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Fair restriction to individual property rights.
A critical analysis of ECtHR's stance
on Public and Private interests
in the Regulation of Property

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Abstract

IT *Il concetto di diritto di proprietà sviluppatosi nel ventesimo secolo riflette la tensione tra le concezioni liberale, da un lato, e sociale, dall'altro, della proprietà. Si inserisce in questo contesto, l'Articolo 1 del Primo Protocollo alla Convenzione europea dei diritti dell'uomo (Art. P1-1) che, garantendo il diritto di ciascuno al godimento dei propri beni, sancisce il diritto degli Stati contraenti di porre in vigore le leggi da essi ritenute necessarie per disciplinare l'uso dei beni in modo conforme all'interesse generale.*

Questo articolo illustra come, adottando il principio di proporzionalità quale criterio generale per decidere in merito alla "convenzionalità" delle limitazioni ai diritti garantiti dalla CEDU, la Corte europea dei diritti dell'uomo ha avocato a sé l'ultima parola in materia di bilanciamento tra interesse generale e interesse privato nell'ambito di applicazione della Convenzione. Dall'analisi della giurisprudenza della Corte di Strasburgo emerge che la Corte procede al bilanciamento tra i confliggenti interessi dalla prospettiva del ricorrente. Ne consegue che, con riferimento alla casistica inerente il diritto di proprietà, il principio di proporzionalità è strumento di misura, calibrato sulla base dei valori sottesi alla Convenzione, dei pesi imposti al proprietario; mentre scarsa attenzione è riservata all'interesse generale avanzato a giustificazione della regolamentazione dell'uso dei beni.

Keywords: diritto di proprietà – limitazioni alla proprietà privata – proporzionalità -CEDU

EN *The concept of right of property as developed in the course of the twentieth century highlights the need to reconcile individual and collective interests. Accordingly, Article 1 of the First Protocol to the European Convention on Human Rights (Art. P1-1), which guarantees the right to the peaceful enjoyment of possessions, allows for "justified" restrictions imposed on property rights to uphold the use of property in accordance with the general interest.*

The paper illustrates how the ECtHR, by adopting the principle of proportionality as general standard of judicial review, took upon itself whether States succeed in striking a fair balance between "the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights". On the basis of the study of the relevant ECtHR case law, the paper claims that the Court usually pays little attention to the analysis of the public interest side of the balancing test. The ECtHR is concerned with the burden imposed on the owner, rather than with the justifications for the restrictions. This paper, thus, argues for a different approach to the principle of proportionality by the ECtHR jurisprudence in cases involving property issues, arguing that it is used not so much to balance the two sides of scale, but rather as a tool, which is calibrated to the values underlying the Convention, to "weigh" States interferences with the enjoyment of property rights protected under Art. P1-1.

Keywords: right of property – restrictions on property rights – proportionality -ECHR

FAIR RESTRICTION TO INDIVIDUAL PROPERTY RIGHTS

A CRITICAL ANALYSIS OF ECTHR'S STANCE ON PUBLIC AND PRIVATE INTERESTS IN THE REGULATION OF PROPERTY

SABRINA PRADUROUX*

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1. Introduction

From the end of the nineteenth century, socially oriented legal thinkers began to question the markedly individualistic nature of the right of property that had been shaped by the Enlightenment doctrines. The concept of *right of property* that has developed over the course of the twentieth century is based on the need to reconcile individual and collective interests. The concept of an owner's obligation to act in a way which is compatible with social interests found one of its most succinct expressions under Article 153 of the Weimar Constitution of 1919, according to which 'Property imposes obligations. Its use by its owner shall at the same time serve the public good'. The social obligation principle, which began to emerge as a factor in several national Latin American and European constitutions, stipulates that restrictions to property rights should be correlated with the fulfilment of the collective needs of the society.

The debate on the inclusion of the right of property in the European Convention on Human Rights (hereafter, ECHR) clearly shows that the social characteristics of that time period were still very much a central issue in defining the scope of the right of property. The discussion, of a mostly political nature, has led to a text that seeks to maintain a reasonable balance between both individualistic and social views on property. Thus, Article 1 of the First Protocol (hereafter, Art. P1-1) to the ECHR, declares that 'Every natural or legal person

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is entitled to the peaceful enjoyment of his possessions' and allows for *justified restrictions* to be imposed on property rights to support the use of property in accordance with general interest.

Entrusted with interpreting and applying the ECHR and its Protocols, the European Court of Human Rights (hereafter, ECtHR) has over the years, ruled on national law regulating private property regimes. It follows that, even though it is not its duty to state how governments should implement and regulate property law, the Court of Strasbourg delivers authoritative judgments on how States should strike the balance between private and public interests in property.

This contribution illustrates how the ECtHR, in the wake of twentieth-century constitutionalism, adopted the principle of proportionality as a general standard of judicial review and how it has taken upon itself to decide whether States succeed in striking a fair balance between the general interest of the community and the protection of individual fundamental rights. In studying the relevant ECtHR case law, this paper points out that the principle of proportionality has been instrumental in extending the scope of Art. P1-1 and fostering the values that underpin the ECHR in cases involving property issues. The paper concludes by proposing a different reading of the principle of proportionality as applied by the ECtHR, arguing that it is used as a tool, calibrated to the values underlying the Convention, to weigh State interferences with the enjoyment of property rights protected under Art. P1-1.

2. Proportionality as Key Feature of Judicial Review under ECHR Law

Proportionality as a general principle of law has ancient roots. In Antiquity, it was perceived as the foundation of legal rules, closely linked to the concept of justice being a precise ratio.¹ In the transition from ancient to modern times, Grotius assimilated the idea of justice as a ratio with balancing of interests as a method for resolving conflicts between fundamental norms.² However, as remarked by Aharon Barak, the development of proportionality as a method for reviewing infringements of rights is closely related to the Enlightenment and the social contract doctrine, which required the rulers to act in the interests of citizens.³

The principle of proportionality as we understand it today is essentially the result of judicial creation and cross-fertilization between jurisdictions. The jurisprudence of the German Constitutional Court has been particularly influential. In Germany the principle of proportionality has developed from an

¹ Cf. E. Engle, 'The History of the General Principle of Proportionality: An Overview', *DLJ*, 2012, p. 4-5, in which the Author traces the origins of proportionality as a principle of law back to the Aristotelian concept of justice.

² Engle, *cit.*, p. 5.

³ A. Barak, *Proportionality. Constitutional Rights and their Limitations*, Cambridge: Cambridge University Press, 2011, p. 176.

unwritten constitutional rule that was derived from the rule of law doctrine. According to the German Constitutional Court, proportionality is ‘an expression of the general right of the citizen towards the State that his freedom should be limited by the public authorities only to the extent indispensable for the protection of the public interest’.⁴ As a guarantee against misuse of government discretion, the test of proportionality conceived by the German Constitutional Court aims to analyse the suitability, necessity and proportionality - in the narrower sense - of any government interference with individuals’ fundamental rights. To pass the test, the burden to the individual resulting from State action must not be excessive relative to the public interest concerned. As a result, courts are engaged in balancing public and individual interests.

The principle of proportionality that includes the balancing of competing interests has become, over the last sixty years, a central tenet of constitutional adjudication in almost all constitutional and supranational courts.⁵ According to some commentators, the global spread of proportionality is explained ‘by the global spread of a constitutional culture which puts justification at its centre’.⁶

As for the ECtHR, it has embraced the balancing model of adjudication from its early case law. In interpreting the limitation clause that is adhered to various rights declared by the ECHR, the Court of Strasbourg has recognized different standards of justification for the restriction of Convention rights. Some of these standards have been included in the Convention itself, while others have been established in the case law of the ECtHR. All standards are based on a moral balance that is qualified by formulae to allow for a certain degree of flexibility.⁷ Indeed, as emphasized by the Court, the search of a fair balance between the protection of the general interest of the Community and the respect of fundamental human rights is the *ratio fundamentalis* that shall govern the interpretation and application of the Convention. Such a balance

⁴ BVerfGE 19 S 342 & E 35 S 401, quoted by N. Emiliou, *The Principle of Proportionality in European Law. A Comparative Study*, London-The Hague-Boston: Kluwer Law International, 1996, p. 66.

⁵ Cf. A. Stone Sweet & J. Mathews, ‘Proportionality Balancing and Global Constitutionalism’, *Colum. J. Transnat’l L.*, 2008-2009, illustrating the emergence and spread of proportionality as ‘a global constitutional standard’.

⁶ Cf. M. Cohen-Eliya & I. Porat, ‘Proportionality and the Culture of Justification’, *Am. J. Comp. L.*, 2011, p. 482.

⁷ See, App. No. 5493/72, *Handyside v The United Kingdom* [1976] ECtHR, para. 48, where the Court remarks that ‘whilst the adjective “necessary”, within the meaning of Article 10 para. 2 (art. 10-2), is not synonymous with “indispensable” (cf., in Articles 2 para. 2 (art. 2-2) and 6 para. 1 (art. 6-1), the words “absolutely necessary” and “strictly necessary” and, in Article 15 para. 1 (art. 15-1), the phrase “to the extent strictly required by the exigencies of the situation”, neither has it the flexibility of such expressions as “admissible”, “ordinary” (cf. Article 4 para. 3 (art. 4-3), “useful” (cf. the French text of the first paragraph of Article 1 of Protocol No. 1) (P1-1), “reasonable” (cf. Articles 5 para. 3 and 6 para. 1) (art. 5-3, art. 6-1) or “desirable”’.

should be achieved to grant the effective protection of fundamental rights in a changing society.⁸

In one of the leading cases involving these limitation clauses, the ECtHR elaborated further. Referencing the relevant articles of the Convention, it was clarified that the role of the ECtHR is to evaluate and review the actual interference methods used by national authorities in relation to the protected rights of individuals in the exercise of their power of appreciation. This means that national authorities are left a fair degree of discretion when making the initial assessment of whether restrictions comply with the Convention requirements, that is, national authorities have a duty to independently assess the proportionality of those restrictions. Nevertheless, such discretion is not unfettered, as the ECtHR tracks and reviews such assessments.⁹

Since the balancing approach to judicial review requires that judges not only analyse the facts of the case, but also evaluate the moral and political interests at the foundation of the rights and principles at stake, its application *in concreto* by the ECtHR follows and reflects the strengthening of the Court. In early judgments, the reference to the principle of proportionality appears to be a more ritual formula than an actual rationale behind the decision of the Court. As the Court gained more approval and legitimacy among the States, it abandoned the initial attitude of self-restraint and the fair balance test has become a pervasive part of its case law.

Even so, scholars repeatedly criticise the court for failing to develop a clear and defensible doctrine of fair balance, as it has not identified a coherent set of principles governing the fair balance test. Indeed, the ECtHR's approach varies from case to case, with the Court closely scrutinising some cases and carrying out only a brief analysis in others.¹⁰ Nevertheless, it is possible to highlight two basic points underpinning the application of the fair balance test by the ECtHR. First, the Court adopts a holistic approach. As a rule of the Court, its review is not limited to ascertaining whether a respondent State has exercised its discretion reasonably, carefully and in good faith; but rather, to examine the opposed interference in the light of the case as a whole and determine whether the applicant has suffered an excessive burden as a result of the scope and terms of the State's action. Second, it is up to the defendant State to prove that its employment of power is justifiable. Namely, it must be able to provide relevant and sufficient reasons to show that the interference with the applicant's rights

⁸ App. No. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, and 2126/64, *Case 'relating to certain aspects of the laws on the use of languages in education in Belgium' v Belgium* [1968] ECtHR.

⁹ See, *supra* note 7, *Handyside*.

¹⁰ On the variable approaches to balancing taken by the ECtHR, see Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Oxford: Intersentia 2002; J. Rivers, 'Proportionality and Variable Intensity of Review', *Cambridge L.J.*, 2006.

that has been contested by the ECHR is justified. Taking this into account, the ECtHR does not require the defendant government to demonstrate that a less intrusive measure could have been taken to achieve the objective of the State. Indeed, the rule of minimum interference with fundamental rights as outlined in the third section of the ECtHR was applied in the *Hatton* case, concerning noise pollution emanating from Heathrow airport during night hours; but the Grand Chamber refused to support the minimum interference approach and reversed the judgment of the Chamber.¹¹

The reluctance of the Grand Chamber to pressure the States to adopt a measure that resulted in a reduced impairment to a protected right is evidence of the determination of the Court to respect the margin of government choice when implementing programs that interfere with qualified Convention rights. Jonas Christoffersen observed that the adoption of the criterion of strict necessity comprising a least/less onerous means test would jeopardize the ECtHR's role as the international court responsible for establishing and enforcing minimum standards for human rights protection.¹² It follows that the question at the very core of the fair balance test under ECHR law is whether the conduct of the government is excessive and not whether it could have had recourse to a less restrictive measure.

3. Proportionality as Standard of Judicial Review under Article P1-1 ECHR

As interpreted by the ECtHR, Art. P1-1 is comprised of three distinct rules. The first rule, conveyed in the first sentence, is of a general nature and lays down the principle of peaceful enjoyment of property. The second rule, set out in the second sentence, covers deprivation of possessions and subjects it to certain conditions. The third rule, laid down in the second paragraph, recognizes that Contracting States are entitled, amongst other things, to control the use of property in accordance with general interest by enforcing legislation they deem necessary.¹³

Such rules reinforce what seems to be the original and essential objective of Art. P1-1: the protection of individuals against arbitrary interferences with the peaceful enjoyment of their possessions.¹⁴ Moreover, aware that States distrust the idea that an international court might have extensive powers to review social and economic legislation, the ECHR judicial bodies initially

¹¹ See, App. No. 36022/97, *Hatton and others v The United Kingdom* [2001]; App. No. 36022/97, *Hatton and others v The United Kingdom* [2003] ECtHR [G.C.].

¹² See J. Christoffersen, 'Straight Human Rights Talks – Why proportionality does (not) matter?', *Scandinavian Studies in Law*, 2010, especially p. 26.

¹³ App. No. 7151/75 and 7152/75, *Sporrong and Lönnroth v Sweden* [1982] ECtHR, para. 61.

¹⁴ Cf. App. No. 6833/74, *Marckx v Belgium* [1979] ECtHR, dissenting opinion of Judge Sir Gerald Fitzmaurice, para. 20.

adopted a cautious approach to the interpretation of Art. P1-1. The European Commission and Court of Human Rights restricted themselves to supervising the lawfulness and purpose of restrictions to property rights, thus affirming that Contracting States were the sole judges of the necessity of promulgating legislation that controls the use of property.¹⁵ In keeping with this approach, the Convention organs' jurisdiction did not encompass an examination of the proportionality of interferences with the rights protected by Art. P1-1.

Subsequently, the ECtHR affirmed that the search for a fair balance between the demands of the general interest of the community and the protection of the individual's fundamental rights 'is inherent in the whole of the Convention and is also reflected in the structure of Article P1-1' and stated that it must determine whether such balance was struck.¹⁶ Therefore, to decide a case under Art. P1-1, the ECtHR must check *in concreto* the proportionality of national laws regulating the use of property; namely, it must consider the effects of a State's interference with the applicant's right of property against his actual and factual situation, as well as weigh the reduction in enjoyment of his property rights against the gain to the public interest. Interferences would amount to a violation of Art. P1-1 if the applicant had to bear a *disproportionate and excessive burden*.

By using proportionality as a standard of judicial review, to evaluate measures that interfere with the right to the peaceful enjoyment of one's possessions, the ECtHR has widened the scope of Art. P1-1. The article has now taken on the function of protecting private owners against the imposition of lawful but excessive, or disproportionate, burdens.

The following paragraphs offer some insight into the factors that are considered particularly relevant to the ECtHR when deciding whether a given interference with property rights amounts to a disproportionate burden for the owner, thus infringing Art. P1-1.

4. The Conduct of Public Authorities as a decisive Factor in Interferences with the Right to the Peaceful Enjoyment of Possessions

The first rule contained in Art. P1-1 guarantees and protects the individual's right to the peaceful enjoyment of his possessions, free from State interference.

¹⁵ *Supra* note 7, *Handyside*, para. 62; See *supra* note 14, *Marckx*, para. 64, where in interpreting Article P1-1 §2, the ECtHR affirmed that: 'this paragraph sets the Contracting States up as sole judges of the "necessity" for an interference. Consequently, the Court must restrict itself to supervising the lawfulness and the purpose of the restriction in question'.

¹⁶ *Supra* note 13, *Sporrong*, para. 69. More recently see App. No. 20287/10, *Saliba and others v Malta* [2011] ECtHR, para. 54, where the Court plainly states that: 'in addition to being lawful, a deprivation of possessions or an interference such as the control of use of property must also satisfy the requirement of proportionality'.

There are no defined criteria establishing *a priori* the applicability of the first rule. In the *Sporrong* case, the Court assigned it a subsidiary role, stating that it must first be established whether the second and third rules are applicable before considering whether the first rule must be followed.¹⁷ The Court then found a device in the first rule to avoid classification of cases that could easily be classified under both the second and third rule.

This approach makes identifying specific elements to emphasise in the fair balance test more problematic. The ECtHR declared in general terms that ‘[i]n the context of the general rule enunciated in the first sentence of the first paragraph of Article 1, ascertaining whether such a balance existed requires an overall examination of the various interests in issue’.¹⁸

However, the ECtHR recently demonstrated willingness to interpret the first rule as a source of the State’s obligation to protect private property in a positive manner.¹⁹ In these cases, the balancing test centres on the appropriateness of the positive actions taken by the State in order to protect individual’s property. The *Önerlydiz* case, which concerned the destruction of a slum erected by the applicant in breach of Turkish planning regulations near a waste disposal site, is illustrative. In cases such as this, the Court found a violation of Art. P1-1 when it established a causal link between the negligence attributable to the State and the endangering of private property due to of dangerous activities and/or weather hazard. The ECtHR blamed national authorities for taking any practical steps to avoid the risks or the actual destruction of the applicant’s house, despite the fact that they knew of the risk of an explosion at the waste disposal site. In establishing the causal link between the gross negligence attributable to the State and the loss of applicant’s house, the Court affirmed that: ‘the resulting infringement amount[ed] not to “interference” but to the breach of a positive obligation, since the State officials and authorities did not do everything within their power to protect the applicant’s proprietary interests’.²⁰ The court then concluded that a violation of Art. P1-1 had occurred.

The ECtHR came to the same conclusion in the *Kolyadenko* case, which concerned damages to property caused by the floodwater that followed an urgent large-scale evacuation of water after heavy rains from a reservoir.²¹ Considering the authorities’ evident failure to properly maintain the river channel and apply town-planning restrictions in line with the technical

¹⁷ *Supra* note 13, *Sporrong*, para. 61

¹⁸ App. No. 33202/96, *Beyeler v Italy* [2000] ECtHR [G.C.], para. 114.

¹⁹ See, App. No. 48939/99, *Önerlydiz v Turkey* [2002] ECtHR, para. 145, where the Court stated that: ‘the real and effective exercise of that right [i.e. the right enshrined in Article P1-1] does not depend merely on the State’s duty not to interfere, but may require positive measures of protection’.

²⁰ App. No. 48939/99, *Önerlydiz v Turkey* [2004] ECtHR [G.C.], para. 135.

²¹ App. No. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05, *Kolyadenko and Others v Russia* [2012] ECtHR.

requirements of the utilisation of the reservoir, the Court affirmed the existence of a causal link between State's negligence and the damage caused to the property and possessions of those living in the vicinity of the reservoir. Accordingly, the Court concluded that the Russian authorities failed in their positive obligation to protect the applicants' property, breaching Art. P1-1.

Contrarily, in cases in which the causal link between the State's failure to take appropriate actions and the material damage to private property is not well-established, the finding of State negligence itself is not sufficient grounds to determine a breach of Art. P1-1. Indeed, in the *Budayeva* case the Court found that there had been no violation of Art. P1-1, considering that the appropriate measures were implemented by the domestic authorities to comply with the State's positive obligation to protect private property from natural disasters.²² The facts of the case concerned a mudslide that devastated the town where the applicants lived. The latter complained about the authorities lack of implementing and ensuring the functioning of the mud defence structure and warning infrastructures, as well as the inadequacy of the compensation granted to them for the loss of their homes. According to the ECtHR, the negligence attributable to the State was no more than an aggravating factor contributing to the damage caused by natural forces. Considering that the positive obligation of the State to protect private property from natural disasters cannot be construed as a binding obligation of the State to compensate the full market value of destroyed property, the Court assessed the seriousness of the harm suffered by the applicants, taking into account all the measures implemented by public authorities and giving due consideration to the complexity of the situation. It concluded that the conditions under which the victims were granted compensation for possessions lost in the mudslide did not impose a disproportionate burden on the applicants.

More generally, it can be remarked that the ECtHR attaches decisive weight to the conduct of national authorities, which have an obligation to act in good time, in an appropriate manner and with utmost consistency. As an example, in the *Stran Greek Refineries* case,²³ the ECtHR found that the Greek government violated Art. P1-1 by passing a law that guaranteed that the result of pending proceedings would be favourable to the State. In this case, the applicants were attempting to recover the sum awarded to them by an arbitration court following a claim for damages for breach of contract by the State, which was the other party of the contract. The State contested the validity of the arbitration clause before domestic ordinary civil courts. Shortly before the hearing in the Court of Cassation, the Greek government enacted a law that sought to deprive any arbitration awards that were made after the termination of contracts of effect, effectively excluding any meaningful examination of the case of the

²² App. No. 15339/02, 21166/02, 20058/02, 11673/02, and 15343/02, *Budayeva and others v Russia* [2008] ECtHR.

²³ App. No. 13427/87, *Stran Greek Refineries and Stratis Andreadis v Greece* [1994] ECtHR.

applicants by the Court of Cassation. The ECtHR found that the interference in question was neither expropriation nor a measure to control the use of property and thus fell under the scope of the first rule of Art. P1-1. It then stated that by adopting a law to ensure that the imminent outcome of proceedings was favourable to the State, there existed a disproportionate interference with the applicants' rights under Art. P1-1.

Likewise, in the *Beyeler* case,²⁴ which concerned the exercise of a right of pre-emption by the Italian Government over a Van Gogh painting, the ECtHR found it significant that public authorities exercised the right of pre-emption significantly later than the time the work was purchased by the applicant, thus creating continual uncertainty as to his legal position with regard to the painting.

Following the same *ratio*, in the *Trgo* case the ECtHR acknowledged that the State should bear the risk of any mistake made by public authorities. The applicant alleged, in particular, that his right under Art. P1-1 had been violated because of the domestic court's refusal to acknowledge ownership of certain plots of land he had acquired by virtue of legislation on adverse possession, which had been abrogated by the national Constitutional Court while the civil proceeding for the declaration of his ownership was pending. The ECtHR stated that

‘the applicant, who reasonably relied on legislation, later on abrogated as unconstitutional, should not – in the absence of any damage to the rights of other persons – bear the consequences of the State's own mistake committed by enacting such unconstitutional legislation’,²⁵

thereby concluding that there had been a violation of Art. P1-1.

It is worthwhile noting that in all the cases mentioned above the ECtHR stated that national authorities' actions were in the general interest; however, once confirmed that public officials acted negligently it would have been difficult for the Court to justify a balancing of conflicting interests in favour of the public ones, without jeopardizing the rule of law principle. This approach leaves little room for balancing the advantages and disadvantages of the restriction to property rights.

5. Fairly Balanced Takings in the Light of the ECtHR Case Law

Within the ECtHR case law the mechanism at the core of taking private property is the permanent extinction of the owner's rights. Taking of property within the context of Art. P1-1 can result in a compulsory transfer of property,

²⁴ App. No. 33202/96, *Beyeler v Italy* [2000] ECtHR [G.C.].

²⁵ App. No. 35298/04, *Trgo v Croatia* [2009] ECtHR, para. 67.

regardless of whether or not the property will be acquired by the State,²⁶ or in the impossibility for the owner to dispose of his own possessions due to the action of the State, i.e. *de facto* expropriation.²⁷

Under the second rule set out in Art. P1-1, each deprivation of property shall be undertaken according to the conditions provided for by law and in pursuance of the public interest. However, as explained above, the actual basis for litigation is the fair balance test. In weighing a number of competing factors, the ECtHR has consistently recognized two factors as being of particular relevance to the assessment of proportionality: a) the availability and amount of compensation; and b) the existence of adequate procedural protection for the right of property.

5.1. The Availability and Amount of Compensation

The text of Art. P1-1 is silent with regards to required compensation for expropriation.²⁸ However, the ECtHR has affirmed that there is an obligation to pay compensation, which ‘derives from an implicit condition in Article 1 of Protocol No. 1 (P1-1) read as a whole’.²⁹ More precisely, referring to a general principle of paying levels of compensation that are in accordance with the legal requisites of the Contracting States, the ECtHR stated that as far as Art. P1-1 is concerned, ‘the protection of the right of property it affords would be largely illusory and ineffective in the absence of any equivalent principle’.³⁰ It then allowed itself to review the terms of compensation under domestic law, stating that they are ‘material to the assessment of whether a fair balance has been

²⁶ See App. No. 8793/79, *James and others v The United Kingdom* [1986] ECtHR, concerning tenants’ right to compulsorily purchase the freehold from the landlord on certain terms and conditions; App. No. 9006/80, 9262, 9263, 9265, 9266, 9313 and 9405/81, *Lithgow and others v The United Kingdom* [1986] ECtHR, concerning nationalization of industries.

²⁷ See App. No. 14556/89, *Papamichalopoulos and others v Greece* [1995] ECtHR, concerning the permanent physical occupation of privately owned land without formal transfer of ownership; App. No. 34049/96, *Zwierzyński v Poland* [2001] ECtHR, concerning the impossibility of recovering possession of a lost property because of an expropriation subsequently declared null and void.

²⁸ The issue was debated during the draft of the Convention. Some delegates suggested using the formula of a ‘fair compensation that shall be fixed in advance’ while others proposed to make reference to ‘compensation as shall be determined in accordance with the conditions provided for by the law’. See Council of Europe, *Collected Editions of the “Travaux Préparatoires” of the European Convention on Human Rights*, The Hague: Martinus Nijhoff, 1975, vol. VII, 1975, p. 194 & p. 222-224.

²⁹ *Supra* note 26, *Lithgow*, para. 109. The case concerned the nationalization of certain industries in accordance with the Aircraft and Shipbuilding Industries Act of 1977. The applicants complained that the amount of compensation they received was grossly inadequate and discriminatory. The ECtHR held that there had been no breach of Art. P1-1 taken alone or in conjunction with Art. 14.

³⁰ *Ibidem*, para. 120.

struck between the various interests at stake and, notably, whether or not a disproportionate burden has been imposed on the person who has been deprived of his possessions'.³¹

The lack of any compensation for the taking of property rights would normally upset the fair balance to the detriment of the owner,³² unless the deprivation occurred under *exceptional circumstances*.³³ In all other cases, compensation must be *reasonably related* to the value of the property. The Court's case law does not offer clear guidance on the meaning of the statement 'reasonably related to the value of the property'. Indeed, the ECtHR explicitly stated that in many cases of lawful expropriation, such as a distinct expropriation of land for purposes of public interest, only full compensation can be regarded as reasonably related to the value of the property. That said, Art. P1-1 does not guarantee a right to full compensation in all circumstances, since legitimate objectives that are in the public interest may call for less than reimbursement of the full market value.³⁴

Therefore, the market value of the expropriated property provides a general point of reference that, if so required by the circumstances of the case, can be disregarded for an alternative amount. Notably, the existence of specific legitimate objectives of public interest, such as measures of economic reform or measures designed to achieve greater social justice or to safeguard a country's historical or cultural heritage, may justify the award of compensation that is lower than the full market value.

In any case, the ECtHR has the last word as to whether terms of compensation under national law are adequate. Notably, the ECtHR has never contested the existence of general interest raised by the State, but in several cases it has found that there had been a violation of Art. P1-1 on the grounds that compensation bore no reasonable relation to the value of the expropriated land.³⁵

³¹ *Ibidem*.

³² App. No. 25701/94, *Former King of Greece and Others v Greece* [2000] ECtHR [G.C.].

³³ App. No. 46720/99, 72203/01, and 72552/01, *Jahn and others v Germany* [2005] ECtHR [G.C.], concerning the legislation adopted by the German government to address the mistakes committed by national authorities in applying the *Modrow* Law, which enabled those in possession of agricultural land to convert personal usufructuary interests to full ownership. To date this is the only case in which the ECtHR found a deprivation of property consistent with the Convention, despite a lack of compensation.

³⁴ This dictum has been fully endorsed by the Grand Chamber. See, for instance, App. No. 2334/03, *Kozacıoğlu v Turkey* [2009] ECtHR [G.C.], especially para. 64.

³⁵ See, for instance, App. No. 36548/97, *Pincova and Pinc v The Czech Republic* [2003] ECtHR; App. No. 36813/97, *Scordino and others (No. 1) v Italy* [2006] ECtHR [G.C.]; App. No. 25774/05, *Bistrović v Croatia* [2007] ECtHR; App. No. 22186/03 *Pešková v The Czech Republic* [2009] ECtHR; *supra* note 34, *Kozacıoğlu*.

In principle, a proportionate relationship should be developed between a level of compensation that is equivalent to the seriousness of the loss suffered by the owner and to the importance of the public interest objective. In searching for a proportional relationship between the amount of compensation and appreciable losses, the market value of the property must be considered in conjunction with the losses that could eventuate from the expropriation, such as decreases in the value of the remaining estate,³⁶ the impossibility of continuing a business,³⁷ or non-pecuniary damages.³⁸ This first step in finding a balance reflects the ECtHR concern that the owner should not have to bear an excessive burden. In balancing the scope and degree of importance of the public interest against the nature and amount of compensation, the Court could prevent an interpretation of property rights that imposes a disproportionate burden on the community. Keeping with this view, in the *Urbárska* case the Court affirmed that ‘there is a direct link between the importance or compelling nature of the public interest pursued and the compensation which should be provided in order for the guarantees of Article 1 of Protocol No. 1 to be complied with’.³⁹ This statement clearly indicates that there should be a proportional relationship between the public benefit and the burden imposed on the owner. It appears that the greater the public interest, the greater the burden that the owner is expected to bear. While appealing, this statement does not provide any indication on how to put the equation into practice and the ECtHR case law on this point is cryptic. Indeed, in the case at issue, which concerned a land consolidation act that gave users of the land the right to acquire ownership while the owners were given the right to claim compensation, the ECtHR accepted that the objective of the contested legislation,

³⁶ *Supra* note 13, *Bistrović*, concerning land expropriation proceedings, with a view to building a motorway that affected part of the applicants’ farming land, the Court held that ‘by failing to grant indemnity for the decrease in the value of the [applicants’] remaining estate, the national authorities have failed to strike a fair balance between the interests involved’ (para 44).

³⁷ App. No. 46044/99, *Lallement v France* [2002] ECtHR. In this case, the applicant had been expropriated of part of his farm, after which it became unprofitable to continue farming the remaining land; the ECtHR considered that the State’s interference affected the applicant’s ability to continue his business and found, therefore, that compensation based on the market value of the expropriated property was not sufficient to comply with the proportionality requirement.

³⁸ *Supra* note 35, *Pincova*. The applicants complained that they had been deprived of a property they had acquired legally and in good faith without being paid any appropriate compensation. Assessing whether the choice of compensation terms fell within the State’s wide margin of appreciation, the Court remarked that ‘the ‘compensation’ awarded to the applicants did not take into account their personal and social situation and that they were not awarded any sum for the non-pecuniary damage they sustained as a result of being deprived of their only property’ (para 63). It then concluded that the burdens imposed to the applicants were excessive and contrary to Article P1-1.

³⁹ App. No. 74258/01, *Urbárska obec Trenčianske Biskupice v Slovakia* [2007] ECtHR, para. 126.

implemented in the name of general interest, was namely a rational arrangement of land ownership in accordance with the need for protection of the environment and the creation of stable ecological systems. However, the Court was not persuaded that the declared public interest was sufficiently broad and compelling to justify the substantial difference between the real value of the applicant's land and the value that the applicant obtained in compensation, which amounted to approximately one-third of the general value of the land. To reach the conclusion that there had been a violation of Art. P1-1 as the relevant legislation failed to strike a fair balance between the interests at stake, the ECtHR placed special emphasis on the fact that only a small percentage of agricultural land in Slovakia has been affected by the contested legislation and that there was no indication that, in general, persons using the concerned lands belonged to a socially weak or particularly vulnerable part of the population.⁴⁰

5.2. The Existence of Adequate Procedural Protection for the Right of Property

The existence of procedural safeguards protecting owners from arbitrariness is the other factor of pivotal importance in assessing the proportionality of takings under ECHR law.

As an example, in the *Hentrich* case, the ECtHR found that a French law allowing the Revenue to exercise the right of pre-emption over property sold at a price it considered too low 'did not sufficiently satisfy the requirements of precision and foreseeability implied by the concept of law within the meaning of the Convention'.⁴¹ In particular, the ECtHR observed that the right of pre-emption as described by the contested legislation did not apply systematically to all cases where property was sold at a lower value than its worth but was in fact only exercised on rare occasions, making its application scarcely foreseeable. Considering that the pre-emption operated arbitrarily, selectively and in the absence of adversarial proceedings that complied with the principle of the equality of arms, the Court decided that the applicant bore an individual and excessive burden which 'could have been rendered legitimate only if she had had the possibility – which was refused to her – of effectively challenging the measure taken against her'.⁴² Therefore, the ECtHR found a breach of Art. P1-1.

In another case, the Court held that

'where an individual's property has been expropriated, there should be a procedure ensuring an overall assessment of the consequences of the

⁴⁰ *Ibidem*, para. 131. See also App. No. 28697/03, *Salus v Slovakia* [2009] ECtHR; App. No. 6284/02, *Šefčíková v Slovakia*.

⁴¹ App. No. 13616/88, *Hentrich v France* [1994] ECtHR, para. 42.

⁴² *Ibidem*, para. 49.

expropriation, including the award of an amount of compensation in line with the value of the expropriated property, the determination of the persons entitled to compensation and the settlement of any other issues relating to the expropriation'.⁴³

Therefore, according to the Court, the defendant government failed to strike a fair balance between the protection of owners' rights and general interest, by establishing that the civil courts that assess the unit amount of compensation for expropriation do not have jurisdiction to determine whether or not the owners of expropriated land derive benefit from public works carried out on the expropriated land.

6. Due Process as a relevant factor in Regulation of Property Cases

Recognizing that Contracting States have the power to regulate the use of property in accordance with the general interest, the second paragraph of Art. P1-1 seems to perform the function of limiting the jurisdictional competence of the Strasbourg Court. However, as said above, by introducing the fair balance standard within Article P1-1, the Court allowed itself to expand the scope of its review to the fairness *lato sensu* of domestic legislations that concern private property regimes.

From an analysis of the relevant case law, it emerges that existing procedural safeguards are of critical importance for the ECtHR in deciding the proportionality of measures regulating the use of property.

The ECtHR included the due process requirement in Art. P1-1 by means of the doctrine of positive obligations. In the *Sovtransavto* case, the Court affirmed specifically that

'States are [by virtue of Article P1-1] under an obligation to afford judicial procedures that offer the necessary procedural guarantees and therefore enable the domestic courts and tribunals to adjudicate effectively and fairly any dispute between private persons.'⁴⁴

States are thus under a positive obligation to effectively and fairly adjudicate disputes that concern property matters. According to the ECtHR, if the individual or entity is not afforded the procedural safeguards that would allow the a reasonable opportunity to present the case to the relevant authorities and thus, effectively challenge the measures that are interfering with his right of property, the fair balance that must be struck between the requirements of public interest and the protection of the right to the peaceful enjoyment of one's possessions is upset. The *Megadat.com* case is illustrative of this point.⁴⁵ The

⁴³ App. No. 55794/00, *Efstathiou and Michailidis & Co. Motel Amerika v Greece* [2003] ECtHR, para. 29.

⁴⁴ App. No. 48553/99, *Sovtransavto v Ukraine* [2002] ECtHR, para. 96.

⁴⁵ App. No. 21151/04, *Megadat.com Srl v Moldova* [2008] ECtHR.

applicant company complained that its telecommunications licences were invalidated because it had failed to notify the relevant regulatory board of a change of address. The applicant also complained that it was the only one from a long list of companies to which such a severe sanction was applied. The Moldovan courts ultimately dismissed its administrative complaint against the regulatory board, and the applicant's licences were withdrawn, which forced it to close down. The Court considered that the termination of licenses was a measure of control of the use of property that should have been examined under the second paragraph of Art. P1-1. It then left the questions of legitimacy and lawfulness open and focused on the proportionality of the measure. At this stage, the Court noted that the applicant was never given an opportunity to appear or to explain its position before the regulatory board and that, in the appeal proceedings, the case had been decided in its absence. Indeed, the Moldovan courts' examination of the case had been formalistic and appeared to be carried out without balancing the general issue at stake with the sanction applied. Due to the arbitrary nature of the proceedings, the discriminatory treatment of the applicant company, and the disproportionately harsh measures applied against it, the ECtHR found that a fair balance was not preserved and the applicant company had borne and was bearing an individual and excessive burden in violation of Art. P1-1.

For the right to judicial protection to be effective there must be, *inter alia*, respect for and effective enforcement of domestic courts' judgments. In the *Saffi* case, the Court expressly affirmed that

‘while it may be accepted that Contracting States may, in exceptional circumstances and, by availing themselves of their margin of appreciation to control the use of property, intervene in proceedings for the enforcement of a judicial decision, the consequence of such intervention should not be that execution is prevented, invalidated or unduly delayed or, still less, that the substance of the decision is undermined’.⁴⁶

⁴⁶ App. No. 22774/93, *Immobiliare Saffi v Italy* [1999] ECtHR [G.C.], para. 74. The applicant company complained of a violation of Art. P1-1 and 6 ECHR because it had been unable, over a prolonged period of time, to enforce an order for possession since it had been refused police assistance. According to the Court, there had been a disproportionate interference with the applicant's property rights, contrary to Art. P1-1, because the applicant was left for approximately eleven years in a state of uncertainty as to when repossession of their apartment. The Court further considered that the repeated delays in the enforcement of the order for possession without the necessary procedural guarantees created a situation that was incompatible with the principle of the rule of law and thus also found a violation of Article 6 ECHR.

In addition to respect for due process, the ECtHR considers other factors such as the economic impact of a regulation. In fact, owners' entitlement to derive profit from their property is another factor that the ECtHR takes into consideration when assessing the proportionality of a regulation of property. For example, changing its previous approach, the Court found that severe restrictions on the owner's right to receive a market rent and to terminate leases amounted to a disproportionate and excessive burden contrary to Art. P1-1.⁴⁷

The Court held that lack of compensation for substantial economic burdens imposed on the owner upset the fair balance between the individual and general interests in other cases. A noteworthy example is provided by the *Ouzounoglou* case.⁴⁸ The applicant protested against the expropriation of a part of the land on which her house stood in order to build a new road. She unsuccessfully took legal action before the national courts to have a special compensation recognized for the impossibility of continuing to live in her house when the new road was opened to traffic. The ECtHR considered that the facts amounted to a restriction of the free disposal of the applicant's right of use, since the nature of the work directly contributed to the substantial depreciation of the value of the remaining applicant's property. It concluded that by failing to compensate the applicant for the loss of value of the non-expropriated part of land, a fair balance between the individual and general interest was not struck.

7. Conclusions

The fair balance test provides the ECtHR with the ability to review the totality of circumstances with the view of granting rights that are practical and effective. As remarked by Tom Allen, '[t]he adoption of the fair balance test favoured the liberal model of the right of property, not only because it enhanced the protection of property, but because the image of the balance treats State action as a threat to the individual'.⁴⁹ Indeed, the ECtHR seems more concerned with the degree of burden imposed on the individual than with the justification for the restriction to his property rights. Careful examinations of facts lead to an emphasis on the burden placed on the individual, putting less importance on the owner's responsibility to the community. Contrarily, placing a greater emphasis on justification would increase the responsibility of the owner to the

⁴⁷ App. No. 31122/05, *Ghigo v Malta* [2006] ECtHR. Also see App. No. 17647/04, *Edwards v Malta* [2006] ECtHR; App. No. 47045/06, *Amato Gauci v Malta* [2009] ECtHR; App. Nos. 13221/08 and 2139/10, *Lindheim and Others v Norway* [2012] ECtHR. Compare to App. Nos. 10522/83; 11011/84; 11070/84, *Mellacher and Others v Austria*, where the ECtHR acknowledged that regulations may have a severe impact on the value and profitability of property, without violating Art. P1-1.

⁴⁸ App. No. 32730/03, *Ouzounoglou v Greece* [2005] ECtHR. See also App. No. 2531/02, *Athanasiou and others v Greece* [2006] ECtHR; *supra* note 13, *Bistronić*; App. No. 49000/06, *Antonopoulou and others v Greece* [2009] ECtHR.

⁴⁹ T. Allen., 'Liberalism, Social Democracy and the Value of Property under the European Convention on Human Rights', *Int'l & Comp. L.Q.*, 2010, p. 1066.

community. As far as ECtHR case law on Art. P1-1 is concerned, it can be remarked that property rights invoked by the applicants and the general interest identified by the States to justify the alleged restrictions to property rights are not brought before the Court in an equal manner. Applicant claims receive the most attention, as the Court has to establish whether the interests invoked can be considered as possessions within the meaning of Art. P1-1, and, should that be the case, the scope of the restriction in order to decide which of the three rules contained in the article *de quo* should apply. Contrastingly, the defendant government briefly demonstrates general interest to show the legitimacy of the alleged interference and the ECtHR rarely delves into evaluations concerning the actual and concrete contribution of the contested measure to the realization of the general interest.

Therefore, it can be held that the Court does not usually pay a great deal of attention to the analysis of the public interest side of the balancing test. In other words, the ECtHR does not consider the legitimate objective; it is concerned with the burden imposed on the owner, rather than with the justifications for the restrictions. The principle of proportionality is therefore used by the Court to weigh up the State's interferences with property rights protected under Art. P1-1 in the light of the values underlying the Convention.

Ultimately, the factors that the ECtHR regards as pivotal in deciding whether State interference constitutes a disproportionate burden for the owner, shows that the values and principles related to the doctrine of the rule of law play a leading role. In particular, the weight of interferences in property rights is assessed in terms of respect for due process and legal certainty. Indeed, the Court is used to declaring that a restriction to property rights places an excessive burden on the owner, if it finds that public authorities acted in a way to create a situation of legal uncertainty or failed to respect due process requirements or the principles of good administration. Thus it is found that proportionality in ECHR law serves the doctrine of the rule of law, subjecting the legitimacy and legality of governments' actions to requirements of procedural fairness and rationality.