

# Expropriation and protection of private property: Analysis of the recent applicable law in Kosovo in relation to international standards

## Abstract

The right to private property is guaranteed by international acts and domestic laws from the arbitrary intervention of state bodies. Private property may be assumed only in the public interest and under the conditions specified by law. In Kosovo, this right is guaranteed by the Constitution and special laws in the field of ownership. This article analyses the legal foundation in Kosovo from the angle of practice within the European Court of Human Rights. Our analysis is focused specifically on scrutinising the 2009 Law on the Expropriation of Immovable Property, as amended in 2010. The article concludes that this law provides a legal foundation which satisfactorily guarantees the right to property. Nevertheless, the Law requires significant experience in its implementation due to the numerous deadlines and procedures which need to be interpreted in logical connection with the Law's different strands. The article concludes with recommendations aimed at highlighting the measures of caution of which the law enforcement authorities need to be aware when implementing the Law.

**Keywords:** private property rights, expropriation, European Court of Human Rights

## Introduction

Private ownership is protected and guaranteed under international instruments, ensuring that private property is infrangible and that this may be limited only in the public interest and under the conditions specified by the law<sup>1</sup> as well as in the context of the public interest.<sup>2</sup> In the given context, domestic laws must also be in compliance with such standards to achieve the required level of guarantee of the right of property.

1 UN Declaration on Human Rights approved by Resolution 217 A (III), 10 Dec 1948, UN Doc. A/810, at 71 (1948), Art. 17; European Convention on the Protection of Human Rights as amended by Protocol 11, 4 November 1950, 213 UNTS 221, Protocol 1, Art. 1.

2 Joseph Singer (1997) *Property law, rules, policies and practices* Aspen Law & Business: New York, p. xli.

In Kosovo, the right of property is guaranteed under the Constitution<sup>3</sup> and by special laws in the field of ownership.<sup>4</sup> In the general sense, the right of property refers to the relationships between individuals with regard to the control, enjoyment and transfer of property – conveying certain material values.<sup>5</sup> In the strict sense, property means the objects upon which the right of property is founded.<sup>6</sup> Ownership is an economic and legal notion implying the appropriation of economic assets in the former case and, in the latter, a summary of the legal norms regulating such appropriation.<sup>7</sup>

Private property may be the object of utilisation – expropriation by the state in the public interest, when the said interest cannot be realised in other ways. In the broad sense, the term ‘expropriation’ includes all forms of the assumption of private property by the state for public use in times of peace, war or in emergency circumstances.<sup>8</sup>

The wave of economic development in Kosovo has raised the need for eviction from private property in the public interest, but it also has an impact as regards the increase in opportunities for the violation of such rights. Economic projects, particularly those that are crucial for the development of the country (the Highway Project; the New Kosovo Power Plant Project; regional road construction projects; and other projects expected in the future), lead the state authorities necessarily to intervene with the enjoyment of private property for the purpose of realising such projects. The law allows for the option of taking private property in the public interest, but the protection of ownership is not unimportant since expropriation may take place only under the conditions envisaged by the law. On the other hand, even private owners may not impede expropriation when the legal conditions are met:

The right of property is considered as a shield for every other right, and deprivation of one's right to property is deprivation of his/her liberty.<sup>9</sup>

The guarantee of ownership rights is considered significant also for economic development on the grounds that investments may be subject to limitation, or expropriation, only under justifiable circumstances and when compensation is provided. Hence, a reduction of the risk of the arbitrary expropriation of property (capital) has

3 Constitution of the Republic of Kosovo, approved on 9 April 2008, entered into force on 15 June 2008, Art. 46.

4 Law No. 03/L-139 on Expropriation of Immovable Property, *Official Gazette of the Republic of Kosovo* No. 52/8, 2009; as amended by Law No. 03/L-205, *Official Gazette of the Republic of Kosovo* No. 91/10, 2010.

5 Singer (1997) *op. cit.* p. xli.

6 Roger Smith (2000) *Property Law* Third Edition, New York, p. 3.

7 Andria Gams (1978) *Real rights* Pristinë, p. 26.

8 Cheng, Bin (1958) ‘The rationale of compensation for expropriation’ *Transactions of the Grotius Society* 44: 267-310, at p. 268.

9 Gaus, G (1994) *Property rights: Property, rights and freedom* Cambridge University Press p. 209.

historically contributed to economic development<sup>10</sup> due to this legal safety underpin for investment.

Research shows that, in Kosovo, many violations of the rights of ownership have been committed in the sense of the public authorities expropriating property.<sup>11</sup> This situation must be changed in the future, continually increasing the level of readiness for establishing the rule of law. Taking into account such circumstances, it is quite difficult, in the practice of the implementation of expropriation law, to establish the so-called 'Fair Balance Test'<sup>12</sup> between the public interest in expropriation and the right to enjoy private property. For this reason, implementation of the law in conformity with the international standards deriving from Article 1 of Protocol 1 (P1-1) of the European Convention on the Protection of Human Rights and Fundamental Freedoms, known as the European Convention on the Protection of Human Rights (hereinafter: ECHR), and the case law of the European Court on the Protection of Human Rights (hereinafter: ECtHR), serves as both guideline and reference point.<sup>13</sup> The rights protected by the Convention apply to all natural and legal persons within the territory of a state which is a signatory to the Convention.<sup>14</sup> The ECtHR, being a parastatal court, has exercised its experience over a long period in the implementation of standards in the field of ownership protection and has, in many jurisdictions, influenced the harmonisation of legal acts and their interpretation in compliance with international standards.<sup>15</sup> One must bear in mind that cases of the violation of property rights by state bodies may, in the future, also be brought for review before the ECtHR in Strasbourg.

This might reflect upon Kosovo in two respects:

1. lack of rule of law in the field of ownership
2. expenditures of the Kosovo Budget compensating owners whose property has been illegally expropriated; and the adequacy of the compensation provided.

The purpose of this article is to analyse the legal foundations of expropriation based on the positive legislation in Kosovo, with a view to Protocol 1 of the Convention and the case law of the European Court on the Protection of Human Rights. The analysis focuses on the interpretation of the legal provisions in the most essential as-

10 Jacoby, Hanan G, G. Li and S. Rozelle 'Hazards of expropriation: Tenure insecurity and investment in rural China' *American Economic Review* 92(5): 1420-1447, p. 1420.

11 OSCE (2006) *Report on expropriation in Kosovo for 2006*. This report reflects analyses of expropriation during 2006 and shows many instances of the violation of private property rights in expropriation cases.

12 ECtHR: *Belgian Linguistic v Belgium*, judgment of 23 July 1968, para. 32; *Sporrong and Lönnroth v Sweden*, 23 September 1982, para. 69; Allen, T (2007) 'Compensation for property under the European Convention on Human Rights' *Michigan Journal of International Law* pp. 296-300.

13 ECHR, Protocol 1, 20 March 1952, 213 UNTS 262.

14 Mountfield, H (2002) 'Regulatory expropriations in Europe: the approach of the European Court of Human Rights' *New York University Environmental Law Journal* pp. 136-147, at p. 136.

15 *ibid.* at p. 137.

pects of the expropriation of immovable property and in guaranteeing the right to enjoy private property.

### Legal foundations in Kosovo for expropriation and for the protection of ownership in cases of expropriation

In Kosovo, private property is protected under the most senior legal document – the Constitution of the Republic of Kosovo. Article 46 regulates and guarantees the protection of property from any arbitrary intervention. Article 46(4) provides that:

No one shall be arbitrarily deprived of property. The Republic of Kosovo or a public authority of the Republic of Kosovo may expropriate property if such expropriation is authorised by law, is necessary or appropriate to the achievement of a public purpose or the promotion of the public interest, and is followed by the provision of immediate and adequate compensation to the person or persons whose property has been expropriated.<sup>16</sup>

This provision therefore guarantees from the very top the right to private property from arbitrary interventions of state-public authorities; while eviction from property – namely, expropriation – may be carried out only in the public interest and under the conditions which are envisaged by the law. Any form of expropriation must also be followed by adequate compensation for the expropriated owner.

The 2009 Law on Ownership and other Property Rights contains a provision which guarantees ownership, which may be limited only under the conditions and procedures foreseen by the law.<sup>17</sup> More specifically, the expropriation of immovable property is regulated with the Law on the Expropriation of Immovable Property in the public interest.<sup>18</sup> This law is *lex speciale* on the expropriation issue. It regulates only the expropriation and limitation of immovable property by public authorities,<sup>19</sup> and contains the material and procedural provisions on expropriation, rendering invalid the 1978 Law on Expropriation (*Official Gazette of the SAPK* 21/78).<sup>20</sup> Article 4 determines the legal conditions for expropriation, which are listed in a specific manner. Expropriation may be carried out only for the purpose of achieving a lawful public objective, and when that public objective cannot be realised in any other practical manner without expropriation having to take place. In the first place, the public interest in expropriation must be greater than the interest of the property owner, and must not have a discriminatory character; and, secondly, expropriation may be carried out only in accordance with the procedures and conditions specified by the law.<sup>21</sup>

16 The Constitution of the Republic of Kosovo, Art. 46.

17 LPORR, Art. 1(4).

18 Law No. 03/L-139 on Expropriation of Immovable Property (2009). All references to Articles are to this Law, as amended in 2010, unless otherwise specified.

19 Art. 3(2).

20 Art. 46.

21 Art. 4.

Formally, the Law meets the requirements on expropriation and deprivation of the interests of the owners of property rights provided for in Article 1 Protocol 1 of the ECHR, which runs thus:

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 the 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>22</sup>

From this viewpoint, the Law in Kosovo is harmonised with international standards but the implementation of the law must also be in conformity with judicial practice created by the ECtHR, which has jurisdiction over the rights deriving from the ECHR. States are granted the right to determine laws and conditions limiting property rights, but only in the public interest.<sup>23</sup> This means that the promulgation of laws on expropriation is a right belonging to states; however, legal conditions, which must themselves not infringe international standards, must also be specified.

#### Determination and the proclamation of public interest in the expropriation of immovable property

One of the fundamental conditions for the restriction of private property through expropriation is the existence of a public interest. Under the Law on Expropriation, a state authority<sup>24</sup> may expropriate immovable property, but only where its actions in doing so are carried out clearly and directly to achieve a lawful public objective.<sup>25</sup>

Authority for this can be traced to the ECHR which, as we have seen, does permit states to promulgate laws that the rights to property may be subsumed to the public interest.<sup>26</sup> Indeed, the public interest represents the real conditions justifying any eviction from private property. Furthermore, however, P1-1 requires substantial justice; thus, intervention in private property is justifiable only if it is carried out under legal conditions and is proportionate to the lawful objective.<sup>27</sup>

This rule is envisaged also in Article 4(1.1) and (1.2) of the Law on Expropriation, according to which a lawful objective must exist and that this objective cannot be realised in any other way. The meaning of this provision lies in that the determination of the public interest must be realistic and not articulated so as to defend any other interest; and truly shows the need for eviction from private property to satisfy public objectives. For example: no public road may be constructed without having it

22 ECHR, Protocol 1, Art. 1(1).

23 ECHR, Protocol 1, Art. 1(2).

24 Art. 4. Authorities are the government and its authorised bodies at central level; or municipalities and their authorised bodies at local level.

25 Art. 4(1).

26 ECHR, Protocol 1, Art. 1(2).

27 Allen *op. cit.* p. 9.

pass through private properties and so eviction from such properties is certainly indispensable. In such a situation, the objective is evident and legitimate.

In *Sporrong and Lönnroth v. Sweden*, the ECtHR explained the meaning of P1-1 by interpreting the legitimacy of intervention in private property as lawful in cases where a public interest exists.<sup>28</sup> However, in all cases, the determination of public interest requires a ‘fair balance’ to be struck between the public interest and the right to private property.<sup>29</sup> In the Kosovo law, a fair balance is held to exist when the public benefit from expropriation is greater than the interests negatively affected by the expropriation itself.<sup>30</sup> States enjoy quite broad discretion in assessing the need for eviction from private property. This concept was developed during judicial interpretation of the ECtHR, under states’ so-called ‘margin of appreciation’.<sup>31</sup>

#### *Determination of the public interest*

State bodies determine what is the public interest in Kosovo based on development plans and public needs. Article 4 of the Law on Expropriation specifies the situations in which the public interest in expropriation may be expressed. Such interest is divided into cases which apply at the municipal level and those which apply at the central level. Municipal level bodies may expropriate property located on the territory of the municipality where the expropriation is clearly and directly linked to the realisation of the public interest. The latter is defined as follows:

- implementation of an urban or spatial plan, approved by a municipal authority in compliance with the law
- construction or expansion of a building or facility to be used by a municipal public authority for the exercise of public functions
- construction, expansion, establishment or building of infrastructure and plants, serving for general use to enhance the economic and social well-being of the municipality, and where this produces obvious benefits for the inhabitants of the municipality.<sup>32</sup>

Central-level bodies (i.e. the government) may expropriate immovable property which does not fall within the competence of the municipality and where it meets the envisaged expropriation requirements. Pursuant to Article 4(3), lawful public objec-

28 ECtHR: *Sporrong and Lönnroth v. Sweden*, judgment of 23 September 1982, para. 61.

29 ECtHR: *Belgian Linguistic v Belgium*, judgment of 23 July 1968, para. 32; *Sporrong and Lönnroth v Sweden*, 23 September 1982, para. 69.

30 Art. 4(1.3).

31 ECtHR: *James v. United Kingdom*, judgment of 21 February 1986, p. 46. Under ECtHR practice, a ‘margin of appreciation’ refers to the state’s rights to evaluate public interest needs in order to interfere with property rights. Under ECtHR practice, the notion of ‘public interest’ is quite extended.

32 Art. 4(2). Actions that can be undertaken by the municipality are those related to: municipal roads; municipal public facilities for educational or health and welfare purposes; water supply; sewage pipes; municipal landfill; municipal cemeteries; municipal public parks; and the implementation of a mining licence, if it is given to the municipality by the Independent Commission for Mines and Minerals (ICMM).

tives are virtually the same as those applying at the municipal level and the wording used is highly similar:

- implementation of an urban or spatial plan, approved by a central public authority in compliance with the law
- construction or expansion of a building or facility to be used by a central public authority for the exercise of public functions
- construction, expansion, establishment or building of infrastructure or plants necessary for the enhancement of the general economic and social well-being of Kosovo.<sup>33</sup>

The Law specifically determines cases in which a public interest in expropriation may exist; however, it goes on to use the expression ‘without being limited to those’, implying that the law permits the possibility that, in certain cases, when deemed necessary, it may also determine any other public interest. In international practice, states clearly enjoy the right to promulgate laws and determine the conditions under which property rights may be restricted, but such laws must be ‘adequately accessible and sufficiently precise’.<sup>34</sup> In this sense, even the specification of those cases as to when a public interest may exist is a necessary element in property rights. Failure to respect the conditions for determining what the public interest in expropriation may be thus constitutes a violation of the right to property.<sup>35</sup>

The ECtHR therefore considers the determination of the public interest by state legislation as one of the guaranteeing conditions under which expropriation shall be lawful. Such a rule derives from P1-1 of the Convention which, in the Court’s view, actually embodies three distinct rules:

1. eviction from property must be carried out in compliance with domestic law and international law
2. deprivation of the right to property may be accomplished only in the public interest or under general interest; or to guarantee the levying of taxation or the payment of penalties
3. in the event that measures are undertaken based on the deprivation or limitation of the right to property, in conformity with the law and in the public interest, it must be assessed that the intervention creates a proper balance between the pub-

33 Art. 4(3.1-3.4). Infrastructure goals include: building, expanding or establishing interstate roads, or municipal roads, which offer public transport services; railways; facilities and security areas for waste disposal related to the processing, transmission and distribution of energy; mining and mining safety zones; telecommunications lines and facilities; public facilities needed for education, health and welfare of a central public authority; pipes and sewage for public enterprises; dumps, dams, reserves, state veterans cemeteries for distinguished and recognised public servants; airports, parks and state public sports parks; and the protection of monuments of an archaeological, or historic and scientific, character.

34 ECtHR: *Lithgow v. UK*, judgment of 8 July 1986, para. 110.

35 ECtHR, *Marckx v Belgium*, judgment of 13 June 1979; *Loizidou v. Turkey*, 18 December 1996; *Sporrong and Lönnroth v. Sweden*, 23 September 1982.

lic interest requirement, across the whole of society, and the requirements for the protection of basic human rights.<sup>36</sup>

#### *Bringing a decision on the proclamation of public interest in the expropriation of immovable property*

Prior to initiating expropriation procedures, a decision may be reached by the expropriation authority as regards conducting the preparatory work required to assess whether a certain property is suitable to achieve a public objective. Such a decision must be published in the *Official Gazette* of the Republic of Kosovo.<sup>37</sup> Proclamation of the public interest, in the case law of the ECtHR, is an essential prior element.

Owners of or stakeholders in the immovable property targeted for such preparatory work must be notified at least twenty days prior to the commencement of the work, while the accomplishment of these preparatory actions must be such as to inflict as little loss to the owners as possible.

It is worth noting that accomplishment of the preparatory work, even though no decision on expropriation has been issued, constitutes a form of property determination which, in the case law of the ECtHR, may amount to '*de facto* expropriation'.<sup>38</sup> Intervention of the state in one's property may be such as to impede the owner from effectively using the property, even if s/he has not yet been evicted from it and the legal status of the property has not undergone any amendment.<sup>39</sup> *De facto* expropriation obliges that the owners be compensated.<sup>40</sup> Temporary eviction from property for emergency needs is also considered amongst the actions which cause *de facto* expropriation.

#### **Decision on expropriation**

##### *Initiation and issue of initial decision on expropriation*

The Law in Kosovo provides for a preliminary procedure to take place prior to the final decision being taken. The purpose of this procedure is to proclaim the public interest in expropriation and to grant owners and stakeholders the opportunity to oppose the initiation of expropriation procedures if the legal requirements are not met.

The initiation of an expropriation procedure starts with the expropriation authority itself or with the submission of a request for expropriation by a public body or enterprise, a public-private partnership, a party to an infrastructure contract being the winner of a bid, and any inheritor of or successor to a public-private partnership.<sup>41</sup>

36 ECtHR: *Sporrong and Lönnroth v. Sweden*, judgment of 23 September 1982, para. 61; Mountfield *op. cit.* p. 141.

37 Art. 5.

38 ECtHR: *Papamichalopoulos v. Greece*, judgment of 24 January 1993.

39 OECD (2004) *Indirect expropriation and the 'Right to regulate' in international investment law* Working Paper No. 2004/4, p. 3.

40 Mountfield *op. cit.* p. 138. .

41 Art. 7.

The request for expropriation must contain the elements specified by the law.<sup>42</sup> Documentation must be attached to the request certifying that sufficient means of compensation for expropriation are in place. When the request is submitted by a public-private partnership, it must contain a bank guarantee ensuring the payment of compensation for the expropriation.<sup>43</sup>

The expropriation authority conducts a *prima facie* review of the request within fifteen days of receipt as regards whether it meets the requirements for expropriation provided for in Article 4. If it establishes that the request does not meet the conditions, it rejects the request and provides a justification for it. If the expropriation authority establishes that the request appears to meet the requirements, it processes the request further by issuing a decision admitting the request for review.

The decision on the request must be submitted to the Immovable Property Assessment Office within five days and, within ten, sent to the owners and to those holding an interest in the property. At the same time, the same people should also be sent all follow-up documentation: a notification describing the public objective behind the expropriation; a notice that each owner has the right to submit an observation relating to the request for expropriation prior to the deadline; and a notification that a public hearing on the expropriation should be conducted in the municipality in which the immovable property is located. It also publishes, within ten days, the decision on admitting the request for review in the *Official Gazette* and in another newspaper with a large circulation.<sup>44</sup>

The purpose of these initial procedural actions is to make public the interest in expropriation as well as the assessment on the lawfulness of the expropriation. This requires the accomplishment of many actions, but they are all in favour of the protection of the right to property in the event of expropriation.

Viewed from the perspective of the person submitting a request for expropriation, it may seem an overburdened and lengthy procedure, but it must all be completed within 25 days. The law has set deadlines which need to be met in due time and which contribute to an efficient procedure. Additionally, however, Article 8(9) provides for an extra deadline regarding the publication of the interest in expropriation: within seven to ten days of publication of the first notification, the notification on expropriation must be republished, which seems to point to the lawmaker taking into account the need to ensure everyone is informed in relation to the procedure.

42 Art. 7. The request must include: the name and address of the expropriation authority; if the expropriation authority is not acting on its own initiative, the name and address of the applicant for expropriation; the name and address of the persons who are the owners or have any interest in the immovable property which is to be expropriated; the location and number of each parcel which is the object of the immovable property; a description of each of the rights applying to that immovable property; a detailed description of the public purpose behind expropriation; the documentation and evidence necessary to prove the legitimacy of the public purpose; a description of the details of any possible dispute over the properties that are the subject of the expropriation.

43 Art. 8(1-4).

44 Art. 8(5-8).

The law envisages a time period for receiving comments and observations and for the organisation of a public hearing. Within ten days of the publication of the first notification, all stakeholders/persons interested may submit observations and comments in relation to the expropriation; while, within fifteen days of the end of the period for lodging observations, the expropriation authority must organise a public hearing, inviting and enabling the participation of all those whose interests are affected by the expropriation.<sup>45</sup>

Upon completion of the publication procedures stage and the hearing of comments, an initial decision must be issued.<sup>46</sup> Within thirty days of the public hearing procedure, and where it is in support of the move, the expropriation authority must issue an initial decision stating that the requirements for expropriation had been met. This decision must contain a notice for the expropriation petitioner, the property owner and any other stakeholder, informing them of the right to appeal against such a decision.<sup>47</sup> The decision comes into force on the day it is published in the *Official Gazette*, where publication should be made within a period of ten days of it being issued.

The expropriation authority may also issue an initial decision rejecting a request where the legal requirements for expropriation have not been met. The initial decision in this instance must be served on the parties within five days of it being issued.<sup>48</sup>

#### *Final decision on expropriation*

The expropriation authority must issue a final decision either permitting or rejecting expropriation within a period of six months. The six-month period commences at a point fifteen days after the initial decision has come into force. In the event that the initial decision is taken to appeal, the period in which the final decision must be issued is extended until the court decision has been made.<sup>49</sup>

Once the court has reached its verdict, the expropriation authority should issue a final decision on expropriation. The final decision may be one granting expropriation or one which rejects the request for expropriation. Where a decision granting expropriation is issued, it must contain the elements specified by law;<sup>50</sup> or, where the request is rejected, the decision must provide a detailed explanation of the rejection. As with the initial decision, the final one also comes into force on the day of its publication in the *Official Gazette*,<sup>51</sup> and must be served on the parties within five days with

45 Art. 9.

46 Art. 10(1).

47 Art. 10(1).

48 Art. 10(2).

49 Art. 11(1) and (2).

50 Art. 11(3). The decision contains the names and addresses of the applicant, owners and other persons who have any interest in the immovable property which is subject of the expropriation; the location and number of each parcel, or part thereof; the amount of compensation, which depends on the assessment office for the valuation of immovable property; the valuation; and a description of the terms of the expropriation.

51 Art. 11(3) and (4).

publication in the *Official Gazette* (and another newspaper with a broad circulation) within a further ten.

When a final decision granting expropriation is issued, the property owners may not be forced to vacate their property prior to being compensated. Taking possession of immovable property may, however, take place twenty days after complete compensation, as specified in the final decision, has been paid in full<sup>52</sup> and, for other types of properties, within ten days. The Law thus contains one of the most secure instruments for the protection of property: no-one may be arbitrarily expelled from their property prior to receipt of compensation.

### Conveyance of ownership and utilisation of expropriated property

After the final decision has been issued, thereby authorising the expropriation, it must be registered in the cadastre. At this point, no owner of or stakeholder in the expropriated property may undertake any actions which alter the value or status of the expropriated property. If the final decision is revoked or annulled by the court, it is the cadastral bodies' duty to register the revocation or annulment in the cadastral records.<sup>53</sup> Conveyance of ownership may be accomplished only on the issue of a final decision and once compensation has been awarded in full. If the expropriation was carried out by the municipality or by any municipal body, ownership of the expropriated property is transferred to the municipality; when the expropriation was realised by the government, the property is transferred into the ownership of the Republic of Kosovo.<sup>54</sup>

Rights of use of property may be transferred where an appropriate licence has been issued by ICMM. In such cases, the transfer of rights and the expropriation process itself is finalised only when compensation has been paid. Furthermore, rights of use or administration over the expropriated property may be sold, rented, assigned or transferred to a contractor or public-private partnership. Likewise, such a transfer may take place only after the payment of compensation by the contracting party.<sup>55</sup>

### Compensation and forms of compensation for expropriation

Compensation of the owner of expropriated property is one of the key components supporting the expropriation procedure. The 'fair balance' between the public interest and the right to private property encompasses reasonable compensation being made in relation to the value of the property.<sup>56</sup> In the case of *James v. United Kingdom*, the ECtHR, in interpreting international compensation standards, uses the expression 'prompt, adequate and effective'<sup>57</sup> in interpreting what 'reasonable compensation' means in practice.

52 Art. 11(9) and (25).

53 Art. 12.

54 Art. 4(4), Art. 5 and Art. 26.

55 Art. 14.

56 Allen *op. cit.* p. 288.

57 ECtHR: *James v. United Kingdom*, judgment of 21 February 1986, para. 58.

### *Forms of compensation and the manner of payment*

The Law determines that the market value of the property should be the basis for compensation. The market value itself is to be calculated in line with the criteria set under the legal provisions<sup>58</sup> which, in turn, reflect ECtHR practice. The direct value of the damage inflicted and the value of the immovable property and its accessories and profits are included in the compensation.

However, there are exceptions to the market value determination process under certain circumstances, particularly when the public interest evidently prevails over the private interest. Such circumstances are held to justify compensation lower than full market value.<sup>59</sup> In *James v. United Kingdom*, the court stated that:

Article 1 (P1-1) does not, however, guarantee a right to full compensation in all circumstances. Legitimate objectives of ‘public interest’, such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value.<sup>60</sup>

It must be borne in mind that this rule is applied in exceptional cases and only in circumstances pertaining to deep economic reforms, from which the whole society benefits and where a balance is attained between the public interest and the right to private property. Under normal circumstances, the market value is taken as the basis for compensation. The Law prohibits compensation, however, in the following cases:

- a) alteration of the property value after the date of the decision admitting the request for expropriation to review
- b) where it is necessary to carry out preparatory work before expropriation, changes in the property value from the date when the decision to carry out such works was taken
- c) artificial or manipulative changes in market value, deriving from the consequences of the actions and manipulations of people with precursory knowledge of the expropriation plans and having such an impact that the market value of the properties concerned is inflated artificially
- d) illegal construction (construction which is not yet legalised due to the lack of urban plans and where the state authorities have not issued construction permits).<sup>61</sup>

The Ministry of Economy and Finance publishes by-laws on the means of calculating properties and determining property values. These by-laws must be in compliance with international standards and ECtHR practice. In line with the Law on Immovable Property Tax, the standards adopted by the MEF are also taken into account in the calculation of the value of expropriated property. The Property Tax Department and the Immovable Property Assessment Office in the MEF are the competent

58 Art. 15(6).

59 ECtHR: *James v. United Kingdom*, judgment of 21 February 1986; *Lithgow v. United Kingdom*, judgment of 8 July 1986.

60 ECtHR: *James v. United Kingdom*, judgment of 21 February 1986, para. 54.

61 Art. 15 par 1-3.

departments in property assessment. Assessment is carried out in compliance with the procedure stipulated by law and within a time period of 150 days.<sup>62</sup>

Payment of compensation may be realised in property of the same value or with money (the euro or any other currency exchangeable in Kosovo). Payment is carried out according to the value specified in the expropriation decision and with 7% interest, calculated annually. The purpose of this provision is to stimulate payment as early as possible for the owner and to prevent the losses an owner may ultimately suffer as of the date when the final decision on expropriation was made.<sup>63</sup>

The Law contains one more provision specifying the time during which payment must be made by the expropriation authority: payment must be executed within two years of the date of the final decision on expropriation.<sup>64</sup> This provision is very significant for the protection of ownership as it pressurises bodies to complete the expropriation procedures without delay. The two-year period must not be interpreted as allowing authorities to take possession of a property and then, within two years, compensate the owner: possession may not be taken prior to compensation being made. Furthermore, when such a rule is not respected, the owner, at the passing of the two-year period, has the right to demand the annulment of the expropriation decision.<sup>65</sup>

We should add here that all those with any kind of right or interest recognised by the law over the expropriated property also enjoy the right to compensation. Those holding an interest are considered to be those having: real servitude rights; personal servitudes; rights for construction; rights on pre-emption or the right to use; and on the dissolution of a rental contract.<sup>66</sup>

### Legal remedies for the protection of owners' rights in cases of expropriation

For the purpose of assuring owners that the procedure and expropriation are in compliance with the law and international standards, legal remedies have been set out under which the expropriation authority may be held to account for its decisions.

#### *Complaint against initial decision*

The initial decision, through which the expropriation authority decides if the request for expropriation *prima facie* meets the expropriation requirements, may be taken to appeal. Such a complaint must be filed within a period of fifteen days from the date of its publication in the *Official Gazette*.<sup>67</sup> This complaint may oppose either entirely or partially a decision specifying the public interest in expropriation or that the legal requirements have not been met. If the expropriation authority is a municipality, the complaint is addressed to the municipal court; where it is the government, the complaint is filed with the Supreme Court.

62 Art. 15, in connection with Art. 22 and 23.

63 Art. 16.

64 Art. 16(6).

65 Art. 16(6).

66 Art. 17, 18 and 19.

67 Art. 10(1.2) and Art. 35.

The complainant is obliged to serve the expropriation authority with five copies of the complaint within five days of the date the complaint was lodged with the court. Failure to do so will lead the court to reject the complaint. The expropriation authority has fifteen days following receipt of the complaint in which to submit a response to the court.

A complaint stays further expropriation proceedings until the courts have issued their decision. In this regard, the law provides high safeguards for owners; yet, on the other hand, it may have an impact on slowing down the expropriation procedure since courts are, frequently, ineffective at bringing decisions. Nonetheless, in order to avoid such an obstacle, the law identifies that such a procedure before the court is urgent and must be dealt with prior to other cases.<sup>68</sup>

After review of the complaint, the court may decide to:

1. over-rule the expropriation procedure completely, if the legal requirements for expropriation have not been met
2. request the expropriation authority to amend its initial decision and exclude any properties for which the legal requirements for expropriation have not been met
3. allow the further continuation of the expropriation procedure and the issue of the final decision.<sup>69</sup>

The purpose of this legal remedy is either to withhold further proceedings if the legal requirements for expropriation have not been met; or to permit the resumption of proceedings if it is established that a lawful public objective for expropriation exists and the legal requirements have been met. It is clear that the court may decide on the lawfulness of the expropriation. When an appeal is filed and the right to issue a final decision is granted, no second appeal may be lodged with regard to the lawfulness of the expropriation.

#### *Complaint against final decision relating to the amount of compensation*

The expropriation authority may not proceed to a final decision until the court has given its verdict in relation to any initial decision which has been the subject of an appeal.<sup>70</sup>

However, an appeal against a final decision may only be made with regard to the amount of compensation made available.<sup>71</sup> Again, any appeal is either to a municipal court or the Supreme Court, depending on the level of the expropriation authority. The complaint must be filed within fifteen days of the date the final decision came into force, and it must be served on the expropriation authority within five days of the date the complaint was filed with the court. The expropriation authority then has fifteen days, following its receipt of the complaint, to file a response. The court may decide to decrease or increase the amount of compensation. Neither a complaint

68 Art. 35.

69 Art. 35, as amended in 2010.

70 Art. 35(8).

71 Art. 36(1).

against the final decision on the amount of compensation nor an appeal against a judgment of the court stays the execution of the final decision.<sup>72</sup>

### Summary and recommendations

The Law on Expropriation of Immovable Property represents a new legal foundation and may be considered to be in compliance with international standards in the field of ownership rights protection. The Law contains fairly rigorous legal provisions, assuring that the right to ownership may be restricted only for lawful public interest and only when the legal requirements are met. Public interest and expropriation requirements are specifically determined while the owner may be assured with the payment of compensation. The present Law entirely amends the legal rules and procedures on expropriation provided for in the 1978 Law on Expropriation (OG SAPK 21/78) and, at the same time, repeals it.

It is worth stating that the Law is in close agreement with ECtHR case law. In this regard, the Law not only envisages situations in which public interest may exist, but requires this interest to be lawful. In addition, in any case, the Law obliges the law enforcement bodies to consider whether the public interest prevails in potential expropriations, and that the benefit from expropriation is greater than the loss to be suffered by the person affected by the expropriation. This is in the spirit of reaching a so-called 'fair balance' between the public interest and the right to property. The Law contains strict provisions regarding the issue of a decision on expropriation, foreseeing the announcement of what is the public interest in the issue of a decision admitting a request for expropriation for review, and then in an initial decision. That this takes place firmly in the context of a public space is aided by the organisation of public hearings, the submission of complaints regarding the foundations of a decision's legitimacy and the possibility of appeal as regards the lawfulness of the initial decision in the light of the public interest in expropriation and other legal requirements. In such a way, prior to a final decision being brought, stakeholders have the option of filing complaints.

Expropriation, and possession of the property, may not take place ahead of the entire amount of compensation being paid; in this way, the Law provides assurance guarantees to the owner. The expropriation authority must pay compensation at the latest within two years of the entry into force of the final decision on expropriation or, alternatively, see the decision being annulled as unlawful. Real market value serves as a basis for the calculation of the amount of compensation.

The right to property, in cases of expropriation, is also guaranteed by the existence of legal remedies against a decision to expropriate. Owners may not only participate in the initial proceedings when a request for expropriation is being reviewed, and at that point introduce their counter-arguments, but they also have the right to appeal against the initial decision in terms of the lawfulness of the public interest in expropriation, as well as against the final decision in terms of the amount of compensation. The first complaint against the decision stays even the continuation of the

72 Art. 36(2-8), as amended in 2010.

proceedings and blocks the issue of a final decision until the courts have reached their verdicts.

The Law contains numerous provisions assuring the protection of the right to property but, viewed from the public interest perspective and the need for expropriation, it may be represented as a fairly rigid law in that the expropriation procedure is lengthy. Furthermore, viewed from the perspective of implementation, it requires advanced professional experience because it includes numerous deadlines while the connectivity between the different strands of the Law establish several points of reference which make implementation rather difficult.

This analysis leads us to the following recommendations:

1. the law enforcement authority must engage experienced people to implement the Law in such way as to comply with its real objectives. They must be cautious with the interpretation of the Law, taking into account the reference points and connectivity of the different strands in order to find the right meaning of legal norms
2. state bodies must prepare preliminary expropriation plans, since no expropriation procedure, according to the Law, may be completed before approximately six months has elapsed, with the exception of cases where property is temporarily taken for use in emergency cases
3. state bodies planning expropriations must, in due time, make budgetary planning provision, particularly in respect of previous budgetary years, since compensation too must be part of expropriation planning as the possession of property may not be taken up prior to the award, and delivery in full, of compensation.

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