions

### 6 2 1 Established doctrine in German and US law

The chapter on German and US law sought to set out the approach of the respective jurisdictions in relation to how property is defined for constitutional purposes, how to distinguish between deprivation and expropriation of property and the application of the proportionality principle as a means to test the legitimacy of an interference with constitutionally protected rights. The chapter is set up with the purpose of representing these two jurisdictions as two markers, or points on a continuum,

specifically in relation to these three questions. The chapter reveals that German and US constitutional property law represent two different approaches to the three main themes. However, in some instances the outcomes of the two jurisdictions are similar but they clearly use different methodologies and for different reasons. The German constitutional property law system is regulated by the Basic Law and legislation, with clear requirements that must be followed in order for the protection provided by Article 14 to be applicable. These requirements are enforced strictly and failure to comply with them will result in invalidity. US constitutional property law relies less on legislation and more on the wording of the Fifth and Fourteenth Amendments and doctrine developed by the courts over time.

Despite the difference in the general point of departure in these jurisdictions, both German and US law have a wide constitutional notion of property that begins with the private law concept but then, in the case of German law, goes beyond it. In German law a wider notion of property is consciously developed for constitutional law in terms of Article 14. The constitutional notion of property in these two jurisdictions ends up including most well-known and recognised rights and interests in property. Both German and US law exclude from protection non-property interests such as the general wealth of an individual and mere expectations. German and US law also treat certain categories of property rights differently, such as public participation rights. Under German law, these rights are protected as property for all intents and purposes, whereas in US law these rights are only regarded as property for the purposes of due process and therefore cannot be the object of a taking requiring compensation. A difference between German and US law is that property in German law is not a pre-constitutional right because Article 14 explicitly empowers the legislature to determine its content and limits. In US law, it can be implied that at

least some property rights are pre-constitutional because the source of property is state law.

In terms of the distinction between deprivation and expropriation, German and US constitutional property law diverge quite significantly. German law views these two forms of interference with property as being distinct from each other, as evidenced by the different validity requirements for each of them. This strict enforcement of these requirements is why the concept of constructive expropriation or regulatory takings has no place in German constitutional property law. A constructive expropriation of property does not comply with the requirements of a regulation or an expropriation and is therefore constitutionally invalid. This approach means that there is no grey area between a deprivation and an expropriation of property; an interference with property is either a deprivation (regulation) or an expropriation. It is not possible for a regulation of property to be transformed into an expropriation by judicial interpretation; any attempted regulation of property that does not satisfy the requirements is constitutionally invalid. Thus, constructive expropriation is not recognised in German law.

US law approaches the deprivation (regulation) and expropriation (taking) of property in a manner opposite to the German law approach. US law treats these two forms of interference as points on a continuum, with a grey area existing in between. It is in this grey area that the regulatory takings doctrine finds its application. This approach has led to much confusion surrounding US takings law and discrepancies in the judgments of the courts adjudicating constitutional property matters. This approach also allowed for the creation of the regulatory takings doctrine, which in itself is confusing with unpredictable results at times.

There are however similarities between the German and US law approach to deprivation and expropriation, particularly with regard to excessive regulation of property. Both German and US law place a strong emphasis on the formal source or power to perform either regulation or expropriation of property. The consequences of attempting to interfere with property using the incorrect power are quite similar in German and US law. Where the state's regulation of property using the police power is excessive, German law will regard the regulation as constitutionally invalid if it does not meet the requirements of a valid regulation of property; compensation in the form of equalisation may nonetheless be payable if it has been specifically provided for in the legislation. In US law, excessive regulation may be struck down as constitutionally invalid for being an improper use of the police power or it may give rise to a claim for expropriatory compensation because it amounts to a regulatory taking. In this regard, equalisation payment is not the same as expropriatory compensation. Furthermore, in both systems, the provision of some form of equalisation or compensation does not legitimise the unconstitutional interference. The interference remains unconstitutional with the equalisation or compensation serving to alleviate the excessive burden placed on the property holder or holders in question.

Both German and US law require that expropriation of property be either in the public interest or for a public use, however this requirement is approached differently in these two jurisdictions. Whereas German law interprets this requirement strictly, the US Supreme Court has adopted a highly deferential approach to this requirement. The payment of compensation for expropriation is required in both German and US law, although the reasoning behind and the intricacies related to compensation, differs in some respects. German law requires that the legislation

authorising the expropriation must provide for compensation, specify the type and extent of compensation and such compensation must reflect a fair balance between the public interest and the interests of those affected. On the other hand, US law requires that just compensation is required in the event of expropriation. This does not necessarily mean that full compensation will be paid. Rather, compensation is determined according to the fair market value standard. As mentioned above, whereas US law provides for expropriatory compensation to be paid in the event of a regulatory taking, German law does not. German law allows for equalisation to be paid to an owner whose property rights have been unintentionally infringed by legislation, but this is not compensation for expropriation.

Regarding proportionality, the approach of German and US law diverges. Proportionality is a well-established principle of German constitutional law and is the primary method of testing the legitimacy of state interference with property. Proportionality takes two forms in German law. The first is a general application test, asking whether law of general application has infringed the right in question, whether the infringement is necessary, whether the infringement is properly authorised and asks whether the ends of the regulation justify of the means, generally speaking. The second form focuses on the effect of the regulation on the individual property owner. Proportionality is not unheard of in US law, but is only applied in certain cases, most notably in cases of regulatory takings and exactions. The primary method of determining the constitutionality of takings of property is judicial balancing. Judicial balancing involves weighing up a number of factors in an abstract manner within a single calculation with the focus on the effect on the individual property owner or owners in question. In this regard, it is not really concerned with a general application test.

## 6.2.2 The influence of the ECHR

Another framework that might influence the development of constitutional property law in the Central Eastern European jurisdictions is the doctrine regarding the protection of possessions developed by the ECHR. The special role of the ECHR on the new democracies in Central Eastern Europe was discussed in chapter 3. The chapter showed that the ECHR influences the member states of the European Union, especially the Central Eastern European members. The existing law of Central Eastern European countries that seek to become members of the European Union in the aftermath of the fall of Communism may be influenced by the principles and case law of the ECHR. In order to deal with potentially conflicting existing law of the member states of the European Union, particularly in the case of property disputes, the ECHR has developed the autonomous meaning doctrine regarding the definition of "possessions" for the purposes of Article 1 of Protocol No 1 (Article 1). This doctrine was initially developed with a focus on Article 6 but was later also used in property disputes. This doctrine allows the ECHR to determine for itself whether a particular interest constitutes a possession for the purposes of Article 1. This prevents the member states from legislating that a particular interest is not property so as to frustrate or prevent potential applicants' claims from being brought before the ECHR. Therefore, the ECHR's interpretation is not dependent on any domestic law definitions of property. It will consider domestic law to determine if the interest in question is property in the domestic law of the state in question and if so, it will regard the interest as a possession for the purpose of Article 1. However, if the interest is not recognised as property in the domestic law of the state in question, the

autonomous meaning doctrine allows the ECHR to determine if the interest in question is a possession for the purposes of Article 1 or not.

The ECHR has also developed something of a distinction between the deprivation (regulation) and expropriation of property. In this regard, the ECHR has interpreted the term “deprived” in Article 1 to mean expropriation of property. This expropriation must be in line with some public interest and subject to any conditions on expropriation in the domestic law of the member state as well as the principles of international law. In the third paragraph of Article 1, provision is made for the individual member states to control the use of property within their own jurisdictions. This provision allows the member states to control the use of property through any regulations that they deem necessary. A wide degree of deference is provided to the member states regarding the measures that they may implement for this purpose. However, this degree of deference is not unlimited. The ECHR will intervene when a measure implemented by a member state to control the use of property is manifestly unreasonable in the circumstances. The three-rule structure of Article 1 appears to indicate that the ECHR treats deprivation (expropriation) and regulation of property as two discrete categories that do not overlap. While both must comply with the principle of lawfulness, be in the public or general interest and comply with the principle of proportionality, each constitutes a unique interference with the right to the peaceful enjoyment of possessions. In the context of deprivation (expropriation), the first rule of Article 1 does not explicitly state that compensation is required for deprivations to be valid, though the ECHR has stated that compensation is required for deprivations in order to maintain a fair balance.

It is uncertain whether the ECHR recognises something like a notion of constructive expropriation. A small number of decisions appear to have created the

space for something like constructive expropriation but the authority for doing so is not clear. The ECHR's inconsistency in classifying interferences under the three rules in Article 1 has led to decisions that appear to constitute a third category of interference with possessions. The interferences in this category are judged under the first rule of Article 1. If the ECHR awards compensation for interferences judged under the first rule, for example a monetary amount as just satisfaction under Article 50, then that compensation will not be compensation for expropriation. Rather, this compensation would resemble either a general award of constitutional damages or compensation in terms of the equalisation awards that are allowed in German law.

When there is an interference with a right in the Convention, the ECHR must determine whether a fair balance has been struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. Proportionality analysis has been incorporated into the fair balance inquiry and is described as playing a central role in the jurisprudence of the ECHR. An important aspect of the fair balance inquiry is the margin of appreciation afforded to member states. The ECHR will defer to the member states regarding the implementation of legislation and policy within their jurisdictions. The rationale for this level of deference is that the legislatures of the member states are in the best position to legislate on matters in the jurisdiction than the international judge. This margin of appreciation further enforces the ECHR's supervisory role in that the ECHR cannot dictate to the legislatures of the member states how to protect property rights or other rights in their respective jurisdictions.

The ECHR is a supervisory body aimed at enforcing the protection of the rights in the Convention and to ensure that member states provide for this protection. While it cannot directly dictate to the member states what principles they should adopt and

how they should do so, the ECHR can influence the existing law of the member states to bring it in line with the principles developed by the ECHR. This influence is most notable in member states such as Bosnia and Herzegovina, whose use of ECHR principles and case law is incredibly prolific and used to provide content to their right to property. Other Central Eastern European member states, such as the Russian Federation, make use of ECHR principles and case law to a more limited extent, while others, such as Hungary, do not use them at all. Nonetheless, the ECHR's doctrine could potentially influence the developmental direction that an emerging democracy's laws and policies take if it wishes to be a member of the European Union and to have access to the ECHR.

### 6 2 3 The Central Eastern European jurisdictions

The Central Eastern European jurisdictions discussed in chapter 4 all opted for constitutionally democratic approaches, with emphasis on the protection of fundamental rights. A number of the constitutional courts use the principles and case law of the ECHR, which is unsurprising given the fact that they are signatories to the European Convention for the Protection of Human Rights and Fundamental Freedoms. The principles and the case law of the ECHR have clearly had a major impact on the development of the constitutional law of Central Eastern Europe, with these principles being used to provide content to otherwise vague rights, or as a secondary set of norms which can be applied to test the constitutional validity of interferences with property rights, as is the case with Bosnia and Herzegovina, Croatia, Moldova, the Russian Federation and the Czech Republic. However, not all of the constitutional courts choose to rely on the principles and case law of the ECHR, for example Estonia and Hungary. Although it remains difficult to make an

overall assessment in relation to the three broad themes investigated, there are nonetheless a number of conclusions that can be drawn in relation to the concept of property for constitutional purposes, the distinction between deprivation and expropriation and the application of the proportionality principle.

All of the Central Eastern European jurisdictions have adopted a broad concept of property for constitutional purposes that include a number of interests, including monetary claims, pension rights, legitimate expectations and other rights having economic value. The Constitutional Courts of Bosnia and Herzegovina and Moldova use the principles and case law regarding the definition of “possessions” developed by the ECHR, apparently to provide content to the often vague right to property or the right of ownership provided for in the jurisdictions’ property clauses. Similar to the approaches in German and US constitutional property law, no attempt has been made to exhaustively define what constitutes property for constitutional purposes. The Central Eastern European jurisdictions appear to approach the concept of property from a constitutional perspective, recognising each new interest as property individually, and not from a private law notion that is incrementally expanded on a case by case basis as Germany, the US and South Africa do.

All of the Central Eastern European jurisdictions also make provision for the restriction of property rights, either explicitly in the text of the property clause or through interpretation. Those constitutional property clauses that do refer to the restriction of property rights explicitly use varying terminology. Deprivation is referred to in some of the property clauses but this term is most often understood to mean expropriation instead of regulation of property, similar to the approach of the ECHR. Other property clauses use different terms for regulation of property such as “restriction” or “limitation”. Expropriation is specifically referred to in some clauses

while others refer to this type of interference in different ways, such as the rescission of ownership or the forced confiscation of property.

A consistent requirement for expropriation in all of the Central Eastern European constitutional property clauses discussed is that there must be compensation for expropriation of property. That being said, the other requirements for expropriation vary among the property clauses discussed. Whereas some property clauses require that the expropriation be for some public purpose or public use, others do not mention a public purpose or public use requirement at all. Similarly, not all of the property clauses require legislation that specifically authorises expropriation. Some require a different form of authorisation; for example, a court order to authorise expropriation. While all of the property clauses discussed refer to expropriation in one way or another, not all of them refer to the regulation of property. As already mentioned, those that do refer to regulation use varying terminology, referring to the restriction or limitation of property. Regarding the regulation of property, it appears that Central Eastern European jurisdictions follow one of two paths. Whereas some will apply the ECHR's principles regarding the regulation of property, others apply their own principles for the regulation of property. On the continuum between the German and US law approaches, those Central Eastern European jurisdictions that do not apply the ECHR's principles regarding the regulation and expropriation of property, for example Estonia and Hungary, lean more towards the German law approach end of the continuum, without explicitly following German law.

None of the Central Eastern European jurisdictions discussed appear to recognise something like a notion of an excessive regulation being validated through compensation. In this regard, most jurisdictions specifically state that an interference

that is disproportionate will be unconstitutional. No provision is made for something similar to equalisation payments like in German law, nor does there appear to be recognition of something like regulatory takings as in US law.

Each of the Central Eastern European jurisdictions discussed in chapter 4 applies some form of proportionality review. The methods of application of the proportionality review differ among the Central Eastern European jurisdictions but they all do something similar in that they test the interference with property to determine if it is proportionate and therefore constitutional. The jurisdictions that apply their own interpretation of the proportionality principle appear to employ a contextual approach. Certain factors are considered to determine if the interference is proportionate in the circumstances of the particular case. Therefore, the application of the proportionality principle by these jurisdictions appears to lean more to the German law end of the continuum than the US law end. Those jurisdictions that apply the ECHR's fair balance principle appear to be, in substance, following more of a German law approach than a US law approach, again, without explicitly referring to German law.

In light of the conclusions reached above, the best way forward for the Central Eastern European jurisdictions discussed would perhaps be to continue with their current approaches to constitutional property law. Those jurisdictions that rely on the principles of the ECHR should arguably continue to do so because doing so provides certain advantages to such young constitutional democracies. These advantages include access to fully developed constitutional property law principles specifically tailored to the European legal environment and access to an objective tribunal beyond the highest court of any individual member state. These advantages make the application of ECHR principles very attractive for Central Eastern European

constitutional democracies and this approach is more viable than applying US constitutional property law, for example. The Central Eastern European jurisdictions that apply their own constitutional property law principles reach a result that is similar to German law, though they do not explicitly cite German law. Given the option of following either German or US law, these Central Eastern European jurisdictions appear to be more inclined towards following an approach that is similar to German law rather than US law. Therefore, albeit not expressly, German constitutional property law appears to have greater influence in the development of the constitutional property law of these Central Eastern European jurisdictions than US law.

#### 6 2 4 South African law

In chapter 5, the South African law regarding the concept of property for constitutional purposes, the distinction between deprivation and expropriation and the application of the proportionality principle is discussed. Section 25 of the South African Constitution does not contain a definition of property, nor has the Constitutional Court attempted to exhaustively define what property is for the purposes of section 25. The term “property” is interpreted very widely and a number of interests are recognised as property for the purposes of section 25, including limited real rights in land, movable property such as vehicles, intellectual property, a claim for the restitution of money paid based on unjustified enrichment and a liquor licence on a case by case basis. New interests are added over time and on an incremental basis. This means that the concept of property is flexible and can be expanded as the need for such expansion arises. The Court’s approach of interpreting property widely and incrementally, adding interests to the concept of

property on a case by case basis, is similar to the German, ECHR and US law approach to the interpretation of the concept of property. Doctrinally the construction that the South African Constitutional Court uses is probably the most similar to German law even if German law is not explicitly followed. In other words, the private law, narrow notion is used as the starting point and incrementally a wider constitutional notion is developed by courts. Although the examples from the Central Eastern European jurisdictions, or even other comparative jurisdictions' examples would not change how the constitutional concept of property is being developed in South African law, some specific examples might be interesting to consider in case by case development in the future, such as the land and housing cases decided by the ECHR and identified in chapter 2. In South Africa, informal land rights will be interesting to consider when thinking about how the constitutional concept of property will be interpreted in the future. The South African law approach to the constitutional concept of property is fairly unproblematic. The incremental expansion so far has resulted in a broad concept of property for constitutional purposes and has yielded results that are in line with other constitutional democracies in this regard.

Regarding the distinction between deprivation and expropriation, the Court initially adopted a subset approach to this distinction, viewing expropriation as a smaller category of interference wholly included in the larger category of deprivation. However, the Court appears to have now adopted a categorical approach between the notions of deprivation and expropriation, requiring state acquisition of the property in order to establish expropriation, similar to the pre-constitutional understanding of the notions. Subsequent decisions have called this approach into question by referring to interferences with property that have the same effect as an expropriation as a kind of expropriation. Interferences of this nature usually exist

where there is an overlapping of the notions of deprivation and expropriation but a categorical approach does not allow for such an overlap. Based on the state acquisition requirement, the approach to the distinction between deprivation and expropriation appears to be a categorical one for now, although statements by the Constitutional Court that an interference can be a kind of expropriation makes an overall conclusion about the distinction between deprivation and expropriation really difficult to draw. On the continuum between the German and US law approaches to this distinction, the apparently categorical South African law approach is closer to the German law end of the continuum. The uncertainty in US law regarding this distinction makes something like the categorical approach in German law very attractive to South African law. What is necessary is clarity from the Constitutional Court regarding whether South African law actually follows a categorical approach to the distinction between deprivation and expropriation or not.

The South African law approach to the public purpose requirement seems to sit in the middle of the strict German law approach and the deferential US law approach. Compensation is required only for expropriations and not for deprivations of property, though it appears that it is possible that expropriation without compensation could be justifiable under section 36 of the Constitution. The recognition of a notion like constructive expropriation seems inappropriate in South African law, given the apparent categorical approach to the distinction between deprivation and expropriation adopted by the Constitutional Court in *Agri SA*. This approach does not allow for something like constructive expropriation. However, the *Arun* and *City of Tshwane* decisions, at the very least, raise questions about whether the Constitutional Court actually follows a categorical approach. While the notion of

constructive expropriation is not expressly recognised in South African law, there is uncertainty regarding whether it will be recognised in the future.

Regarding the South African law approach to proportionality, the Constitutional Court follows a two-stage approach when inquiring into whether an interference with property is valid. In the first stage, the Court determines whether the interference satisfies the internal requirements of section 25. The second stage is reached if the interference does not satisfy the relevant requirements. In this stage, the Court applies a proportionality test provided in section 36(1) to determine if the interference is justifiable, despite failing to meet the necessary validity requirements of section 25. Deprivations of property are first subjected to the arbitrariness review, the standard of which can vary between rationality and just short of proportionality due to the wide judicial discretion that this test allows. A finding of arbitrariness moves the inquiry to the second stage, which involves the application of full proportionality review in order to determine if the arbitrary deprivation is justifiable in the circumstances. The standard of review in this second stage does not vary. Therefore, two tests are employed when determining the validity of a deprivation of property.

A two-stage approach is also employed when determining the validity of expropriations. The Court first determines if the requirements for a valid expropriation in terms of section 25(2) are satisfied. If not, the Court moves to the second stage and applies the same full proportionality review as it does in the second stage of the deprivation enquiry. Only one proportionality test is applied when determining the validity of an expropriation of property. The South African law approach to determining the legitimacy of interferences with property appears to resemble the German law approach.

Case law has indicated that the Court does not always engage in a detailed justification inquiry when the interference does not satisfy the specific internal requirements of section 25 because, in the case of deprivations, both the arbitrariness and justification enquiries involve the same analysis and consideration of similar factors and therefore the outcome is unlikely to be different under the justification inquiry. If the deprivation is not arbitrary, there is no need for a justification enquiry because the deprivation is valid. If an expropriation does not satisfy one or more of the requirements it is unconstitutional and will probably not be justifiable either. Therefore it seems that the section 36(1) justification enquiry is not really significant for the purposes of section 25 because limitation of property that does not satisfy the specific requirements in section 25 will most likely always be unconstitutional. While the two-stage approach is adequate and effective in theory, more clarity is required regarding its application by the Constitutional Court, specifically in those cases where the proportionality inquiry proceeds to the second stage proportionality test under section 36(1).

Given the conclusions reached regarding South African constitutional property law, the way forward is less clear. Whereas the South African approach to the interpretation of property and the application of the proportionality principle is relatively straightforward and for the most part consistent, the approach to the distinction between deprivation and expropriation is much less clear. It appears that a categorical approach has been adopted again, with state acquisition of property now a requirement for expropriation of property. This position is further bolstered by the inclusion of a definition for expropriation in the 2015 Expropriation Bill, which is girdled in state acquisition. It is uncertain whether this approach will be consistently followed because interferences have been regarded as being a kind of expropriation

or having the same effect as an expropriation (so called *de facto* expropriations). This characterisation conflicts with the apparent categorical approach because under this approach an interference is an expropriation or it is not. It remains to be seen whether this apparent categorical approach will be applied in subsequent decisions.

South African law appears to follow an approach to the constitutional concept of property and the application of the proportionality principle that resembles German law. The South African law approach to the distinction between deprivation and expropriation is less straightforward. Where the approach to distinguishing these two notions is categorical with state acquisition being a requirement for expropriation but not deprivations, the approach bears a striking resemblance to the German law approach to the distinction. However, the Constitutional Court's references to interferences that have the same effect as expropriation as a kind of expropriation indicates an approach that is similar to US law, which recognises an overlap between deprivations and expropriations. This overlap allows for the recognition of interferences that have the same effect as an expropriation, which may in some instances require compensation. At this point it is difficult to draw a general conclusion regarding what kind of approach to the distinction between deprivation and expropriation South African law uses and therefore it is difficult to determine whether the South African law approach, at least as far as the distinction between deprivation and expropriation is concerned, resembles either German or US law. That being said, the apparent adoption of a categorical approach to the distinction between deprivation and expropriation, which seems to exclude the notion of something like constructive expropriation, seems to indicate that the South African approach tends more towards the approach in German law than US law.

## List of abbreviations

<i>ASSAL</i>	Annual Survey of South African Law
<i>BYU LR</i>	Brigham Young University Law Review
<i>Eur J of Int'l L</i>	European Journal of International Law
<i>German LJ</i>	German Law Journal
<i>Harv J L &amp; Pub Pol'y</i>	Harvard Journal of Law and Public Policy
<i>Hum Rts LR</i>	Human Rights Law Review
<i>Int'l J Const L</i>	International Journal of Constitutional Law
<i>J Comp L</i>	Journal of Comparative Law
<i>Law &amp; Pol'y</i>	Law and Policy
<i>Neth Q Hum Rts</i>	Netherlands Quarterly of Human Rights
<i>Oxford J Legal Stud</i>	Oxford Journal of Legal Studies
<i>PELJ</i>	Potchefstroom Electronic Law Journal
<i>Rev Cent &amp; E Eur L</i>	Review of Central and East European Law
<i>SAJHR</i>	South African Journal on Human Rights
<i>SALJ</i>	South African Law Journal
<i>Santa Clara LR</i>	Santa Clara Law Review
<i>SAPL</i>	South African Public Law
<i>Stell LR</i>	Stellenbosch Law Review
<i>Syracuse J Int'l L &amp; Comm</i>	Syracuse Journal of International Law and Commerce
<i>TSAR</i>	Tydskrif vir die Suid-Afrikaanse Reg
<i>UCL Hum Rts Rev</i>	University College London Human Rights Review
<i>Wm &amp; Mary Bill Rts J</i>	William and Mary Bill of Rights Journal

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