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Land reform in the case law of the European Court of Human Rights.
Lessons for South-Africa?

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I. Introduction

In South-Africa, section 25 of the Constitution (the 'property clause') provides for the expropriation of property under certain conditions. The expropriation should be duly authorized, should be for a public purpose or in the public interest and a 'just and equitable' compensation ought to be paid.

The property clause expressly labels the nation's commitment to land reform as a 'public interest' and therefore expropriation may be used as a tool to achieve the goal of land reform.
However, problems seem to arise when it comes to the compensation for such expropriation.

The Constitution seems rather straight-forward. In section 25 (3) we find a (non-exhaustive) list of five factors that are to be taken into account when determining the compensation for expropriation. Those factors are: (i) the current use of the property, (ii) the history of the acquisition of the property, (iii) market value, (iv) the question whether the acquisition by the person expropriated and the capital improvement made to such property was made to the land with the assistance of the apartheid state and (v) the purpose of the expropriation.

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The expropriation rules that are incorporated in the South-African Constitution have not yet been translated in a new Expropriation Act. The current Expropriation Act is 'pre-Constitutional', dating from 1975.
In the Expropriation Act, market value is not just one of five factors determining the amount of compensation but is (in section 12) the keystone in determining the compensation for expropriation.

To be short, South-African case law apparently shows that the South-African judiciary – still working with the 1975 Act and understandably accustomed to calculating compensation on the basis of market value – frustrates the land reform agenda, because obviously expropriation for land reform purposes will never be successful as long as full market value has to be paid.[2] Pressing on with the land reform agenda would then simply be too expensive.

In Europe we also have a tradition of land reform. Not in the western part, but in Eastern Europe where especially after the reunification of East-Germany with West-Germany and the disintegration of the Soviet Union land reform became a more pressing issue for some European States.
It is evident that every State makes its own expropriation legislation – a comparison of all those legislations goes far beyond the scope of a paper like this – but all these different legislations, more specifically the way these legislations panned out in specific expropriation cases, can be put to a common, central test. On a supranational level the European Court of Human Rights (ECHR) in Strasbourg is in a position to determine whether a specific expropriation violates human rights, such as the right to property. Although the ECHR upholds as a general rule that expropriation should go together with (full) compensation, in land reform cases the Court has repeatedly ruled that the compensation could consist of an amount (far) less than actual market value.

What we would like to do in this short paper is to take a closer look at this case law in the hope that it might offer South-African judges just a bit more comfort in

[2] See W.J. du Plessis, *Compensation for Expropriation under the Constitution* (diss. Stellenbosch), 2009, p. 271: *"It has been shown that the advent of constitutional democracy has not had a far-reaching impact on compensation for expropriation so far, due to the existing legal culture of expropriation."*

interpreting the Expropriation Act in accordance with the Constitution knowing that their colleagues in Strasbourg have created some 'precedents'.

After this introduction we will first briefly sketch the genesis of the European Convention of Human Rights and article 1 of the First Protocol to this Convention, the article that guarantees the right to property. We will then discuss the content of the aforementioned article before delving into the land reform case law of the ECHR, the *piece the résistance* of this paper. Of course our focus will be mainly on the compensations issues involved, but we will also pay some attention to the question whether land reform is a legitimate aim for expropriation. We will end with some conclusions.

II. The European Convention and the First Protocol

Following the Second World War, in 1949, the Council of Europe was founded.[3] The aim of the Council of Europe, according to Article 1 of its Statute, is to achieve a greater unity between its members for the purpose of safeguarding and realizing the ideals and principles which are their common heritage and facilitating their economic and social progress.
In pursuing this aim, the Council of Europe immediately started the drafting process for a European Human Rights document. This document, the Convention for the Protection of Human Rights and Fundamental Freedoms, was finished and signed in Rome on 4 November 1950 (and is therefore also sometimes referred to as the 'Treaty of Rome'). The Convention entered into force in 1953. At that time, ten countries were party to the Treaty. Currently, all European countries, with the exception of Belarus and Vatican City, are party to the Convention.

The European Convention on Human Rights has a special place in the European legal order. The reason for this is that the Convention does not merely oblige Contracting Parties to guarantee the human rights that are included in the European Convention, but also establishes the European Court of Human Rights. This is a permanent Court which can rule on all matters concerning the interpretation and application of the

[3] The Council of Europe should not be confused with the European Union. They are two entirely different organisations. The Union has a lot less Member-States than the Council.

European Convention and the Protocols thereto. The European Court of Human Rights can decide on cases brought to the Court by one Contracting Party complaining about another Contracting Party. However, the Court can also decide on cases brought to the Court by an individual who claims to be the victim of a violation of the rights set forth in the Convention and the Protocols thereto by one of the Contracting Parties. The possibility for individuals to bring claims to the Court – a possibility that was only introduced in 1998 - has made the European Convention a big success. Regardless of whether the case was brought to the Court by another Contracting Party or by an individual, the signatory states have to abide by the judgments and decisions of the Court in any case in which they are parties.[4]

The European Convention guarantees the respect for fundamental Human Rights such as the right to life and the protection from slavery and forced labour. It also guarantees the respect for fundamental freedoms such as the freedom of expression and the freedom of assembly and association. However, not all important rights and freedoms were guaranteed in the European Convention. Some rights and freedoms received protection later, as part of a Protocol to the European Convention. The right to the protection of property is one of those rights that received protection later, in 1952, as Article 1 of the First Protocol to the European Convention.

The reason that the right to property is not contained in the Convention itself, but is appended to the Convention by means of a Protocol, is because some Member States feared that an overly extensive protection of the right to property might impinge upon national social policies. The inclusion of the right to property in the Convention itself had met with objections in Great Britain where the socialist Government had begun large scale nationalisations.[5]
The vague wording of the article can also be traced back to these fears. Article 1 primarily protects citizens of Member States against the arbitrary deprivation of property, not against the deprivation of property in itself.

[4] See for all this in more detail: Cl. Ovey & R. White, *Jacobs and White: The European Convention on Human Rights*, Oxford: OUP 2006, especially chapter 1.
[5] E.A. Alkema, 'The Concept of property – in particular in the European Convention on Human Rights', in: J.P. Loof, H. Ploeder, A. van der Steur (red.), *The right to property, The influence of Article 1 protocol No. 1 ECHR on several fields of domestic law*, Maastricht: Shaker Publishing 2000, p. 19.

III. Article 1 of the First Protocol

Article 1 of the First Protocol to the European Convention guarantees the right to peaceful enjoyment of possessions. It provides 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."*

A survey of relevant case law shows that Court uses the term 'possession' in a fairly broad sense.[6] The term is not restricted to the property of material goods, such as the classic cases in which the property of a piece of land or a house is at stake, but can also cover various immaterial goods, such as patents, goodwill or permits. Furthermore, domestic law is not conclusive as to whether something amounts to a property right, which means that Member States cannot restrict the protection offered by article 1 by defining certain goods as not being property. The autonomous concept utilised by the Court thus prevents convenient national definitions of property.

One restriction of the protection offered by article 1 can be found in the Court's requirement that the property right qualifies as an asset (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. The mere hope or expectation of a future source of income is insufficient for the applicability of article 1.

[6] See: T. Hartlief, 'The right to own property under the ECHR', in: J.P. Loof, H. Ploeder, A. van der Steur (red.), *The right to property, The influence of Article 1 protocol No. 1 ECHR on several fields of domestic law*, Maastricht: Shaker Publishing 2000, p.31-36.

A landmark case setting out in detail the working of article 1 is the case *Sporrong and Lönnroth v. Sweden*.[7] In this case the properties of the applicants in the city of Stockholm (Sweden) were affected by expropriation permits issued by the Swedish government to the city of Stockholm. These permits granted the municipal authorities the right to start an expropriation procedure, but the authorities never made use of the permits, which resulted in a long period of uncertainty for the applicants. The trouble that this long period of uncertainty (more than 25 years) caused was considerably enhanced by the fact that the expropriation permits also entailed prohibitions on construction without the law providing for any compensation caused by these important restrictions on the peaceful enjoyment of property. The Court sets out three rules for the evaluation of whether the interference with the right to property constitutes a violation of article 1:

> *"That Article (P1-1) comprises three distinct rules. 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 first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognises that the 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 the purpose; it is contained in the second paragraph."*

The ECHR has since this case held that article 1 First Protocol contains three rules. First, it contains the principle of peaceful enjoyment of property. The second rule covers the deprivation of property and makes it subject to certain conditions. The third rule recognizes the ability of the State to control the use of property in accordance with general interest by enforcing laws they deem necessary. The European Court of Human Rights has determined that the rule regarding the deprivation of property is not unconnected from the first rule. The right to the peaceful enjoyment of property is the general rule, from which derogation is possible under strict conditions. When it comes to land reform-issues, the second rule

[7] ECHR 23 September 1982, no. 7151/75, 7152/75, *Series A* vol. 52 (*Sporrong and Lönnroth v. Sweden*).

regarding the deprivation of property is relevant. Therefore, we will focus on the deprivation of property.

We would like to point out that – as was made clear in the aforementioned case *Sporrong and Lönnroth v. Sweden* - the Court does not restrict its evaluation to expropriations formally categorized as such. In the absence of a formal expropriation, that is to say a transfer of ownership, the Court considers that it must look behind the appearances and investigate the realities of the situation complained of. Another approach would not guarantee rights that are 'practical and effective'. The Court thus ascertains whether a particular interference with property amounts to a de facto expropriation. An interference can be qualified as a de facto expropriation if the property right does not just lose some of its substance, but completely disappears. This was for example relevant in the case of *Papamichalopoulos v. Greece*. During the dictatorship in Greece, a plot of land belonging to the applicant was used for a Navy base. Even though there was never a formal transfer of property to the State of Greece or the Greek Navy, it was decided that the applicant was deprived of his property.[8]

A deprivation of possessions can be permitted under three conditions summed up in article 1. First, the deprivation must meet the criteria set for lawful deprivations in the national law. Second, the general principles of international law must be respected. Third, the deprivation must be in the public interest.
The second condition, regarding the general principles of international law is in practice not very relevant, so we will not look at this requirement in detail.

The first criterion, requiring that the deprivation must meet the criteria set under national law, is relevant. In the case of *Iatridis v. Greece*, for example, the Court held there was a violation of article 1 because the deprivation of property had taken place in violation of national law.[9] The first criterion does not only require that the conditions set out in the national law are met, but it also requires the national law to have a certain quality. It requires the law to be sufficiently precise and foreseeable

[8] ECHR 4 June 1993, no. 14556/89, *Series A* no. 260-B (*Papamichalopoulos v. Greece*).
[9] ECHR 25 March 1999, no. 31107/96 (*Iatridis v. Greece)*.

and appropriate procedural guarantees have to be put in place for the deprivation.[10] Also, the legislation has to be qualitatively sound, should not be arbitrary and has to be easily accessible.[11]
An example where the quality of legislation was relevant, is the *Hentrich* case. In this case, the European Court of Human Rights considered that the procedural rules were too much in favour of the State because individuals were not able to start proceedings challenging the State's right to buy property at undervalue. The Court found there was a violation of article 1.[12] The Court determines whether there has been a violation of article 1 through three criteria. The first of these criteria is lawfulness. According to the Court, the first and most important requirement of article 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful: the second sentence of the first paragraph authorises a deprivation of possessions only 'subject to the conditions provided for by law' and the second paragraph recognises that the States have the right to control the use of property by enforcing 'laws'. The requirement of lawfulness means that rules of domestic law must be sufficiently accessible, precise and foreseeable.
If the interference satisfies the requirement of lawfulness, the Court turns its attention to the question whether the interference is in the public interest.

As we indicated above, the second criterion (regarding the general principles of international law) is not relevant in practice. The third criterion requires the deprivation to be in the public interest. The European Court of Human Rights requires the measure to serve a legitimate aim, which is in the public interest. In each case the Court will presume that the measure is in the national interest.[13] The Court will accept that a particular measure is in the public interest, unless that judgment is manifestly without reasonable foundation.[14]

Apart from checking if the measure pursues a legitimate aim, the Court also applies a proportionality test. The public interest has to be balanced against the rights of the

[10] ECHR 21 February 1986, no. 8793/79, *Series A* no. 098-B (*James a.o. v. UK)*.
[11] ECHR 9 November 1999, no. 26449/95 (*Špaček v. Czech Republic*), para. 54.
[12] ECHR 22 September 1994, no. 13616/88, *Series A*, no. 296-A (*Hentrich v. France*).
[13] ECHR 21 February 1986, no. 8793/79, *Series A* no. 098-B (*James a.o. v. UK*), para. 61-63 and ECHR 8 July 1986, nos. 9006/80, 9262/81, 9263/81 and 9265/81 (*Lithgow a.o. v. United Kingdom*), para. 111-119.
[14] ECHR 21 February 1986, no. 8793/79, *Series A* no. 098-B (*James a.o. v. UK*).

individual. There needs to be a fair balance.[15] This fair balance will be missing if a measure places an individual and excessive burden on the owner of the possession.[16] The Court will grant the Contracting Parties a wide margin of appreciation. However, generally, a compensation is expected for the Court to rule that there is a fair balance between the individual interest and the general interest.[17]

IV. Legitimate aim

The European Court of Human Rights is not very strict when it comes to what can be recognized as a legitimate aim and what cannot be recognized as such.
An example of this is the case of *Holy Monasteries v. Greece*.[18] A law was passed in Greece, which expropriated the Greek monasteries of their land unless they could prove they had the legal title to the land. The reasons for the measure, set out by the government, were to end illegal sales of the relevant land, encroachments on it and the abandonment or uncontrolled development of it. Even though the Court expressed doubts as to the question if this aim put forward by the Greek government was the real reason for the legislation, it did decide that the aim of the measure could be considered to be in the public interest. The Court did not leave the Monasteries empty handed though: it reaffirmed that compensation of the full market value is the general rule. Because of the lack of compensation, the European Court of Human Rights held that the measure was disproportional and thus constituted a violation of article 1.

Even though the Court does not seem to be very strict on what can be recognized as a legitimate aim and what cannot be recognized as such, the Contracting Party does have to at least put forward a legitimate aim for the measure. If it does not, as happened in the case of *Strain and others v. Romania*, the Court will hold there was a violation of article 1.[19]

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[15] ECHR 23 September 1982, no. 7151/75, 7152/75, *Series A* vol. 52 (*Sporrong and Lönnroth v. Sweden*), para. 50.
[16] ECHR 24 June 2003, no. 35179/97 (*Allard v. Sweden*).
[17] ECHR 9 December 1994, no. 13092/87, *Series A* 301-A (*Holy Monasteries*), para. 71.
[18] ECHR 9 December 1994, no. 13092/87, *Series A* 301-A (*Holy Monasteries*).
[19] ECHR 21 July 2005, no. 57001/00 (*Strain and others v. Romania*).

In the case of *The Former King of Greece v. Greece*, the Court had to decide if the deprivation of property from the former King of Greece was acceptable.[20] The Greek government had stated that they needed to expropriate him, because it was in the public interest to be better able to control the forests and the archeological sites on the land owned by the former King. Also, it would protect that status of Greece as a Republic. The Court held that this was a legitimate aim. The former Royal family did, however, have a right to compensation, something which we will discuss further below.

The Court holds 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 upon the circumstances, constitute a legitimate means for promoting the public interest. In the case of *Allard v. Sweden*, for example, the Court accepted that the State could require an illegally built house to be removed, even though this amounted to the deprivation of property with no apparent benefit for the community. The Court considered that the benefit for the community was in the preservation of a functioning system of ownership. The circumstances of that particular case, however, did lead the Court to decide that in those particular circumstances, the State could have and should have chosen a less invasive measure which interfered with the rights of the individuals in a less direct manner.[21]

The Court generally leaves the States a wide margin of appreciation in the designation of a certain measure as being in the public interest. The Court holds that the national authorities are in principle better placed than the international judge to appreciate what is in the public interest because of their direct knowledge of their society and its needs. 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.

[20] ECHR 28 November 2002, no. 25701/94 (*The Former King of Greece v. Greece*).
[21] ECHR 24 June 2003, no. 35179/97 (*Allard v. Sweden*).

Furthermore, the notion of 'public interest' is necessarily extensive. 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 will thus generally respect the legislature's judgment as to what is 'in the public interest' unless that judgment be manifestly without reasonable foundation. In practice, the hurdle of public interest rarely proves to be insurmountable. The most difficult test to which an interference with property is subjected is the proportionality test.

V. The proportionality test

As we set out above, the proportionality test involves balancing the public interest against the rights of the individual. If there is a fair balance between these interests, and the measure does not place an individual and excessive burden on the owner of the possession, the measure will pass the proportionality test. The Court grants the Contracting Parties a wide margin of appreciation in selecting a certain measure to achieve the legitimate aim. The possible existence of alternative solutions does not in itself render the contested measure unjustified. As long as the measure remains within the bounds of the margin of appreciation, the Court will refrain from judging that the State in question should have exercised its legislative discretion in another way.[22] The existence of alternative, less burdensome measures may, however, constitute one of the factors the Court takes into consideration when assessing whether there is a fair balance.

It is worth noting that the fair balance test consists of both a procedural and a material requirement. In some cases, the Court has held that there was no fair balance because the applicant had insufficient legal remedies to protect himself against the interference with his property, or because the relevant national procedures took an excessively long time.[23] In the case of *Almeida Garrett and others v. Portugal*, the Court held that the long delay (24 years) in paying the applicants the

[22] ECHR 19 December 1989, nos. 10522/83, 11011/84, 11070/84 (*Mellacher e.a. v. Austria*).
[23] ECHR 23 September 1982, no. 7151/75, 7152/75, *Series A* vol. 52 (*Sporrong and Lönnroth v. Sweden*), para. 50.

compensation due to them constituted a violation of article 1.[24] In its conclusion, the Court held that the adequacy of compensation would be diminished if it were to be paid without reference to various circumstances liable to reduce its value, such as unreasonable delay. The Court considered the payment of provisional compensation not to be decisive, since it was paid several years after the applicants were deprived of their land. According to the Court, the uncertainty suffered by the applicants was of paramount importance:

> *"54. In any event, even though provisional compensation has been paid, the fact remains that the applicants continue to be faced with uncertainty. It is that uncertainty, coupled with the lack of any effective domestic remedy for rectifying the situation, that leads the Court to find that the applicants have already had to bear a special and excessive burden which has upset the fair balance which has to be struck between the demands of the public interest and the protection of the right to peaceful enjoyment of possessions."*

The material aspect of the fair balance test concerns the assessment of whether the particular measure itself must be considered to constitute an individual and excessive burden, for instance because the State in question has neglected to offer the person deprived of his possessions any or adequate compensation. It is this aspect that we will be concentrating on in the remainder of this article.

Despite the wide margin of appreciation, the Court will generally rule that the fair balance is lacking if no compensation has been offered to the owner of the possession, even if the public interest served by the measure in question is of the utmost importance.[25] Although the right to compensation is not laid down in article 1, a deprivation of property without payment of an amount reasonably related to its value is normally considered a disproportional interference which could not be considered justifiable under Article 1. The Court holds that the obligation to pay compensation derives from an implicit condition in article 1 read as a whole.[26]

[24] ECHR 11 January 2000, nos. 29813/96, 30229/96 (*Almeida Garrett and others v. Portugal*).
[25] ECHR 9 December 1994, no. 13427/87 (*Stran Greek Refineries and Stratis Andreadis v. Greece*).
[26] ECHR 8 July 1986, nos. 9006/80, 9262/81, 9263/81 and 9265/81 (*Lithgow a.o. v. United Kingdom*).

As the assessment of the right to compensation is closely linked to the proportionality test, a heavier burden upon the person faced with expropriation requires a proportionally more generous payment of compensation. Otherwise, there would be no fair balance. The Court assesses the balance between burden and compensation more strictly when it comes to deprivation rather than regulation of property.

Since the Court holds that the deprivation of property without payment 'of an amount reasonably related to its value' means there is no fair balance, much depends on the answer to the question how this amount should be calculated. The answer is generally that only full compensation can be regarded as reasonably related to the value of the property. This raises the question how the value of the property must be determined. This is of some importance, since various methods of valuation may lead to widely differing outcomes.

In general, the Court leaves States a wide margin of appreciation in their choice of a method of valuation. An applicant can thus not claim the right to have his property valued according to a particular method of valuation. Illustrative for the Court's approach to such question is the case of *Malama v. Greece*, in which the Court pointed out that it is not required to decide on what basis the domestic courts should have assessed the amount of compensation payable, since it cannot take the place of the domestic courts in determining the year that should have been taken into consideration for the estimation of the value of the expropriated land and for the assessment of the sums due in consequence.[27]

However, there are instances in which the Court has found that the method of valuation chosen by the State does not fall within the wide margin of appreciation. In the just mentioned case of *Malama v. Greece,* for instance, the Court considered that there was no fair balance, since the calculation of compensation by the domestic courts took no account of the excessive length of the proceedings and the fact that applicants were awarded no compensation for this delay or additional interest. Another example can be found in the case of *Platakou v. Greece*.[28] This case is of particular interest, since the Court conducts a material assessment of the valuation by

[27] ECHR 1 March 2001, no. 43622/98 (*Malama v. Greece*).
[28] ECHR 11 January 2001, no. 38460/97 (*Platakou v. Greece*).

the State and concludes that the applicant has shown that the compensation for expropriation assessed by the domestic court did not bear a reasonable relationship to the value of her property, since the courts had based the compensation on the assumption that the building was in very poor condition, when in fact the building was described in an expert report as being in very good condition.

In sum, the proportionality of a particular measure plays an important role in the assessment whether an expropriation passes the article 1-test. The questions whether compensation has been offered, and whether the amount of compensation offered is reasonably related to the value of the property, must in general be answered affirmatively, otherwise the Court will hold that there is no fair balance as required by article 1. There are, however, certain exceptional circumstances in which the expropriating State need not offer any compensation at all. In the following paragraph, we will set out when no (full) compensation needs to be paid.

VI. Land reform cases: less than 'full compensation'

In recent years, the Court has developed a new line in case law, in which exceptions to the rule of full compensation have been accepted. These exceptions fall into roughly two categories: cases in which less than full compensation is deemed acceptable, and cases in which the State in question does not have to pay any compensation at all. Unsurprisingly, the latter type of case is far less prevalent than the former type.

For the first type of case, in which less than full compensation is acceptable, the *Holy Monasteries*-case is relevant.[29] In this case, the Court repeated that when it comes to deprivation of property through expropriation, the general rule is that the compensation must consist of the full market value of the object in question. However, the Court held that legitimate objectives of public interest can lead to the conclusion that the State was not in fact held to pay the full market value of the object. This raises the question what objectives can be qualified as legitimate objectives of public interest. The Court supplied an answer to this question in the case

[29] ECHR 9 December 1994, nos. 13092/87 and 13984/88 (*Holy Monasteries v. Greece*).

of *Scordino v. Italy*[30]. In this case, the Court made an important distinction between cases in which expropriation is used as an instrument to achieve economic reform or greater social justice, and cases in which expropriation is used as a measure to achieve less exalted aims, such as the building of a road:

"The Court reiterates that in many cases of lawful expropriation, such as a distinct expropriation of land with a view to building a road or for other purposes "in the public interest", only full compensation can be regarded as reasonably related to the value of the property (…). However, legitimate objectives of "public interest", such as those pursued by measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value."

The Court came to a similar conclusion in the case of *Lithgow and others v. United Kingdom*.[31] In that case, the question was whether the nationalisation of an entire industry formed a legitimate objective that would justify less than reimbursement of the full market value. The Court held that a distinction could be drawn between cases of nationalisation and cases concerning other takings of property by the State, such as the compulsory acquisition of land for public purposes, and that this distinction could be reflected in the standard of compensation. According to the Court, both the nature of the property taken and the circumstances of the taking in these two types of cases give rise to different considerations which may legitimately be taken into account in determining a fair balance:

> *"121. (..) The valuation of major industrial enterprises for the purpose of nationalising a whole industry is in itself a far more complex operation than, for instance, the valuation of land compulsorily acquired and normally calls for specific legislation which can be applied across the board to all the undertakings involved. Accordingly, provided always that the aforesaid fair balance is preserved, the standard of compensation required in a nationalisation case may be different from that required in regard to other takings of property."*

[30] ECHR 29 March 2006, no. 36813/97 (*Scordino v. Italy*).
[31] ECHR 8 July 1986, nos. 9006/80, 9262/81, 9263/81 and 9265/81 (*Lithgow a.o.. v. United Kingdom*).

This case confirms that, although reimbursement of the full market value is the norm, there may be circumstances in which the expropriated party may be paid less. As illustrated by the abovementioned cases, this may be the case when the State wishes to carry out a structural reform for reasons of social justice or due to economic considerations. When this is the case, the State has more leeway in determining a different (lesser) amount of compensation, and the expropriated party cannot invoke article 1 in order to receive more compensation.

As indicated above, there are even exceptional cases in which the State need not pay the expropriated party any form of compensation whatsoever. The possibility of expropriation without any form of compensation was entertained for the first time in the case of *Zvolsky and Zwolska v. the Czech Republic*.[32] In that case, the Court considered that the legislature's decision to deal with infringements of property rights under the communist regime globally (with the occasional distinction, where necessary for analytical purposes) is reasonable. The Court explicitly held that it was conscious of the legislature's concern to afford some redress for the infringements and accepts that the exceptional circumstances (the manner in which land was generally acquired at the time) justify the lack of compensation. However, the Court still held that there was a violation of article 1, since the Czech legislation precluded any possibility of re-examination of individual cases involving transfers of land in special circumstances.

The door that had been opened a crack in the case of *Zvolsky and Zvolska v. the Czech Republic* swung open in the famous case of *Jahn and others v. Germany*, in which the applicants had all inherited plots of land under the 1945 agrarian reform in the German Democratic Republic (GDR).[33] On 16 March 1990 the Modrow Law entered into force, lifting the restrictions regarding the transfer of title and giving those concerned full ownership rights. After German reunification, however, certain individuals who had inherited land allocated following the agrarian reform, including the applicants, were required to transfer this land to the tax authorities of their local *Länder* without compensation, under the Federal Republic of Germany's (FRG) second Pecuniary Rights Amendment Act. The applicants complained that, in being required to reassign their

[32] ECHR 12 November 2002, no. 46129/99 (*Zvolsky and Zvolska v. the Czech Republic*).
[33] ECHR 30 June 2005, nos. 46720/99, 72203/01 and 72552/01 (*Jahn a.o. v. Germany*).

property without compensation, they were deprived of their property, in violation of Article 1 of Protocol No. 1 to the Convention.

The Court, however, came to the conclusion that there was no violation of article 1, and based this decision on three factors.
Firstly, the Court attached importance to the circumstances of the enactment of the Modrow Law, which was passed by a parliament that had not been democratically elected, during a transitional period between two regimes that was inevitably marked by upheavals and uncertainties. In those circumstances, even if the applicants had acquired a formal property title, they could not be sure that their legal position would be maintained. Secondly, the Court took into consideration the fairly short period of time that elapsed between German reunification becoming effective and the enactment of the second Property Rights Amendment Act, which means that the German legislature can be deemed to have intervened within a reasonable time to correct the – in its view unjust – effects of the Modrow Law.
Lastly, the Court referenced the reasons for the second Property Rights Amendment Act. In that connection, the FRG parliament cannot be deemed to have been unreasonable in considering that it had a duty to correct the effects of the Modrow Law for reasons of social justice so that the acquisition of full ownership by the heirs of land acquired under the land reform did not depend on the action or non-action of the GDR authorities at the time.
On these grounds, the Court concluded that in the 'unique' context of German reunification, the lack of any compensation does not constitute a violation of article 1.

It goes without saying that the *Jahn*-case was indeed exceptional. It is likely that the Court came to its decision not just because of the exceptional circumstances of German reunification, but also on additional grounds, in particular the fact that the applicants could not be certain that their legal position would be maintained, as well as the underlying aim of the measures, which was to attain social justice.[34]

Although exceptional, the *Jahn*-case is not unique. In its decision in *Weber v. Germany*, the Court declared the applicant's complaint manifestly ill-founded, since

[34] See also B.I. Fischborn, *Enteignung ohne Entschädigung nach der EMRK?,* Tübingen: Mohr Siebeck Tübingen 2010, pp. 194-196.

there was no appearance of a violation of the applicant's rights under article 1.[35] In that case, too, the German reunification played an important part in the Court's reasoning. The German State Railways started using the applicant's plot of land shortly after the reunification and without paying compensation. Although the applicant was thus never formally expropriated, she could no longer use the land she owned. The Court referred again to the "unique context of the German reunification and the enormous task faced by the German legislator in dealing with complex issues, such as the questions of unresolved property issues". Just as in the *Jahn*-case, however, other factors seem to have contributed to the Court's decision. One of the factors in this case was the fact that the plot of land had been used for more than sixty years, first by the German State Railways of the German Reich, then by the German State Railways of the GDR, and later by the German Railways Corporation. The applicant's property rights were thus already significantly diminished to a merely formal title of ownership.

The case law discussed above shows that the general rule is that expropriation will only pass the fair balance test if compensation is offered that is reasonably related to the value of the expropriated possessions. However, the Court has accepted some exceptions to this rule. In some cases, compensation of less than the market value of the property is acceptable, if there are legitimate objectives of public interest. In exceptional circumstances, the Court accepts expropriation without any form of compensation. In these exceptional cases, however, there are generally other aspects that play a role in the Court's decision. The exceptional (political and economic) circumstances can thus play an important role in the fair balance test, but it is questionable whether those circumstances are in themselves enough to ensure that the Court views the measures as proportional.

VII. Some conclusions

What we may take away from the brief analysis of ECHR case law in (especially) land reform issues is that the Court has ruled several times that in these types of cases a

[35] ECHR 23 October 2006, no. 55878/00 (*Weber v. Germany*).

State may expropriate while paying a compensation of (far) less than market value or sometimes even refrain from any compensation at all.

It should be noted however that the aim of the expropriation at hand – land reform, land restitution – is not the only factor that can support a decision to refrain from (full) compensation. Other elements come into play such as the way the owners have come into their ownership rights, the length of the period of enjoyment of those property rights, the legitimate expectations of the owners and the (current) use of the property. Of course these elements – distilled form case law – form not an exhaustive list. They very much resemble however the (also: non-exhaustive) list of factors as incorporated in section 25 (3) of the South-African Constitution: current use of property, history of the acquisition, market value, acquisition with the help of a regime that is currently frowned upon, purpose of the expropriation.

A somewhat bold, but nonetheless very well supportable statement could therefore be that the factors that the European Court of Human Rights uses in order to justify that in certain special expropriation cases, notably cases of land reform, a compensation can be paid of (far) less than market value (or even no compensation at all) are basically the same factors that a South-African court may find in its own Constitution and may use to reach a similar outcome. Compensation issues should therefore not block the progress of the land reform agenda. It might take some courage to take the leap from full market value to considerably less compensation, but the legal tools are at hand and waiting to be used.
What we have demonstrated from a European perspective and what could be the lesson for South-Africa is: Do not be afraid. It has been done before.

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