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STUDENT'S NAME

Mariam Badunts

SUPERVISOR'S NAME

Arman Zrvandyan

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| | |
|-------|---------------------------------------|
| RA | Republic of Armenia |
| ECHR | European Convention on Human Rights |
| ECtHR | European Court of Human Rights |
| UN | United Nations |
| FIG | International federation of surveyors |
| FAO | Food and agriculture organization |
| ADB | Asian Development Bank |

INTRODUCTION

Property right is an inalienable part of a modern capitalistic society. It is impossible to imagine the development in the 21st century without property. Prosperity and property rights are inseparably interconnected. The significance of having well-defined and strongly protected property rights is now widely recognized among economists and policymakers. Nowadays property rights can ensure higher standards of living.¹ Properly defined and well-protected property rights replace competition for control of economic resources by violence with competition by peaceful means.² The system of private property is one of the most important guaranties of freedom, not only for the owners of property, but scarcely less for those who do not own. The most important protection afforded to the individual by law is the protection of his property. That property provides individuals with a protected domain against the state.³

The property right is a constitutional right in most countries, as well as is protected by declarations of human rights.⁴ Property right is guaranteed by Article 1 Protocol No. 1 of the European convention on human rights and is protected in 47 Council of Europe member states.⁵ Despite the nature of the property right, the ownership rights can, however, be limited. Most of the countries have reserved a right to interfere in personal ownership, when it is necessary for the public needs. ⁶Pursued by the demand for economic development and improvement of the life-quality of citizens, governments in most countries exercise the power to expropriate private

¹Gerald P. O'Driscoll Jr. and Lee Hoskins, Property Rights: The Key to Economic Development , <https://www.libertarianism.org/publications/essays/property-rights-key-economic-development>, (last access: 10 February 2017)

² Armen A. Alchian, The concise encyclopedia of economics, Property Rights, <http://www.econlib.org/library/Enc/PropertyRights.html>, (last access: 10 February 2017)

³See footnote 1

⁴KaukoViitanen, Heidi Falkenbach, KatriNuuja, Compulsory Purchase and Compensation Recommendations for Good Practice, FIG Commission 9 – Valuation and the Management of Real Estate, pp. 5-6, <https://www.fig.net>, 1 (last access: 19 February 2017)

⁵ European Convention On Human Rights, 4 November 1950

⁶See footnote 4

properties for public needs. While many sovereign states maintain an “eminent domain” power to satisfy the public needs, the government’s action can negatively impact the life standards of those whose assets are taken. Most countries have developed land expropriation laws to restrict their government’s exercise of its eminent domain power and defined requirements for implementing those laws. Generally, there are quite strict preconditions for such interference, not to harm the functions of the free market. Expropriation laws typically define the conditions under which the government can exercise its power; the rights and level of participation of affected persons in expropriation process; define the expropriated assets for which compensation is payable; as well as the level of compensation that is payable for those assets.⁷

Taking into consideration the nature and the value of the right in the modern society, it is extremely important to ensure the effective protection of that right in a developing country like Armenia, particularly by elevating and solving problems of fair compensation for expropriation. Starting from 2000s in Armenia, as in many developing countries, there were numerous expropriations of property by state. Because of essential legislative gaps in Armenian regulations several problems occurred from the very beginning of this process, a number of expropriations were declared unlawful by the ECtHR.⁸ On 28 February 1998 the Constitutional court declared unconstitutional Article 22 (2), (3), (4), (5) of the RA Law on Real Estate and stated that the Government may not establish a procedure for expropriation of real estate. Later, on 18 April 2006 the Constitutional court declared unconstitutional government decrees and Article 218 of the Civil Code, Articles 104, 106 and 108 of the Land Code on the bases of which expropriations were made.⁹ And a few months later, on 27 November 2006 law on the Alienation of property

⁷ Asian Development Bank, *Compensation and Valuation in Resettlement: Cambodia, People’s Republic of China, and India*, November 2007, p. 13,

http://www.landesa.org/wp-content/uploads/2011/01/ADB-RDI_Report_on_Land_Taking_Law_and_Practice_in_China_India_Cambodia.pdf, (last access: 19 April 2017)

⁸*Minasyan and Semerjyan vs Armenia*, no 27651/05, 23 September 2009

Tunyan and others vs Armenia, no 22812/05, 09 October 2012

Danielyan and others vs Armenia, no 25825/05, 09 January 2013

Ghasabyan and others vs Armenia, no 23566/05, 13 November 2014

Baghdasaryan and Zatikyan vs Armenia, no 43242/05, 13 November 2014

Vardanyan and Namushyan vs Armenia, no 8001/07, 27 October 2016

Gharibyan and others vs Armenia, no 19940/05, 13 November 2014

⁹ՄԴՈ- 630, 18 April 2006

for the needs of the society and the state (hereinafter referred as Expropriation law) entered into force.¹⁰ However, in spite of the new legislation, there are many gaps in the regulations of expropriation, particularly, in the procedure of defining the compensation.

According to international practice expropriation should be implemented with respect to the rights of affected parties, which means that they should have the right to comment, request and be provided with information on issues concerning them, and have their comments taken into consideration during the decision making process.¹¹ Our legislation does not provide the owners with such possibility. The only right that is given to the owner is the right to contest the amount of compensation by the judicial process. But even in this case the right is not guaranteed. The owner can present a motion to the court for making an expertise on the determination of market value of the expropriated property. The court anyway, has no legal obligation to satisfy the motion; this is under the full discretion of the court.

The next problem is with another internationally recognized essential principle of expropriation, according to which the owner shall rest in the same economic position and if the regular compensation does not fully cover the economic injury to the property owner, compensation should also be paid for other damage.¹² Our Expropriation law provides only that for the alienated property should be paid compensation in the amount 15 % more than market price. There is no provision about compensation of losses incurred by the parties, as well as no guaranteed right for the owner to get another equivalent property as compensation.

Also there is a problem concerning liability of the state in case of expropriation. According to our law, the state does not bear any liability when the contract between the acquirer and the owner is concluded.¹³ But taking into consideration the fact that alienation of the property was made for the state needs, establishment of the subsidiary liability of the state for non-compliance of the contractual obligations by the acquirer would enhance the fairness of expropriation process.

¹⁰ ՀՀ օրենքի հասարակության և պետության կարիքների համար գույքի օտարման մասին, 27 նոյեմբերի 2006

¹¹ See footnote 4, p. 9

¹² Food And Agriculture Organization Of The United Nations, FOA land tenure studies 10, Compulsory acquisition of land and compensation, Rome 2008, pp. 23-24, <http://www.fao.org/3/a-i0506e.pdf>, (last access: 02 March 2017)

¹³ See footnote 10

This Master's paper aims to study whether compensation regulations, valuation methods and their implementation can actually lead to full and just compensation, as well as to identify the existing shortcomings on the basis of internationally recognized principles and standards of fair compensation. An attempt will be made to propose achievable and effective solutions for identified problems, including the introduction of good practices and international principles that should be taken into consideration. **Chapter 1** of the paper is designed to study the shortcomings in Armenian national legislation on expropriation before 2006, achieved solutions to a number of raised problems and current regulations particularly concentrating the fair compensation issue. **Chapter 2** will study international best practice in the field of expropriation, including approach of the ECtHR and internationally recognized best practice on the issue of fair compensation by state for expropriated property. **Chapter 3** will make a comparative analysis to identify whether Armenian legislation corresponds to international standards in the field under study, whether the existing regulations can lead to fair compensation in the Armenian reality, identify shortcomings and present recommendations grounded on the abovementioned analysis. Followed by a bibliography listing all the sources used for the paper, the **Conclusion** will succinctly outline the main findings of the research.

During discussions there can raise the question whether the expropriations should be made in the frame of civil proceeding or it would be more effective to examine such cases in administrative proceeding. However, this question, as well as the question concerning effective judicial remedies, will be out of the scopes of the present paper.

Chapter 1 – Regulations on compensation for expropriation before and after 2006

Expropriation is in most countries an essential tool for acquiring land for the public needs, in spite of the fact that land acquisition can often be arranged through other means such as voluntary agreements.¹⁴ However, it is not so easy to reach an agreement with property owners, especially in the terms of compensation. Armenia is not an exception and there are also essential difficulties in the mentioned field. Armenian government since the beginning of 2000s has implemented a number of expropriation projects, particularly, in the streets of Kond, Pavstots Buzand, Eznik Koghbatsi, Aram and North Avenue. The whole process was under the high media attention and got a lot of criticisms by the public. The majority of expropriations were against the will of the owners. The main objections of the owners were in regards to the fairness of compensation. However, there were also many other problems in the regulations on expropriation. No clear definition of "public and state needs" and "cases of exceptional and overriding public interest" was defined. Essentially, the main gap in the process regulation could have been because of the absence of unified legislation.

According to Article 28 of the RA Constitution of 1995:

¹⁴See footnote 4

“Everyone has the right to property and inheritance. ... The owner may be deprived of property only by the court in cases prescribed by law.

Private property may be **alienated for the needs of society and the state only under exceptional circumstances, on the basis of the law and with prior equivalent compensation.**”

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In 1998 the president of the RA raised the question of constitutionality of Article 22 (2), (3), (4), (5) of the RA Law on Real Estate. The Constitutional court by its decision dated 28 February 1998 held that, pursuant to Articles 8 and 28 of the RA Constitution, real estate may only be expropriated through the adoption of a law on the expropriation of particular real estate, in which the extreme importance and significance of the expropriation of real estate shall be substantiated. Such a law has to state which needs of the society and the state will be satisfied through the expropriation of real estate. The law has to oblige the Government to fix the value of compensation for real estate based on a financial-economic assessment, taking market prices into account. It has to be based on the results of negotiations between the owner of the real estate and the Government, and it has to be based on the written consent of the owner, which is subject to court dispute by the latter. Furthermore, the Constitutional Court emphasized that the Government may not establish a procedure for expropriation of real estate which would grant it the power of forced expropriation of real estate.¹⁶

After the constitutional amendments of 2005, the same right but with lower required standards for expropriation was established by the Article 31 of the RA Constitution:

“Everyone shall have the right to freely own, use, dispose of and bequeath the property belonging to him/her. ...

No one shall be deprived of property except for cases prescribed by law in conformity with the judicial procedure.

The private property may be **alienated for the needs of the society and the state only in exclusive cases of prevailing public interests, in the manner prescribed by the law and with prior equivalent compensation...**¹⁷

¹⁵RA Constitution, 1995

¹⁶ՄՊՈ-92, 27 February 1998

¹⁷RA Constitution, 1995 (with amendments of 2005)

In spite of the fact, that Constitution expressly defined that the private property may be alienated for the needs of the society only in the manner prescribed by the law, before 2006 there was no law regulating this issue. Before 2006 expropriations were made based on a number of articles in different legal acts. Particularly, government decrees and Article 218 of the Civil Code, Articles 104, 106 and 108 of the Land Code regulated the whole process. Many people, whose property was declared subject to expropriation, were unsatisfied by the fairness of the whole procedure, as well as by the amount of compensation. Moreover, some of them applied to the ECtHR.¹⁸ By a number of cases lodged against Armenia the Court established violation of Article 1 Protocol No.1 of the ECHR. The main issue was the fact that expropriations were made on the basis of Government decrees, while the ECHR requires that expropriations could be made only on conditions provided for by law.

The European Court of Human Rights, in its judgment of 23 June 2009 *Minasyan and Semerjyan vs. Armenia* set:

“The Court reiterates that the first and most important requirement of Article 1 of Protocol No. 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 authorizes a deprivation of possessions only “**subject to the conditions provided for by law**” and the second paragraph recognizes that the States have the right to control the use of property by enforcing “laws”. Moreover, the rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention. It follows that the issue of 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 becomes relevant only once it has been established that the interference in question satisfied the requirement of lawfulness and was not arbitrary.

The Court further reiterates that the phrase “subject to the conditions provided for by law” requires in the first place the **existence of and compliance with adequately accessible and sufficiently precise domestic legal provisions.**”

Thus, the Court, in his judgment, concluded that the interference with the peaceful enjoyment of possession did not satisfy the requirement of lawfulness, was arbitrary and consequently violated

¹⁸ See footnote 8

Article 1 of Protocol No. 1.¹⁹ Furthermore, the Court noticed that one of the requirements of the provisions of the RA Constitution, at the period of time under discussion, was that an expropriation of property for public needs should be carried out on the “basis of a law.” Thus, the whole process of expropriation for public needs in the RA conducted before the adoption of the law of 27.11.2007 violated not only the European Convention, but also the constitution of RA. To the similar conclusion court came in the other cases versus Armenia concerning expropriation.²⁰

The Human Rights Defender of the RA, taking into consideration the significance of the issue, applied to the Constitutional Court for a ruling upon the conformity of Article 218 of the Civil Code, Articles 104, 106 and 108 of the Land Code and the Decision of the Government of 2002, 1 August, 1151-N with Article 31 of the Constitution. The Applicant argued that the legal norms in question were in conflict with the Constitution because of the absence of clear definition of "public and state needs", "cases of exceptional and overriding public interest", "exceptional importance" and "expropriation "in any of the challenged legislation. Furthermore, the abovementioned articles of the Civil Code and Land Code did not stipulate a sufficiently clear procedure for expropriation. The Human rights defender objectively, argued that there should be separate legislation to regulate this type of issues.

The Constitutional Court interpreting Article 31 of the Constitution made the following observations:

“- There are cases where rights are restricted, when the Constitution itself determines the criteria and framework of the restriction and does not bestow any competence upon the legislator. Property rights may only be restricted in cases prescribed by law. Any deprivation of property has to be carried out in a judicial manner as a compulsory act. "Expropriation of property" should be exercised on the basis of Article 31 of the Constitution.

¹⁹*Minasyan and Semerjyan vs Armenia*, no 27651/05, 23 September 2009, §§ 66, 67

²⁰*Tunyan and others vs Armenia*, no 22812/05, 09 October 2012, §§ 38, 39

Danielyan and others vs Armenia, no 25825/05, 09 January 2013, §§ 38, 39

Ghasabyan and others vs Armenia, no 23566/05, 13 November 2014, §§ 25, 26

Baghdasaryan and Zatikyan vs Armenia, no 43242/05, 13 November 2014, §§ 25, 26

Vardanyan and Nanushyan vs Armenia, no 8001/07, 27 October 2016, §§ 99, 100

Gharibyan and others vs Armenia, no 19940/05, 13 November 2014, §§ 25, 26

- The Constitution provides for the possibility of restrictions on the right to property and expropriation of property.
- Expropriation may only be carried out for public and state needs which should be clearly expressed and directed at a particular property.
- These needs should be exceptional and in the overriding interests of the state or society.
- The procedure of expropriation should be determined by legislation.
- Advance compensation should be guaranteed when property is to be expropriated.
- The compensation should be of equivalent value.”

The Constitutional Court defined that the government should not be allowed to establish through its decisions the procedure of expropriation of property for state needs. This is directly connected with the restrictions on the right to property and guarantees should be set out to ensure a fair balance between public interest and individual property rights. The Constitutional Court said that on the basis of the requirements of Articles 3, 5, 8, 31, 43 and 83.5 of the Constitution²¹, the legal procedure and framework for the expropriation of property for public and state needs should be set out clearly in legislation. The basic premise of such legislation must be that the right to property may only be restricted or terminated in cases prescribed in Article 31 of the Constitution. The law shall determine the procedure of expropriation by specifying:

- “a. the state agency which will decide whether expropriation should take place;
- b. the procedure for providing advance compensation of equivalent value (whether in kind or in monetary form) for the property which is to be seized;
- c. the procedure for appealing against the expropriation and the procedure under which it is carried out (for instance where there might be disagreement over the amount of compensation);
- d. the obligations and restrictions attached to the rights of the owner of the property to be seized;
- e. the procedure for legal execution following the expropriation and any new rights which may arise;
- f. instances where there may be different owners of the property for defined legal objectives.”

So, the Court carried out a constitutional analysis of Article 218 of the Civil Code, Articles 104, 106, 108 of the Land Code, the Decision of the Government of the RA 1151-N as well as its own law-enforcement practice. It ruled that the legal norms mentioned above do not result in

²¹ See footnote 17

guaranteed constitutional protection of property rights. They do not secure a fair balance between individual interests and property rights and public interests as defined according to the rule of law. Neither can the protection of property rights be guaranteed, based on the reasoning of "exceptional overriding public interests". The Constitutional Court also established that legal norms under discussion would become invalid directly the new legislation governing expropriation of property for the needs of society as a whole came into force.²² This decision was made on 18 April 2006, and a few months later, on 27 November 2006 law on the Alienation of property for the needs of the society and the state entered into force.²³

The law on the Alienation of property for the needs of the society and the state defined the concepts and rules mentioned by Constitutional Court as subject of establishment by law. The law stipulated the definitions of "public and state needs", "cases of exceptional and overriding public interest", "exceptional importance", as well as bases and conditions for expropriation, aims that can be pursued by the overriding public interest and a number of other provisions that were not provided by previous regulation.

The law defines that the expropriation can be made only by giving a prior equivalent compensation to the owner. According to Article 11 of law on the Alienation of property for the needs of the society and the state:

- “1. For the alienated property should be paid equivalent compensation. The compensation can be considered as equivalent if it is 15 % more than market price.
2. Market price of alienated property is the more probable price of alienation in open and competitive market, which was the result of conscious and lawful actions of buyer and seller in conditions of fair trading. If for the alienated property there is no proper open and competitive market, then the market price of property is decided by the calculation methods, which will be considered as fair by the court.
3. The valuation of the market price of real property or rights on real property is made in order previewed by the RA law on Real estate valuation²⁴...

²² See footnote 9

²³ See footnote 10

²⁴ ՀՀ օրենք Անշարժ գույքի գնահատման գործունեության մասին, 4 October 2005

5. Financial obligations set by the state bodies and connected with alienation of the property arising for the owner of the property (taxes, fees and other mandatory payments) are paid by the acquirer.
6. Compensation to the persons having proprietary rights toward the alienated property is paid from the sum of compensation for the property. ²⁵

Article 12 of the Expropriation law provides that if during three months after receiving the contract the owner of the property does not sign it the acquirer is obliged to transfer the proposed sum of money as a deposit to the court or notary. And Article 13 continues, that if during seven days after transfer of money as deposit, the contract is not concluded, the acquirer is obliged to apply to the court with the claim of property transfer. In this case the court is authorized to discuss only the amount of compensation.

The law stated that the valuation of the market price of real property or rights on real property is made in order previewed by the RA law on Real estate valuation. The RA law on Real estate valuation provides only general rules and principles of property valuation. To be more particular, the real estate assessment agencies in their activity should be governed by the real estate assessment standards published by RA National Institute of Standards in 2012.

²⁵See footnote 10

CHAPTER 2- International principles and best practice on fair compensation for expropriation

Property right is also well protected in the international arena. Article 1 of Protocol No. 1 of the ECHR, to which Armenia has been part since 2002, states:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.”²⁶

According to Article 1 of Protocol No. 1 of the Convention, the deprivation of property, in order to be compatible with the Convention, must satisfy the following criteria: be **provided by law**, be in the **public interest**, and meet the conditions of the **general principles of international law**. A **fair balance** should be kept between public interest and individual property rights. The ECtHR by its jurisprudence concerning this question gives to member states a wide margin of discretion to stipulate rules in the national levels, but, anyway, it establishes general criteria necessary for the lawfulness of expropriation. A fair balance is judged by the payment of compensation by the State. The Court pays particular attention to this question, in order to assure that a fair balance has been kept in every case.²⁷

By the ECtHR judgment *The Holy Monasteries v. Greece* dated 9 December 1994 was established:

“Compensation terms under the relevant legislation are material to the assessment whether the contested measure respects the requisite fair balance and, notably, whether it does not impose a disproportionate burden on the applicants. In this connection, the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference...”²⁸

²⁶See footnote 5

²⁷Christos Rozakis, The right to property in the Case Law of the European Court of Human Rights, January 2016, pp. 1-4, <http://uipi.com/new/wp-content/uploads/2014/12/Athens-Property-Day-2016.-Keynote-speech.-The-Property-Right-in-the-Case-Law-of-the-ECHR.pdf>, (last access: 02 March 2017)

²⁸*The Holy Monasteries v. Greece*, Nos. 13092/87 and 13984/88, 9 December 1994, §71

Practically, the most critical point concerning compulsory purchase is the question of compensation. That is why the most important issue is whether the compensation regulations, valuation methods and manners really lead to full and just compensation for affected parties.²⁹ Compensation, whether monetary or by equivalent property, is at the center of compulsory acquisition. Because of the government actions, people lose their homes, their land, and sometimes also their source of income. Compensation should repay them for these losses, and must be based on principles of **equity and equivalence**. The principle of equivalence is essential for determining compensation.³⁰ In most cases objections of owners are relating to compensation. They are generally based on the insistence of owners that the compensation offered to them for their property is inadequate. Usually, those who appeal do not raise the question concerning the constitutional power of government to acquire their property for state needs they just seek more money or other forms of compensation. Appeals in the prevailing part of cases claim that incorrect principles of valuation have been used or that the compensation offered is unfair and is subject to be recalculated.³¹

ECtHR established that in the light of Article 1 Protocol No. 1 and the general principles of international law compensation should be **prompt, appropriate and effective** for all forms of deprivation.³² Good illustration of this is the case *Zubani v. Italy*.³³ In the present case the applicants had been deprived of land used to build housing for low-income occupants, and were awarded full compensation for the damage they had suffered. The Court, however, acknowledged that, in spite of the fact, that the reparation made was satisfactory, but, there was no “just satisfaction” by itself, because of the fact that the process of payment of compensation had lasted for more than eight years. This decision clearly illustrates one more time that it is of crucial importance for the Court the effective protection of fundamental rights. This also proves that the Court goes beyond what is sometimes called the right to rights, to assure that **rights**

²⁹See footnote 4, pp. 9-10

³⁰ See footnote 12, pp. 23-24

³¹See footnote 4, p.10-11

³²Laurent Sermet, *The European Convention on Human Rights and property rights*, Council of Europe Publishing pp.41-42, [http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-11\(1998\).pdf](http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-11(1998).pdf), (last access: 02 March 2017)

³³ *Zubani v. Italy*, ECHR, 7 August 1996

must be effective – and that this by itself is a fundamental entitlement.³⁴ The ECtHR by his jurisprudence has also established that the proportionality principle involves a right to reasonable compensation.³⁵ Factually, it states that expropriation without payment of an amount reasonably related to the value of property would be considered as a disproportionate interference which could not be considered justifiable under Article 1 Protocol No 1.³⁶

The basic idea behind the rules of compensation in international practice is that the seller shall be in the same economic position as if the expropriation had never taken place. If the regular compensation does not cover all the economic losses of the property owner, then compensation should also be paid for so called other damages. But what is the meaning of the concept “full compensation”? In reality the meaning of this concept depends on the legislation in each country. There are no strict rules.

According to FIG the full compensation should include the fair market value of the expropriated property, the depreciation of the value of the retaining property, which is the same as severance, and other damages and costs which can weaken the financial situation of the owner of property under expropriation:

$$TC = (V + S + D) + C,$$

where

TC = total compensation

V = compensation for the expropriated property

S = compensation for severance

D = compensation for damages

C = compensation for costs.”³⁷

Swedish expropriation laws have been subject to reform in recent years. The travaux préparatoires of the Expropriation Act of Sweden state that the compensation should correspond to the price that could have been expected if it had been a normal voluntary transaction.³⁸ The

³⁴See footnote 32, pp.7–9

³⁵*James and Others v The United Kingdom*: ECHR, 21 February 1986

³⁶*Lithgow And Others v The United Kingdom*: ECHR, 8 July 1986

³⁷Kauko VIITANEN, Just Compensation in Expropriation, Finland, pp. 3-4,

https://www.fig.net/resources/proceedings/fig_proceedings/fig_2002/Js26/JS26_viitanen.pdf, (last access: 28 February 2017)

³⁸Thomas Kalbro and Hans Lind, Compulsory Purchase: Reasonable and Fair Compensation, Nordic Journal of Surveying and Real Estate Research Volume 4, Number 1, 2007, p.31

current legislation on expropriation establishes a principle of compensation according to market value plus twenty-five percent to individuals that are subject to expropriation, as well as the coverage of all damages caused to the owner by expropriation. These changes had the aim to increase the protection of individuals in cases where the owners of property are obliged to transfer their property for public needs.³⁹ In England, for example, the possible future development value of the land is taken into consideration during the valuation, as well as all such development of the land which would have been permitted to the owner should be taken into account.”⁴⁰

As regards the regulations in United States, the case law interprets the aim of just compensation in full indemnification of the owner for the property loss. In the case *Penn Central Transportation cov City of New York*⁴¹ the court stated that “fairness and justice” require that economic damages caused by state action should be subject to compensation by the government, because the owner alone should not bear the burden of losses when there is public benefit. While deciding what is considered to be just, attention should be paid to both the owner whose property is expropriated and the state that is paying for it.⁴² The Fifth Amendment, the main regulatory act of expropriations, requires that the concept of just compensation cannot be reduced to a formula or be confined to rules, but should be considered separately in each case.⁴³ Just compensation includes the value of the property on the date of expropriation, and as such value should be considered the price that the owner would have obtained in a negotiated sale. Interest also should be payable. This amount is supplemented by compensation that is governed by the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970. The act compensates damages that are the consequences of the expropriation.⁴⁴

³⁹Dr. Björn Hasselgren & Patrick Krassén, Case Study on Sweden. Property Rights Report – Sweden 2015, pp.28-29, <http://internationalpropertyrightsindex.org>, (last access: 09April 2017)

⁴⁰ See footnote 37

⁴¹*Penn Central Transportation cov City of New York*, 438 US 104 (1978) 124

⁴²*United States v Commodities Trading Corporation* 70 S Ct 547 (1950)

⁴³*Georgia-Pacific Corp. v United States* 640 F 2d 328 (2000)

⁴⁴Uniform Relocation assistance and Real property acquisition policies for federal and federally assisted programs, 42 U.S. Code Chapter 61

International federation of surveyors in 2010 developed and published Policy statement on compulsory purchase and compensation, which included general principles on valuation of real estate and recommendations for good practice. One of the main principles of fair valuation according to the statement is that the compulsory purchase shall be implemented with respect to the rights of affected parties. Particularly, affected parties shall have the right to be present, comment, request and be provided with information on issues affecting them, and have their views and comments taken into consideration before decisions are made. A written statement should be provided, which shows that the comments of affected parties have been taken into account in the decision made. Another requirement closely connected with the previous one is transparency of the expropriation process. This means, that all documents relevant to the procedure shall be available to affected parties. They should have the right and a genuine opportunity to access the information. As for the information, it should be communicated in a manner understandable for affected parties. Another essential right is the right to compensation for all losses incurred as a result of expropriation. The method of valuating, agreeing, determining, if it was impossible to reach to an agreement, and paying compensation to affected parties should be clearly and comprehensively established by legislation. And in general, the whole process of expropriation and the payment of compensation should be implemented in accordance with the principles laid down in the legislation and with internationally recognized best practice.⁴⁵

Food and agriculture organization of the United Nations in 2008 also published a study concerning compulsory acquisition of land and compensation. According to UN study, the main principle for legislation on compulsory acquisition is equivalent compensation. Claimants should be paid compensation which is no more or no less than the damage resulting from the acquisition of their property. Legislation should ensure that owners and other affected persons receive equivalent compensation, whether in money or alternative property. To achieve this, legal regulations should clearly set out necessary bases for consistent valuation. The law should be clear enough to provide strict guidelines, but also flexible to allow the determination of fair compensation in specific cases. Probably, it may be also problematic to financially properly quantify non-economic losses, e.g. religious, historical or cultural claims to the land. Taking into

⁴⁵ See footnote 4, pp. 16-22

account the fact, that legislators cannot preview all possible scenarios, and sometimes detailed provisions may result in outcome that people will not be compensated for losses that are not identified in the legislation, it should be flexible enough to cover losses non previewed by legislation. The second most important principle that should guide the process of expropriation is that all affected parties, including owners and occupants should be involved. Ideally, the process should safeguard the rights of people who lose ownership. Legislative and practical measures should ensure that all affected persons, and particularly the vulnerable ones, are not disadvantaged. All the procedures should be transparent and flexible, and should be undertaken in good faith. Affected persons and owners in the majority of cases have less negotiating power, skills and sources than the acquiring party. Often they may be unaware of their rights, and even sometimes under pressure accept an unfair low offer in order to be able to resettle elsewhere quickly. If someone rich may be able to acquire professional advice on the value of compensation, the poor are very likely to be at a disadvantage position. That is why, in cases when the owners or other affected parties have no sufficient means, assistance should be provided so they can participate effectively in negotiations on valuation and compensation.⁴⁶

FAO of the UN also provides examples of what may be compensated. So, depending on the jurisdiction, the total fair compensation may be based on:

- “• The property value itself.
- Improvements to the property.
- The compensation of any other financial advantage different from the market value that the person may have due to the owning or occupying the property in question.
- Expenses incurred as a direct and reasonable result of expropriation.
- Loss in value to other property owned by the affected party because of expropriation.
- Legal or other professional costs such as the costs of legal advice, and of preparing and submitting related documents.
- Costs of moving and costs of acquiring alternative accommodation.
- Costs associated with reorganization of farming operations when only a part of a parcel is acquired.
- Loss in value of a business displaced by the acquisition, or if the business is permanently closed because of the acquisition.
- Temporary loss of earnings.
- Personal hardship.

⁴⁶ See footnote 12, pp. 25-31

- Other losses or damages suffered.⁴⁷

Asian Development Bank in November 2007 published a study on Compensation and valuation in resettlement. According to this publication among policy makers, planners, and practitioners it is widely accepted that displaced persons should not bear any of the externality costs and that rather than trying to reduce some of the burden imposed on the owners, the regulations should focus on totally restoring the financial situation of affected persons. Affected persons should be properly consulted about the compensation and should have free access to mechanisms to enforce their rights of just compensation. Owners' access to information, participation in the expropriation process, and ability to enforce their rights are not only an element of democratic society, but also an effective institutional control on the government's expropriatory power. This policy of ADB is to neutralize the power imbalance that exists in favor of the government during the expropriation process. Another important principle in ADB's policy is that compensation for loss of assets should be determined in a way that the affected persons' economic position rest at least as favorable with the government takings as without them. As regards determination of compensation for lost assets, it should be based on "replacement value." Replacement value can mean either replacing the property with another property of similar quality and quantity or with monetary compensation. And to determine the "replacement value" under the ADB policy a five-component formula, consisting of market value, premium, transaction costs, interests, and direct damages, should be used.⁴⁸

Based on the study of international principles and best practice, it can be concluded that property right is widely protected in international arena and expropriation process to be lawful and compatible with international principles should satisfy a number of criteria. The main criterion is protection of affected parties' rights. Firstly, the owners and other affected parties should have the right to participate in expropriation process, particularly, during determination of compensation. Another essential requirement is equivalent compensation. According to international principles and best practice, compensation for expropriation should be determined in a way that the affected persons' economic position does not deteriorate. That is why, if the regular compensation does not fully cover the economic injury to the property owner,

⁴⁷ Ibid

⁴⁸ See footnote 7, pp. 11-14

compensation should also be paid for other damage. And, finally, all these rights should be effective.

CHAPTER 3 - Shortcomings of legislation and practice on compensation under international standards

From the study of international best practices and recommendations there can be outlined certain points that are necessary for national legislation to make the compensation process fair. The most important ones are the right of affected parties to participate in the process of determination of compensation, compensation for all damages of affected parties and effectiveness of the right to compensation. Hereafter we would like to analyze the abovementioned principles in the light of Armenian regulations to reveal whether Armenian legislation provides sufficient grounds for assuring fair compensation for expropriation.

The first internationally recognized principle of expropriation is that **expropriation should be implemented with respect for the rights of affected parties**. Particularly, affected parties shall have the right to be present, comment, request and be provided with information on issues affecting them, and have their views and comments taken into consideration before decisions are

made. A written statement should be prepared, which shows that the comments of affected parties have been taken into account in the decision made. Moreover, assistance should be provided so owners and occupants can participate effectively in negotiations on valuation and compensation.

In Armenian legislation regulating the expropriation there is no provision giving the right to owner or other affected parties to participate in the process of determination of compensation. According to Article 11(3) of the Expropriation law the valuation of the market price of real property or rights on real property is made in order previewed by the RA law on Real estate valuation.⁴⁹ As for the law on Real estate valuation it does not provide any provision about the rights of the owner of property under valuation. It only regulates the rights and obligations of client and valuator.⁵⁰ And in practice the acquirer of the property is considered as a client of valuation agencies. The contract of valuation of property subject to expropriation is concluded between acquirer and valutors, that is why valutors have obligations only toward acquirer. The agencies trying to get the monopoly for valuation of all the property which would be subject to expropriation become an interested party. Factually, the owner of the property not only is not involved in the process of valuation and determination of compensation, but also is in the vulnerable position. In spite of the fact, that law on Real estate valuation provides that valutors are independent in the process of valuation, we notice something prejudiced in this situation.

The only possibility that is given to the owner to contest the amount of compensation is by the judicial process. But even in this case the right is not direct. Article 12 of the Expropriation law provides that if during three months after receiving the contract the owner of the property do not sign it, the acquirer is obliged to transfer the proposed sum of money as deposit to the court or notary. And Article 13 of the Law continues, that if during seven days after transfer of money as deposit, the contract is not concluded, the acquirer is obliged to apply to the court with property transfer claim. In this case the court is authorized to discuss only the amount of compensation. This means that even if the owner does not agree with the sum of money determined as compensation through valuation process, he cannot contest it. He just should refuse to sign a contract and wait until the acquirer applies to the court. And only after that will the owner have the opportunity to contest the amount of compensation.

⁴⁹ See footnote 10

⁵⁰ See footnote 24

Based on Article 13 of the Expropriation law the owner can contest the amount of compensation in the court. ⁵¹He can formulate his objections and present a motion to the court for making an expertise. The court anyway, is not obliged to satisfy the motion. For example, if the objections of the owner about the properness of valuation are not pursuing for the court, it is free to reject the motion. There is no regulation establishing the cases when the court is obliged to satisfy or reject the motion, it is under the full discretion of the court. Despite the administrative proceedings, where the court has an obligation to establish the facts ex officio, in the civil proceeding the principle of competition is applicable. This means that each party is responsible for providing the proofs of his statements. In this case the main probable means of proving the position of owner about not objective valuation of his property could be presentation of valuation made by another valuation agency. But, for example, what if, the owner has not sufficient financial means to provide the valuation of another valuator. In this case the owner of expropriated property is in the vulnerable position. Our legislation does not provide any assistance for such cases. That is why for protection of owners' right to somehow participate in valuation process at least it should be stipulated an obligation for the court to design an expertise in cases when the owner refuse to sign a contract on alienation of his property because of the amount of compensation. In administrative proceeding this problem is solved by the obligation of the court to examine the case and establish the verity ex officio. Another question is why expropriations are subject to civil hearings. There are no relations based on the mutual agreement or the will of both parties. It would be much more effective to examine such cases in the frame of administrative proceeding. However, as was mentioned earlier, this question should be a different subject of study and is not within the scope of the present paper.

According to the next internationally recognized essential principle of expropriation, the owner shall rest in the **same economic position** as if the compulsory purchase had never happened. If the regular compensation does not fully cover the economic injury to the property owner, **compensation should also be paid for other damage**. But the question is whether Armenian legislation provides sufficient guaranties for ensuring full fair compensation for owner. Our Expropriation law stipulates that for the alienated property compensation in the amount of 15 % more than market price should be paid. There is no provision about compensation of losses

⁵¹ See footnote 10

incurred by the parties. The only additional provision is in Article 11 (5) of law, providing that all financial obligations toward state bodies which rose as a result of expropriation will be covered by acquirer. It is natural, that in many case the owners suffer losses. Sometimes the compulsory acquisition means that people lose not only their property, but also access to the sources of their livelihoods. For example, there could be cases where expropriated property is a place of business or land is used for agricultural purposes, which is the only source of income for the owner. In such cases, even if the property is valuated according to its market value, the compensation will not cover the losses of the owner. Our legislation not only does not provide bases for compensation of damages caused to owner by expropriation, but also does not preview separate compensation for other affected parties. According to Article 12 (6) of law under discussion the compensation to persons other than owner, having proprietary rights toward property subject to expropriation, will be given from the amount of money previewed as compensation.⁵²

Another issue that is not taken into consideration in the Expropriation law is the fact, that, generally, the owner sells his property when he is no more interested in it. In this case he had to accept the market prices and incur himself the losses resulted from that transaction. In case of expropriation the owner had to sell the property, toward which he did not lose his interest. In such conditions it is not fair to oblige the owner to sell his property in a market price. The amount of money which is fifteen percent of the market value cannot be sufficient compensation for the loose of property and cover damages of the owner at the same time. That is why, for instance, Swedish expropriation laws to increase the protection of individuals in cases where the owners of property are obliged to transfer their property for public needs have been subject to reform in recent years. The current legislation previews compensation according to market value plus twenty-five percent to individuals that are subject to expropriation, as well as the coverage of all damages caused to the owner by expropriation.⁵³ Another example can be the regulation in the United States, where the compensation for expropriated property includes the value of the property, relocation assistance and other damages carried out by the owner.⁵⁴

The practical problem that can face the owners is inability to buy an equivalent property with the sum of compensation. That is why international practice preview also restitution in the form of

⁵² See footnote 10

⁵³ See footnote 39

⁵⁴ See footnote 44

replacement by the equivalent property. It is advisable that our legislation implement a provision, according to which, in case of objections of the owner concerning the fairness of the amount of compensation, the acquirer shall be obliged by the court to make a compensation for expropriation by the replacement of alienated property with another equivalent property.

The next important issue about compensation for expropriation is that the compensation should be prior. As set the ECtHR under Article 1 Protocol No. 1 and general principles of international law compensation should be **prompt, appropriate and effective** for all forms of deprivation.⁵⁵ In practice, there are cases when the owners agree to sign a contract with acquirers. According to Article 16 of the Expropriation law if the acquirer in the defined time does not send the draft of contract on alienation to the owner or does not transfer the sum of compensation as deposit or in the time previewed by the law does not apply to the court with the claim on alienation, all documents related to expropriation are null and void. The second part of the same article stipulates that the State has a subsidiary liability for damages caused by a non-compliance of the requirements set in the part one of the article.⁵⁶As can be seen from the article, the state has not any liability in case when the contract between acquirer and owner is concluded. But what if the acquirer does not properly fulfill its obligations under the contract? Who will cover the damages of the owner in such cases? If the expropriation is made for the needs of state and society and the property was declared subject to expropriation by the government decree, it seems logical and fair that the state should take responsibility for the whole process.

Actually, in Armenia, the owners of expropriated property faced identical problems. Some owners in the beginning of the 2000s, on the streets Kond, Eznik Koghbatsi, Aram, signed contracts with private acquirers, according to which the compensation should have been in the form of property that was planned to be constructed in the place of expropriated ones. But the issue is that it is more than ten years, the owners did not get their compensation. The acquirers broke all possible deadlines, and it is not even clear when undertook obligations will be fulfilled. This question many times was raised in the RA Parliament, particularly by the deputy Vahe Efiayyan, but the answer of the Government was in the form of report, stating that the constructional works are in process.⁵⁷For such cases, when the acquirer are not able or willing to

⁵⁵ See footnote 32

⁵⁶ See footnote 10

⁵⁷ Question of the Deputy Vahe Efiayyan addressed to the Government, retrieved 19 March 2017, <<http://armlur.am/649652/>>

fulfill their contractual obligations, the owners should have the right to claim against state and get proper fulfillment of contractual obligations. So, it would enhance the fairness of the process, if RA legislation on expropriation involves an article, providing guaranties for the protection of owners' interests by establishing the subsidiary liability of state also for non-compliance of the contractual obligations by the acquirer.

CONCLUSION

The aim of the master paper was to study the field of expropriation regulations in the Republic of Armenia and reveal whether the current legislation can lead to fair compensation. It was mentioned that before 2006 there was no unified legislation on expropriation, and this fact by itself was the cause of many complications in this field. But studying current legislation, international principles and best practice concerning fair compensation on expropriation and making a comparative analysis it became clear, that the existing legislation of RA on expropriation is far from being an ideal one. The adoption of the Expropriation law was called not just to unify and convert into law regulations existing before 2006, but preview regulations, that would minimize any kind of subjective factors and in maximum would protect rights of the owners of expropriated property.

So, it became clear that the aim was not reached, meanwhile, the study was only concentrated on the issue of fair compensation. It is evident, that real legislative gaps exist in the field of expropriation. To assure the protection of owners' rights, whose property is subject to expropriation, in conformity with international principles and best practices significant amendments should be made in the Expropriation law. Based on the thorough analysis and examination of the main provisions on compensation of the RA legislation, concerning the alienation of property for the public needs, internationally recognized principles and best practice in this field, the following proposals are made to enhance the RA legislation:

1. To stipulate the regulations giving the owners right to participate in the process of determination of the amount of compensation, as well as contest the decision before entering to the court.
2. Provide the owners with assistance (legal or financial) so that they can participate effectively in the process of determination of compensation.
3. To stipulate regulation establishing the cases when the court is obliged to satisfy or to reject the motion on designation of expertise for determining the fair market value of property; or in the scope of expropriation cases establish the obligation of the court to act in accordance with the principle of examination of the case *ex officio*.
4. To stipulate the regulation for compensation of other damages incurred by the owner and affected parties, as well as possibility to get the compensation in the form of equivalent property.

5. To stipulate in the law the subsidiary liability of the state for the obligations of the private acquirers whenever the party to the expropriation contract is a private organization and not a state itself.

Notwithstanding the abovementioned gaps in the legislation on expropriation it should be noted that since 2000s there have been significant changes in the regulations. Many essential problems have already been solved and the next step should be the elimination of existing shortcomings to guarantee the proper protection of the owners in expropriation process and their rights to fair compensation.

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