

# HANDBOOK ON PROPERTY RIGHTS

## Effective implementation of compensation and restitution rights in Albania



### SUPPORTING EFFECTIVE DOMESTIC REMEDIES AND FACILITATING THE EXECUTION OF ECTHR JUDGMENTS

Horizontal Facility for Western Balkans and Turkey

---

Funded  
by the European Union  
and the Council of Europe



EUROPEAN UNION

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

---

Implemented  
by the Council of Europe

# HANDBOOK ON PROPERTY RIGHTS

## Effective implementation of compensation and restitution rights in Albania

*Adapted by*

**Dagmara Rajska,**  
PhD in Human Rights, Barrister

**Naureda Llagami,**  
LLM, Barrister

**Tirana, 2017**

*This publication remains property of the  
Council of Europe.  
All rights reserved.  
No part of this publication may be  
translated, reproduced or transmitted in  
any form or by any means, electronic  
(CD-Rom), Internet, etc*

*This training manual is developed in the  
framework of the project "Supporting  
effective domestic remedies and facilitating  
the execution of ECtHR judgments". The  
manuals were developed following the  
guidelines of Human Rights Education for  
Legal Professionals (HELP). This manual is a  
product of collaboration between a  
national and international consultant. The  
opinions expressed in this work are the  
responsibility of the authors and do not  
necessarily reflect the official policy or  
stance of the Council of Europe.*

Cover Image created by  
Awesomecontent - Freepik.com

## TABLE OF CONTENTS

INTRODUCTION .....	5
<b>CHAPTER 1</b>	
1.1 LEGAL FRAMEWORK AND SCOPE .....	7
Learning objectives .....	7
Sources of Law .....	7
The scope of the rights .....	10
The three rules of Article 1 Protocol 1 .....	21
States obligation .....	22
1.2 LEGAL FRAMEWORK AND SCOPE OF PROPERTY RIGHTS IN ALBANIAN LEGAL ORDER .....	25
Content and objectives .....	25
Albanian institutions implementing property rights .....	25
Albanian legal framework and case law on property rights, in particular restitution and compensation rights .....	25
Overview of relevant ecthr cases against albania .....	27
Questions .....	27
Answer key .....	30
<b>CHAPTER 2</b>	
2.1 STRUCTURE OF ARTICLE 1 PROTOCOL 1 .....	32
THE THREE RULES .....	32
Seizure and sale of possessions of third parties by tax authorities .....	40
Procedural safeguards .....	41
Control of use: fiscal measures .....	42
Taxes that are tantamount to confiscation .....	42
Peaceful enjoyment of possessions .....	43
2.2 THE STRUCTURE OF THE ARTICLE 1 OF PROTOCOL NO. 1 .....	46
Deprivation of property (second rule) .....	46
Control of the use of property (third rule) .....	47
Peaceful enjoyment of possession (first rule) .....	47
Questions .....	48
Answer key .....	51
<b>CHAPTER 3</b>	
3.1 PERMISSIBLE RESTRICTIONS AND PROPORTIONALITY .....	55
When are interferences permissible? .....	55
Lawfulness .....	60
Public Interest .....	64
Proportionality .....	70
3.2 PERMISSIBLE RESTRICTIONS AND PROPORTIONALITY IN ALBANIAN LEGAL ORDER .....	78
Content and objectives .....	78

Interference .....	78
Lawfulness .....	78
General interest .....	80
Proportionality .....	81
Margin of appreciation .....	82
Questions .....	83
Answer key .....	86

## CHAPTER 4

4.1	COMPENSATION AND RESTITUTION .....	89
	Compensation .....	89
	Compensation to ensure fair balance .....	89
	Compensation for Expropriation .....	90
	Compensation for interferences other than Expropriation .....	90
	How much compensation is due? .....	91
	Full market value at the time of the taking .....	92
	Exceptions to the duty of full compensation .....	92
	Less than full market value compensation – other scenarios .....	93
	How can the Court review the amount of compensation? .....	94
	Restitution of property - The ECHR Approach .....	97
	Taking or nationalisation of property after World War II .....	97
	Central-and-eastern Europe characteristics .....	97
	Legislation pertaining to the restitution of property .....	97
	A new property right conferred by the restitution legislation .....	98
	Different HR issues in restitution cases .....	98
	The hope of recognition of a property right .....	99
	The doctrine of the instantaneous act .....	99
	Exceptions and Special Issues .....	100
	The doctrine of the continuous violation .....	100
	Use of extraordinary remedies .....	100
	Balance - rights of [previous] owners and third persons .....	100
	Restitution of Religious Property .....	100
4.2	RESTITUTION AND COMPENSATION IN ALBANIAN LEGAL ORDER .....	102
	Application of article 1 of protocol no. 1 of the european convention on human rights to albanian legal order .....	102
	1998 constitution of the republic of albania .....	102
	Law no. 133/2015 on the treatment of property and finalization of the process of compensation of property .....	103
	Recent developments .....	106
	Comparative overview of legislation and case law involving restitution and compensation rights .....	108
	Questions .....	112
	Answer key .....	116

## CHAPTER 5

5.1 THE RELATIONSHIP BETWEEN ARTICLE 1 PROTOCOL 1 AND OTHER ECHR ARTICLES .....	117
Learning objectives .....	117
Introduction .....	117
Relationship between a1 –p1 and other articles .....	117
Non-enforcement and arbitrariness of judicial decisions .....	118
Environment .....	120
5.2 PROPERTY RIGHTS IN RELATION TO OTHER RIGHTS AT THE NATIONAL LEVEL IN ALBANIA .....	122
Property rights in relation to right to private life – national examples .....	122
Property rights in relation to right to fair trial- national examples .....	123
Questions .....	123
Answer key .....	126

## CHAPTER 6

6.1 ENFORCEMENT MEASURES .....	126
What are enforcement measures? .....	126
Non-enforcement of final domestic decisions in Russia .....	126
Non-enforcement of final domestic decisions in Ukraine .....	126
Non-enforcement of final domestic decisions in Moldova .....	128
Non-enforcement of judicial decisions in Council of Europe member states .....	128
6.2 ENFORCEMENT MEASURES IN ALBANIAN LEGAL ORDER .....	130
Content and objectives .....	130
National regulations and case law on enforcement of final .....	130
Judgments related to property rights in albania .....	130
Execution of civil court decisions .....	130
The execution of financial obligations towards legal entities and natural Persons .....	131
Execution on immovable properties .....	131
Means of defence against execution of decisions .....	132
Invalidity of executive title .....	132
Objection to the action of the bailiff .....	132
Objection to the action of the bailiff from third person .....	132
Execution of final administrative court decisions .....	133
Enforcement of national judgments in albania in the light of the European court of human rights case law .....	133
Questions .....	134
Answer key .....	135

## CHAPTER 7

7.1 Statistics .....	136
----------------------	-----

## INTRODUCTION

Welcome to the Handbook 'Property Rights and the ECHR'.

This handbook is an adaptation of the course 'Property Rights and the ECHR' for the legal professionals in Albania. The HELP course on Property Rights has been drafted following a number of requests from the judiciary of different countries, which still faces a large number of cases concerning the restitution of property seized by various forces. Consequently, the whole handbook focuses on restitution and compensation rights.

The handbook has been developed in the framework of the project "Supporting effective domestic remedies and facilitating the execution of European Court of Human Rights judgments" implemented by the Council of Europe, and funded by the European Union and Council of Europe under the cooperation framework 'Horizontal Facility for the Western Balkans and Turkey'. The handbook was developed in line with the "Human Rights Education for Legal Professionals (HELP)" methodology.

The HELP training methodology takes into account the heavy time pressure imposed on legal professionals in their daily work. Training materials are designed by international experts with the purpose of enhancing knowledge and skills that you can apply directly in your daily work.

This handbook is composed of 6 chapters. Throughout the chapters you will be asked to complete tasks to assess your level of knowledge and skills, as well as its evolution. Chapters are developed according to learning objectives.

An interactive online version of this course in English is also available online for free at [<http://help.elearning.ext.coe.int/course/view.php?id=1732>]. This is the HELP e-learning platform. For more information on HELP see [www.coe.int/HELP](http://www.coe.int/HELP).

## Introduction and historical background

In general, there has been some reluctance on the part of states to provide explicit protection for property interests in human rights treaties after the Second World War. This is valid both for the United Nations' and for the European system of the human rights protection.

The right to property was not initially included in the catalogue of rights found in the Convention and was only added to it through its First Protocol. The States were worried that their social and economic programmes would be hampered by such guarantees. These concerns are contained in the adopted **formulation** which provides **a qualified right to property**. The property guarantee is far from absolute.

It was in the case of Marckx v. Belgium (1979), where the Court recognised that Article 1 of Protocol 1 to the Convention guarantees **in substance** the right to property.

With the joining of Central and Eastern European countries, the Court invented a new mechanism – the pilot-judgment procedure – in order to respond adequately to large-scale property concerns.

Broniowski v. Poland, 2004, was the first pilot-judgment adopted by the Court.



## CHAPTER 1

### 1.1 LEGAL FRAMEWORK AND SCOPE

#### Learning objectives

Welcome to the first chapter of this course. By the end of this chapter you will have:

- Learned the applicable standards of property law and their scope;
  - By developing an understanding of the scope of **Article 1 Protocol 1 of the ECHR**
  - By developing an understanding of **'what'** a possession is and **'who'** is protected.
  - By demonstrating familiarity with the **'three-rule'** approach.
- Learned how to identify compliance and breaches of property law standards;
  - By developing an understanding of the basic knowledge in these chapters.
  - By being able to demonstrate an ability to **follow** and **apply** the **'six-steps' test**.

#### 1. Sources of Law

Mario's Misadventure in property rights

##### One

Mario bought some farmland in Poland in 1975. His plan was to use the land for construction purposes.

In 1988, a decree incorporated Mario's land into a national park, created in 1970.

##### Two

In 1994, a development plan was adopted by the local authorities, prohibiting the use of the land of the national park for construction purposes. The park's Director informed Mario that his land fell within a lake protection zone and it consisted of forest area on which further reforestation was recommended.

Despite his requests the local authorities refused to grant Mario a construction permit.

### Three

Mario unsuccessfully challenged the decision of the local authorities in Polish courts. According to his estimates, the prohibition to build has cost him 200,000 EUR. However, he received no compensation for the loss of value of his land.

#### **What can Mario do now?**

#### **Has Mario got an enforceable claim under international law?**

The right to property is protected under several systems of national and international law.

#### **Domestic Law**

All member states of the Council of Europe protect the right to property in constitutional and statutory sources.

Normally, the law regulates the conditions to access, enjoy and use property.

A breach of domestic law can be challenged in national courts, whether it is committed by state agents or private entities.

#### **Universal Declaration of Human Rights**

Adopted in 1948 by the General Assembly of the United Nations. Not a source of binding law per se, but widely considered to reflect customary international law.

#### ***Article 17***

*"Everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property."*

#### **Charter of Fundamental Rights of the EU**

#### ***Article 17***

*1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.*

*2. Intellectual property shall be protected*

#### **The EU Charter of Fundamental Rights (EU Charter)**

First, the EU Charter only applies in states that are members of the European Union (EU). There are currently 28 states, out of the 47 members of the Council of Europe.

Second, the EU Charter applies to all measures of the institutions of the EU.

Third, the EU Charter applies to the acts of the state only when it implements EU law (Article 51 EU Charter)

**Even in a state that belongs to the EU, when EU law is not at stake, the EU Charter cannot apply to interferences with human rights.**

### Article 51

#### Field of application

1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the member states only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.
2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

Not all state measures must comply with the EU Charter, but only those that fall under the scope of EU law. Namely:

Acts that implement EU law, for instance domestic statutes that transpose a Directive;

Acts that constitute a permissible derogation from EU law (for instance, a justifiable restriction of trade in goods under Article 36 TFEU);

Acts that implement a discretionary power granted by EU law (for instance, to carry out asylum procedure for immigrants instead of returning them to the responsible member state)

#### FRANSSON (2013)

Facts: Swedish law provided for administrative and criminal sanctions for tax evasion. A challenge was brought under the EU Charter, for breach of ne bis in idem. It was held that the domestic measure fell under EU law, and therefore under the EU Charter, because it regulated the collection of VAT, a matter governed by EU law.

"19. ... the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law, but not outside such situations. ... if [national] legislation falls within the scope of European Union law, the Court, when requested to give a preliminary ruling, must provide all the guidance as to interpretation needed in order for the national court to determine whether that legislation is compatible with the fundamental rights the observance of which the Court ensures."

## European Convention on Human Rights

The right to property is not included in the Convention, but in Protocol 1, Article 1 (P1-1)

### **Protection of property**

*1. 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.*

*2. The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*

### **Summary**

- Several sources protect the right to property. Among them is Protocol 1 of the European Convention of Human Rights (ECHR), which binds all states of the Council of Europe (CoE).
- States must respect the standard set in the ECHR when they adopt measures that affect private property.

**Mario's inability to build on his land seems to conflict with the principle of peaceful enjoyment of possessions.**

**Does Mario have a claim under the ECHR against Poland?**

## **2. The scope of the rights**

### **The format of P1-1: a qualified right**

The right to property under the ECHR is not absolute. States can take measures that affect its enjoyment, which are justified if they meet certain requirements. As a result, a breach of P1-1 only arises if the restriction is unjustifiable.

### **MARCKX v. BELGIUM(1979)**

Facts: the daughter of an unmarried woman, under Belgian law, was granted lesser inheritance rights than the child of a married couple. The Court held that the interference with the P1-1 right (the inheritance, which the applicant could not use freely) as such was legitimate, thus no violation. However, the Court found a breach of P1-1 and Article 8 ECHR (on family rights) in connection with Article 14 ECHR, which protects from discrimination.

"63. By recognising that everyone has the right to the peaceful enjoyment of his possessions, Article 1 (P1-1) is in substance guaranteeing the right of property. (...)

64. The second paragraph of Article 1 (P1-1) nevertheless authorises a Contracting State to "enforce such laws as it deems necessary to control the use of property in accordance with the general interest". This paragraph thus sets the Contracting States up as sole judges of the "necessity" for such a law .... As regards "the general interest", it may in certain cases induce a legislature to "control the use of property" in the area of dispositions inter vivos or by will. In consequence, the limitation complained of by the first applicant is not of itself in conflict with Protocol No. 1."

### **A restriction is insufficient to found a successful claim**

To build a meritorious claim under P1-1, a restriction is necessary, but might be insufficient.

One must also prove that the restrictive state measure (which expropriates the possession, or controls/limits its use) is not justified in view of a general interest. The "why" of the measure is critical to its legality under the ECHR.

**Mario should prove that the environmental measures taken by the Polish authorities are not justified, because they do not pursue a general interest, or because they are disproportionate.**

**The scope of P1-1, what, who, when and where?**

**What are "possessions" under P1-1?**

Any asset capable of having an economic value can qualify. This includes, among other things, tangible goods and intangible property, shares, rights and receivables of contractual and non-contractual nature, business interests and goodwill. Definitions under state law are not decisive: "possession" acquires an autonomous meaning under the Convention. However, domestic law can assist in ascertaining whether the possession invoked is warranted, especially in the case of legal claims. A right under domestic law must exist to invoke P1-1.

### **FORMER KING OF GREECE v. GREECE (2000)**

Facts: Greece breached P1-1, by expropriating without compensation the property of the royal family. Greece claimed that the property rights had ceased as a matter of domestic law.

.60"The Court points out that the concept of " possessions "in the first part of Article 1 of Protocol 1 has an autonomous meaning which is independent from the formal classification in domestic law.. . The issue that needs to be examined is whether the circumstances of the case, considered as a whole, conferred on the applicants title to a substantive interest protected by Article 1 of Protocol 1".

## **Possessions are also...**

The ECtHR has had the opportunity to specify several categories of assets that also fall under the protection of P1-1 – besides the obvious categories of tangible assets and land. This is an illustrative list assets that were considered possessions, even if it might be not obvious at first sight.

### **Read the reasoning of the Court in each case.**

#### **Business and professional interests:**

##### **CASE OF CAPITAL BANK AD v. BULGARIA (2005)**

"130. ... the revocation of the licence constituted an interference with the applicant bank's possessions and Article 1 of Protocol 1 is applicable ..."

#### **Credits and claims**

##### **STRAN GREEK REFINERIES AND STRATIS ANDREADIS v. GREECE (1994)**

"62. At the moment when Law no. 1701/1987 was passed the arbitration award of 27 February 1984 therefore conferred on the applicants a right in the sums awarded. Admittedly, that right was revocable, since the award could still be annulled, but the ordinary courts had by then already twice held - at first instance and on appeal - that there was no ground for such annulment. Accordingly, in the Court's view, that right constituted a "possession" within the meaning of Article 1 of Protocol 1 (P1-1)"

#### **Shares and shareholders' interests**

##### **SOVTRANSAVTO HOLDING v. UKRAINE (2001)**

"EN DROIT I.2. La Cour observe qu'en l'espèce, la société requérante possédait au départ 49 % des actions de Sovtransavto-Lougansk, ce qui lui permettait, conformément au droit ukrainien et au statut de Sovtransavto-Lougansk, de participer directement à l'activité de la société et au vote à l'assemblée des actionnaires. La requérante pouvait, le cas échéant, bloquer toute décision de la société anonyme en matière de modifications de ses actes statutaires ou d'augmentation de ses fonds statutaires. A cet égard, elle relève que la dévalorisation des actions de la requérante a entraîné la perte de son influence sur l'activité de Sovtransavto-Lougansk. La Cour estime donc que les actions que détenait la requérante avaient indubitablement une valeur économique et peuvent être considérées comme des « biens » au sens de l'article 1 du Protocole no 1."

#### **Permits to sell alcohol**

##### **TRE TRAKTÖRER AKTIEBOLAG v. SWEDEN (1989)**

"53. The Government argued that a licence to serve alcoholic beverages could not be considered to be a "possession" within the meaning of Article 1 of the Protocol (P1-1). This provision was therefore, in their opinion, not applicable to the case.

Like the Commission, however, the Court takes the view that the economic interests connected with the running of Le Cardinal were "possessions" for the purposes of Article 1 of the Protocol (P1-1). Indeed, the Court has already found that the maintenance of the licence was one of the principal conditions for the carrying on of

the applicant company's business, and that its withdrawal had adverse effects on the goodwill and value of the restaurant (see paragraph 43 above).

Such withdrawal thus constitutes, in the circumstances of the case, an interference with TTA's right to the "peaceful enjoyment of [its] possessions".

### **Security rights by contract**

#### **GASUS DOSIER- UND FÖRDERTECHNIK GmbH v. THE NETHERLANDS (1995)**

"53. The Court recalls that the notion "possessions" (in French: biens) in Article 1 of Protocol 1 (P1-1) has an autonomous meaning which is certainly not limited to ownership of physical goods: certain other rights and interests constituting assets can also be regarded as "property rights", and thus as "possessions", for the purposes of this provision (P1-1). In the present context it is therefore immaterial whether Gasus's right to the concrete-mixer is to be considered as a right of ownership or as a security right in rem. In any event, the seizure and sale of the concrete-mixer constituted an "interference" with the applicant company's right "to the peaceful enjoyment" of a "possession" within the meaning of Article 1 of Protocol 1 (P1-1).

### **A pending trademark registration**

#### **ANHEUSER-BUSCH INC. v. PORTUGAL(2007)**

"76. ...the Court takes due note of the bundle of financial rights and interests that arise upon an application for the registration of a trade mark. It agrees with the Chamber that such applications may give rise to a variety of legal transactions, such as a sale or licence agreement for consideration, and possess – or are capable of possessing – a substantial financial value. With regard to the Government's submission that dealings in respect of applications for the registration of a mark are of negligible or symbolic value only, it is noted that in a market economy, value depends on a number of factors and it is impossible to assert at the outset that the assignment of an application for the registration of a trade mark will have no financial value. In the instant case, as the applicant company did not fail to point out, the mark in question possessed a definite financial value on account of its international renown....

78. These elements taken as a whole suggest that the applicant company's legal position as an applicant for the registration of a trade mark came within Article 1 of Protocol 1, as it gave rise to interests of a proprietary nature. It is true that the registration of the mark – and the greater protection it afforded – would only become final if the mark did not infringe legitimate third-party rights, so that, in that sense, the rights attached to an application for registration were conditional. Nevertheless, when it filed its application for registration, the applicant company was entitled to expect that it would be examined under the applicable legislation if it satisfied the other relevant substantive and procedural conditions. The applicant company therefore owned a set of proprietary rights – linked to its application for the registration of a trade mark – that were recognised under Portuguese law, even though they could be revoked under certain conditions. This suffices to make Article 1 of Protocol 1 applicable in the instant case and to make it unnecessary for the Court to examine whether the applicant company could claim to have had a "legitimate expectation"."

## **Clientele**

### **VAN MARLE AND OTHERS v. THE NETHERLANDS (1986)**

"41. The Court agrees with the Commission that the right relied upon by the applicants may be likened to the right of property embodied in Article 1 (P1-1): by dint of their own work, the applicants had built up a clientele; this had in many respects the nature of a private right and constituted an asset and, hence, a possession within the meaning of the first sentence of Article 1 (P1-1). This provision was accordingly applicable in the present case."

## **Legitimate expectations**

### **PINE VALLEY DEVELOPMENTS LTD AND OTHERS v. IRELAND (1991)**

"51. ... When Pine Valley purchased the site, it did so in reliance on the permission which had been duly recorded in a public register kept for the purpose and which it was perfectly entitled to assume was valid (see paragraphs 9 and 31 above). That permission amounted to a favourable decision as to the principle of the proposed development, which could not be reopened by the planning authority (see paragraph 29 above). In these circumstances it would be unduly formalistic to hold that the Supreme Court's decision did not constitute an interference. Until it was rendered, the applicants had at least a legitimate expectation of being able to carry out their proposed development and this has to be regarded, for the purposes of Article 1 of Protocol 1 (P1-1), as a component part of the property in question (see, mutatis mutandis, the Fredin judgment of 18 February 1991, Series A no. 192, p. 14, para. 40)."

## **An enforceable judgment**

### **PRESSOS COMPANIA NAVIERA S.A. AND OTHERS v. BELGIUM (1995)**

"31. In order to determine whether in this instance there was a "possession", the Court may have regard to the domestic law in force at the time of the alleged interference, as there is nothing to suggest that that law ran counter to the object and purpose of Article 1 of Protocol 1 (P1-1).

The rules in question are rules of tort, under which claims for compensation come into existence as soon as the damage occurs.

A claim of this nature "constituted an asset" and therefore amounted to "a possession within the meaning of the first sentence of Article 1 (P1-1)."

## **The dividing line: legitimate expectations and future profits**

**Only existing assets can qualify as possessions.** Future or expected possessions fall in general outside P1-1, unless they are supported by a legally enforceable claim (e.g., an enforceable monetary award or judgment, a crystallised debt). A mere legitimate expectation to acquire property cannot be safeguarded.

### **XENODOCHIAKI S.A. v. GREECE (2001)**

Facts: the state stopped paying rent to the applicant under a sublease contract, when this was terminated under a law passed during court proceedings. The applicant



claimed the change in the law breached its property rights. The Court found no right protected under P1-1.

"B.2... the applicant company was paid its part of the rent for the period during which the sublease contract was in force. As regards its claims for rent for the period from 18 March 1988 onwards (...) they constituted expectations for future income which cannot be regarded as" possessions "within the meaning of P1-1, since they had not been recognised and determined by a judicial decision having final effect. Yet that is the condition for a claim to be certain, enforceable and, accordingly, protected by Article 1 of Protocol 1 ... Nor could the applicant company rely on a" legitimate expectation "that its claims would be granted (...) since the legal basis of these claims, namely the lease agreement, had been terminated on 18 March 1988".

### **When are legitimate expectations protected?**

Review the three cases below for examples of when a legitimate expectation might be protected.

#### **CASE OF PINE VALLEY DEVELOPMENTS LTD AND OTHERS v. IRELAND(1991)**

Facts: The planning permission upon which applicants had purchased land were declared void by the domestic Court. The Court found that the judicial decision constituted an interference, but it was proportionate. No violation.

"51. ... When Pine Valley purchased the site, it did so in reliance on the permission which had been duly recorded in a public register kept for the purpose and which it was perfectly entitled to assume was valid...That permission amounted to a favourable decision as to the principle of the proposed development, which could not be reopened by the planning authority .... **In these circumstances it would be unduly formalistic to hold that the Supreme Court's decision did not constitute an interference. Until it was rendered, the applicants had at least a legitimate expectation of being able to carry out their proposed development and this has to be regarded, for the purposes of Article 1 of Protocol 1 (P1-1), as a component part of the property in question..."**

#### **CASE OF PRESSOS COMPANIA NAVIERA S.A. AND OTHERS v. BELGIUM(1995)**

Facts: A national law was passed to extinguish the liabilities of certain operators of pilot services. The attending claims for compensation were extinguished, retroactively. The applicants, who had claims for compensation that could no longer be enforced, brought application under P1-1. The Court found a breach.

"31. In order to determine whether in this instance there was a "possession", the Court may have regard to the domestic law in force at the time of the alleged interference, as there is nothing to suggest that that law ran counter to the object and purpose of Article 1 of Protocol 1 (P1-1).

**The rules in question are rules of tort, under which claims for compensation come into existence as soon as the damage occurs.**

**A claim of this nature "constituted an asset" and therefore amounted to "a possession within the meaning of the first sentence of Article 1 (P1-1)."**

BÉLÁNÉ NAGY V. HUNGARY (2016)

Facts: after a change in the law, the applicant lost the disability pension. Although a test demonstrated that she met the required disability level, a new requirement, relating to her contributions, payments barred her from receiving the allowance. The Court found in her favour.

"82. P1-1 imposes no restriction on the Contracting States' freedom to decide whether or not to have in place any form of social-security scheme, or to choose the type or amount of benefits to provide under any such scheme ... If, however, a Contracting State has in force legislation providing for the payment as of right of a welfare benefit – whether conditional or not on the prior payment of contributions – **that legislation must be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No. 1 for persons satisfying its requirements ...**

105. ... [the applicant's] contribution was recognised as sufficient at the latest on 1 April 2001 ... She could therefore reasonably **rely on the promise of the law** that she would be entitled to disability benefits whenever she satisfied the applicable health-related conditions...

108. When, following the entry into force of the new law and relying on her newly re-assessed and sufficiently impaired health, the applicant applied for disability allowance in 2012, she did no more, in the Court's view, than seek to **avail herself once again of an existing legitimate expectation** to be provided with a social-security benefit, **rather than pursuing the "acquisition" of a "possession".** "

**What is not a possession under P1-1**

The ECtHR has had the opportunity to specify several categories of assets that do not fall under the protection of P1-1. What they have in common is that they concern interests in future rights. Even if they might be backed by "common sense", they do not constitute existing possessions.

**Read the reasoning of the Court in each case.**

**Right to inherit**

**CASE OF MARCKX v. BELGIUM (1979)**

"50. ... The Court in fact excludes Article 1 of Protocol 1 (P1-1): like the Commission and the Government, it notes that this Article (P1-1) does no more than enshrine the right of everyone to the peaceful enjoyment of "his" possessions, that consequently it applies only to a person's existing possessions and that it does not guarantee the right to acquire possessions whether on intestacy or through voluntary dispositions. ..."

## **Loss of business due to regulatory change**

### **GREEK FEDERATION OF CUSTOMS OFFICERS v. GREECE (1995)**

"LAW, 1.b. The Commission notes that the applicants' licences have not been revoked, so that they have not lost the opportunity of continuing to practise their profession under those licences. However, the applicants claim that their licences gave rise to a vested economic right and that this has been almost entirely taken away. Further, they assert that it was legitimate and reasonable for them to expect that they would be able to continue to derive advantages from practising the profession covered by the licence.

The Commission notes that the occupation of customs officer is a liberal profession, with no fixed income and no guaranteed turnover, but which is subject to the hazards of economic life. Although the abolition of customs barriers threatens to cause customs officers economic loss, the Commission considers that the latter cannot claim to be entitled to a guaranteed volume of business which could have qualified as a "possession" within the meaning of Article 1 of Protocol 1. Further, as regards the expectation of future revenue, the Commission recalls its previous case-law, according to which future income constitutes a "possession" only if the income has been earned or where an enforceable claim to it exists (see No. 10438/83, Dec. 3.10.84, D.R. 41 p. 170).

Having regard to the factors set out above, the Commission considers that the applicants' complaint is outwith the scope of Article 1 of Protocol 1 and is therefore incompatible rationae [sic] materiae with the provisions of the Convention pursuant to Article 27 para, 2."

## **Right to indexation of savings**

### **GAYDUK AND OTHERS v. UKRAINE (2002)**

"Merits, C.1.(b) ... Article 1 of Protocol 1 does not guarantee any right to acquire the ownership of property (Linde v. Sweden, application no. 11628/85, Commission decision of 9 May 1986, DR 47, p. 270). Consequently, it does not impose any general obligation on states to maintain the purchasing power of sums deposited through the systematic indexation of savings (Rudzińska v. Poland (dec.), no. 45223/99, ECHR 1999-VI; and X. v. Germany, application no. 8724/79, Commission decision of 6 March 1980, DR 20, p. 226). ...

As to the amounts referred to in Law no. 537/96 representing the indexed value of the deposits, the Court notes that their availability depends on the amounts which the

state allocates to the Treasury subject to certain conditions. The proceedings issued by each of the applicants in the domestic courts did not, therefore, concern "existing possessions" that belonged to the applicants. In that connection, the Court reiterates that the right to the indexation of savings as such is not guaranteed by Article 1 of Protocol 1, (see the Rudzińska decisions cited above, and Trajkovski v. Former Yugoslav Republic of Macedonia (dec.), no. 53320/99, ECHR 2002-...), which provision is therefore inapplicable in the instant case."

### **Claims for future rent**

#### **XENODOCHIAKI S.A. v. GREECE (2001)**

"Law 1.B.2. ... As regards its claims for rent for the period from 18 March 1988 onwards, the Court is of the opinion that they constituted expectations for future income which cannot be regarded as "possessions" within the meaning of Article 1 of Protocol 1, since they had not been recognised and determined by a judicial decision having final effect. Yet that is the condition for a claim to be certain, enforceable and, accordingly, protected by Article 1 of Protocol 1 (see, among other authorities, *Stran Greek Refineries and Stratis Andreadis v. Greece* judgment, op. cit., pp. 84-85, §§ 59-62). Nor could the applicant company rely on a "legitimate expectation" that its claims would be granted (see, a contrario, *Pressos Compania Naviera S.A. and others v. Belgium* judgment of 20 November 1995, Series A no. 332, p. 21, § 31), since the legal basis of these claims, namely the lease agreement, had been terminated on 18 March 1988.

In these circumstances, the Court considers that the termination of the sublease agreement to which the applicant' company was a party by virtue of Law no. 1759/1988 did not affect any property right protected under Article 1 of Protocol 1."

### **Right to squat**

#### **DURINI v. ITALY (1994)**

"Law: ... the Commission notes in the first place that the right to live in the castle (which belongs to the foundation) is not a "possession" within the meaning of Article 1 of Protocol No. 1 to the Convention, so that this provision is not applicable to the case."

### **Medical benefits**

#### **SARDIN v. RUSSIA ( 2004)**

"Law, 2: ... As to the applicant's complaint about an alleged deprivation of medical and other benefits, the Court recalls that Article 1 of Protocol 1 does not guarantee the right to acquire possessions (see, mutatis mutandis, *Marckx v. Belgium*, judgment of 13 June 1979, Series A no. 31, p. 23, § 50; *Van der Musselle v. Belgium*, judgment of 23 November 1983, Series A no. 70, p. 23, § 48) and therefore it could not be construed as guaranteeing a favourable outcome of the litigation over social benefits."

### **Access to housing privatisation scheme**

#### **SLIVENKO AND OTHERS v. LATVIA (2002)**

"122. It is undisputed that the first and the third applicants did not own the flat in question, and that they had no personal entitlement or claim to privatise the flat under the relevant domestic legislation in force after 27 June 1997, which is the date of the entry into force of Protocol No. 1 in regard to Latvia. In relation to the flat, they had no sufficient proprietary interest to constitute a "possession" within the meaning of Article 1 of Protocol 1 (see, mutatis mutandis, *Beyeler v. Italy*, no. 96/33202, 5.1.2000, §§ 100-105, to be reported in ECHR 2000-I). It follows that the first and the third applicants' complaint about their inability to privatise the flat is incompatible *ratione materiae* with this provision."

## Loss of profits due to regulatory change

### X. v. THE FEDERAL REPUBLIC OF GERMANY (1979)

"Law, 2.c ... As the Commission just found that the applicant's expectation that the regulations on fees for notaries would remain unchanged did not constitute a property right within the meaning of Article 1 of Protocol 1 a question of discrimination with regard to the rights guaranteed by this Article consequently does not arise."

### **WHO can invoke Art 1 Protocol 1?**

#### INDIVIDUALS

(People just like Mario!)

Legal persons, including companies. This is expressly provided for in P1-1.

Even a monastery was found to benefit from P1-1's protection

(THE HOLY MONASTERIES v. GREECE (1994) (§49)

### **Indirect victims and interest groups**

#### **Indirect victims**

Persons other than the victims, that are directly concerned by the interference, can submit an application to the Court as 'indirect victims'. This includes, for instance, persons that have close links to the victim, like family members. Heirs can continue the application in the applicant's stead, in case of death during the proceedings.

#### Interest groups

Interest groups are not entitled to submit applications for breaches of the interest they represent. They can, however, be victims of breach in the first place, or help actual victims, for instance providing representation in the proceedings. Exceptionally, they can act on behalf of victims who have no means of representation.

#### **The position of shareholders**

Shares are possessions (see above). However, shareholders normally cannot act on behalf of the company to vindicate its rights under P1-1, not even as indirect victims.

**In principle, it is the company itself, and not the shareholders, that can enforce the company's right to property in case of interference.**

See AGROTEXIM v. GREECE (1995) §66

Only in exceptional circumstances, when the corporation is unable to act on its own behalf, can shareholders act to enforce its property rights under the ECHR.

### **When? When does P1-1 apply?**

The acts of the respondent state can be reviewed against the Convention, including P1-1, only if it has come into force in that state. In other words, P1-1 does not apply to measures occurred before a state's accession to the CoE and ratification of Protocol 1.

**However, the Court has often resorted to the notion of a continuing violation.**

If the right to property is still restricted at the time of the application, the Court will have jurisdiction *ratione temporis* even if the interference had occurred (or started) before the entry into force of the Protocol.

### **LOIZIDOU v. TURKEY(1995)**

Facts: after the occupation of northern Cyprus by Turkey, the refugees were prevented from returning to their homes. The Court found against Turkey.

"41. The Court recalls that it has endorsed the notion of a continuing violation of the Convention and its effects as to temporal limitations of the competence of Convention organs ...

Accordingly, the present case concerns alleged violations of a continuing nature if the applicant, for purposes of Article 1 of Protocol 1 (P1-1) and Article 8 of the Convention (art. 8), can still be regarded - as remains to be examined by the Court - as the legal owner of the land."

### **Where: the territorial reach of P1-1**

States are responsible for a breach of the Convention for all attributable acts committed on their territory (there is a presumption of territorial jurisdiction).

Negative obligations are suspended if the state has no control over the territory (due to occupation, riots etc). Positive obligations remain (regain control, secure individual rights) unless the territory is under the effective control of another state, or separatist movement, which could take on ECHR duties. Example: Armenian operations in the disputed area of Gulistan did not spare Azerbaijan from full responsibility under P1-1, see SARGSYAN v. AZERBAIJAN (2015), §§ 148-151).

Convention obligations can also apply outside the state territory, if state authorities exercise their jurisdiction *de facto*. Example: acts of soldiers posted abroad can engage the state's responsibility under the Convention (see LOIZIDOU v. TURKEY (1995), § 62).

### **Recap**

**What:** 'possession' is an autonomous notion under P1. All assets capable of monetary evaluation can qualify. Future profits and legitimate expectations can be covered, but there is no right to acquire property in the future.

**Who:** individuals and legal persons are protected. Shareholders are normally not protected against interference to the company.

**When:** the protection starts after the entry into force of P1. Continuous breaches can be challenged even if they started earlier.

**Where:** on the territory of CoE, or wherever else states exercise their jurisdiction.

### 3. The three rules of Article 1 Protocol 1

Article 1 of Protocol 1 can be split into three separate rules. The Court routinely resorts to this division to review state measures and identify the applicable rule.

**Hover over each title below to review.**

- **Peaceful enjoyment** (first paragraph, first sentence)  
Every natural or legal person is entitled to the peaceful enjoyment of his possessions.
- **Deprivation** (first paragraph, second sentence)  
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.
- **Control of use** (second paragraph)  
The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties

#### **How do the three rules work?**

The Court clarified that, even if they are closely connected, the three rules of P1-1 can be considered separately. The next chapter of this course examines the application of each of these rules.

**Review the case below.**

#### **SPORRONG AND LÖNNROTH v. SWEDEN (1982)**

“61. ... Article [Article 1 of Protocol 1] comprises three distinct rules. **The first rule, which is of a general nature**, enounces the principle of **peaceful enjoyment of property**; it is set out in the first sentence of the first paragraph. **The second rule covers deprivation** of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. **The third rule** recognises that the states are entitled, amongst other things, **to control the use of property** in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph.”

#### **Identifying the applicable rule**

In the case of an interference with the right to property, it is crucial to identify the applicable rule(s) of P1-1. Rules 2 and 3 are *lex specialis*: they regulate two specific applications of the general principle of Rule 1 (deprivation of possessions and rules on their use are two instances of measures hampering the peaceful enjoyment of possessions). If Rule 2 or 3 applies, there is no need to apply Rule 1, but the general principle might assist the interpretation of the applicable rule.

## **Rule 2: was there a deprivation of property?**

*Think of Mario: he was not deprived of his land. Rule 2 does not apply.*

Formal and de facto deprivation can qualify. The most straightforward case is expropriation for public purposes.

## **Rule 3: is there a state measure controlling the use of possessions?**

*Think of Mario: the development plan and environmental regimes govern the use of his land. Rule 3 applies.*

## **Rule 1 (residual catch-all test): do state measures hinder the peaceful enjoyment of possessions?**

### **The six steps to find a breach of P1-1**

In each case, the Court goes through a six-step procedure to determine whether there is a breach of P1-1. In the case of steps 3 and 6, more information will follow later in the course.

1. Is there a right to property in dispute? Check whether the claim concerns a "possession" covered by P1-1.
2. Has there been a state interference with the possession?
3. Which of the three rules of P1-1 applies? (see further in next chapter)
4. Review the legality of the interfering measure against the standard of legal certainty.
5. Is the interference premised on the pursuit of a legitimate interest? Consider whether the aim of the measure corresponds to a public interest. (see further in next chapter)
6. Ascertain the proportionality of the interference.

## **States obligation**

### **What must states do to comply with P1-1?**

#### Negative obligations:

- Refrain from interfering with possessions.

Example: States must *not* expropriate property or limit its enjoyment without justification.

#### Positive obligations:

- States must adopt the necessary measures to ensure that the protection granted in P1-1 is effective.

Examples: States must provide timely and proportionate compensation in case of



expropriation; States must have in place fair and viable procedures for those who seek to enforce their property rights in court.

The Court explained why states are also expected to discharge certain positive obligations to comply with P1-1.

Review the case below.

#### **BRONIOWSKI v. POLAND (2004)**

Facts: Although Polish law granted a right to compensation for properties forcibly abandoned during World War II, access to compensation was severely restricted in practice. The Court found against Poland.

“184. The rule of law underlying the Convention and the principle of lawfulness in P1-1 require states not only to respect and apply, in a foreseeable and consistent manner, the laws they have enacted, but also, as a corollary of this duty, to ensure the legal and practical conditions for their implementation ... **it was incumbent on the Polish authorities to remove the existing incompatibility between the letter of the law and the state-operated practice which hindered the effective exercise of the applicant's right of property.** Those principles also required the Polish State to fulfil in good time, in an appropriate and consistent manner, the legislative promises it had made in respect of the settlement of the Bug River claims. This was a matter of important public and general interest. As rightly pointed out by the Polish Constitutional Court, the imperative of maintaining citizens' legitimate confidence in the state and the law made by it, inherent in the rule of law, required the authorities to

eliminate the dysfunctional provisions from the legal system and to rectify the extra-legal practices.”

#### **Procedural Guarantees**

States can justifiably regulate or restrict the right to property. However, there cannot be measures or factual circumstances that unnecessary hinder the practical and effective enjoyment of that right. Among the positive obligations states have, one is to provide for fair and transparent procedures.

Review the case below.

#### **PĂDURARU v. ROMANIA (2005)**

Facts: The applicant challenged the state measures which hindered his right to have nationalised property returned to him under domestic law. The Court found against Romania.

“92. While the Convention does not impose an obligation on the states to restore confiscated assets, let alone to dispose of them in accordance with the elements of the right of property, **once a solution has been adopted by a state, it must be implemented with reasonable clarity and coherence,** in order to avoid, in so far as

possible, legal uncertainty and ambiguity for the legal persons concerned by the measures to implement it.

93. In addition, each Contracting **State must equip itself with an adequate and sufficient legal arsenal** to ensure compliance with the positive obligations imposed on it.”

The effectiveness of P1-1 would be frustrated if the procedures available to vindicate or protect the right domestically were inefficient or unfair. Even implicitly, P1-1 calls on States to discharge a positive obligation to set up a fair procedural system in support of property rights.

**Review the case below.**

#### **ZEHENTNER v. AUSTRIA (2009)**

Facts: Even if the applicant suffered from mental illness and could not participate in the underlying proceedings, payment orders were issued against her, and her flat was irreversibly sold in enforcement proceedings. The Court found against Austria.

“73. ... although Article 1 of Protocol 1 contains no explicit procedural requirements, the proceedings at issue must afford the individual a reasonable opportunity of putting his or her case to the relevant authorities for the purpose of effectively challenging the measures interfering with the rights guaranteed by this provision. ...

75. ... even in cases involving private litigation the state is under an obligation to afford the parties to the dispute judicial procedures which offer the necessary procedural guarantees and therefore enable the domestic courts and tribunals to adjudicate effectively and fairly in the light of the applicable law.”

Interferences must be provided for in the law. This is not only a formalistic requirement: the minimum standards of what “law” is must also be respected: the law must be clear, apply with consistency, issue from a fair and transparent procedure, and individuals must be able to invoke it in fair proceedings.

**Review the case below.**

#### **HENTRICH v. FRANCE (1994)**

Facts: French authorities exercised the right to pre-empt the applicants’ land, although after the time-limit. The applicants challenged the pre-emption. The Court found against France.

“42. [French law granting the authorities the power to pre-empt and take property at discretion when they consider that the purchase price was too low], as interpreted up to that time by the Court of Cassation and as applied to the applicant, **did not sufficiently satisfy the requirements of precision and foreseeability implied by the concept of law within the meaning of the Convention.** A pre-emption decision cannot be legitimate in the absence of adversarial proceedings that comply with the principle of equality of arms, enabling argument to be presented on the issue of the

underestimation of the price and, consequently, on the Revenue's position – all elements which were lacking in the present case .”

## **1.2 LEGAL FRAMEWORK AND SCOPE OF PROPERTY RIGHTS IN ALBANIAN LEGAL ORDER**

### **CONTENT AND OBJECTIVES**

These chapters contain general information on the legal and constitutional framework of property rights and on independent constitutional and administrative institutions dealing with property rights. They provide methodology on the constitutional test of proportionality, as well as case law of Constitutional Court regarding property rights.

Learning objectives of this chapter:

- Reminder of national stakeholders implementing property rights in Albania;
- Introduction to historical legislative and jurisdictional background of property rights in Albania;
- Identification of leading judgments of the European Court of Human Rights involving property rights in Albania.

### **ALBANIAN INSTITUTIONS IMPLEMENTING PROPERTY RIGHTS**

- Constitutional Court
- High Court
- Courts of general jurisdiction
- Administrative Courts
- School of Magistrates
- General State Advocate
- Agency for the Treatment of Property (ATP)
- Immovable Property Registration Office (IPRO)
- Agency for the Legalization, Urban Planning, and Integration of Informal Areas/ Constructions (ALUIZNI)
- Municipalities and Communes

### **ALBANIAN LEGAL FRAMEWORK AND CASE LAW ON PROPERTY RIGHTS, IN PARTICULAR RESTITUTION AND COMPENSATION RIGHTS**

In 1993, the Albanian authorities have started the legislative reforms in order to compensate the property owners expropriated by the communist authorities in 1944-1992. Since then, different laws were established and amended (see detailed legislative and jurisdictional background in Chapter 4.2).

In the meantime, in 1998, the new Constitution of the Republic of Albania was adopted. It was approved by referendum on 22 November 1998<sup>1</sup>. It establishes rights to property, which should be adjudicated in a fair trial and without any discrimination:

#### Article 11

1. The economic system of the Republic of Albania is based on private and public property, as well as on a market economy and on freedom of economic activity.
2. Private and public property are equally protected by law.
3. Limitations on the freedom of economic activity may be established only by law and for important public reasons.

#### Article 17

1. The limitation of the rights and freedoms provided for in this Constitution may be established only by law for a public interest or for the protection of the rights of others. A limitation shall be in proportion with the situation that has dictated it.
2. These limitations may not infringe the essence of the rights and freedoms and in no case may exceed the limitations provided for in the European Convention on Human Rights.

#### Article 18

1. All are equal before the law.
2. No one may be unjustly discriminated against for reasons such as gender, race, religion, ethnicity, language, political, religious or philosophical beliefs, economic condition, education, social status, or parentage.
3. No one may be discriminated against for the reasons mentioned in paragraph 2 without a reasonable and objective justification.

#### Article 41

1. The right of private property is guaranteed.
2. Property may be acquired by gift, inheritance, purchase, or any other classical means provided by the Civil Code.
3. The law may provide for expropriations or limitations in the exercise of a property right only in the public interest.
4. Expropriations or limitations of a property right that amount to expropriation are permitted only against fair compensation.

---

<sup>1</sup> Translated under the auspices of OSCE-Albania

5. In the case of disagreements related to the amount of compensation, a complaint may be filed in court.

#### Article 42

1. The liberty, property, and rights recognized in the Constitution and by law may not be infringed without due process.

2. Everyone, to protect his or her constitutional and legal rights, freedoms, and interests, or in the case of charges against him, has the right to a fair and public trial, within a reasonable time, by an independent and impartial court specified by law.

In 2012, the legislation on restitution and compensation has still not been effective in accordance to the ECtHR. In judgment *Manushaqe Puto and Others v. Albania* (2012), the Court identified a structural problem in Albanian legal system: namely, the failure to enforce final domestic judicial and administrative decisions related to the right of restitution or compensation.

In 2015, a new Law No. 133/2015 on the Treatment of Property and the finalization of the Process of Compensation of Property was established. The national ordinary jurisdiction courts have still not delivered any case law under the new law at the date of submission of this handbook for publishing<sup>2</sup>.

#### OVERVIEW OF RELEVANT ECtHR CASES AGAINST ALBANIA

The most important cases concerning restitution and compensation issues are : *Driza v. Albania* (2007) and *Ramadhi and Others v. Albania* (2007) ; *Mullai and Others v. Albania* (2010) ; *Çaush Driza v. Albania* (2011) and *Manushaqe Puto and Others v. Albania* (2012) (see Chapter 4.2).

#### QUESTIONS

**Q1** Read the judgment in the case [AGROTEXIM v. GREECE \(1995\)](#). What is the reason provided by the Court to support the conclusion that, in principle, shareholders cannot act to enforce a company's right to property? **Enter your answer in the box below.**

---

<sup>2</sup> This conclusion is based on the research done on the accessible databases of the Albanian High Court and the Constitutional Court. No data is available on the websites of the Agency for the Treatment of Property (ATP), first instance court and appeal court to support a different conclusion from the above.

**Q2** A company filed an application for patenting a trademark. Pending the application, the state adopted measures which determined the rejection of the application. Can the company raise a claim under P1-1, arguing that intellectual property interests are protected as «possessions», and challenge the state measures?

**Enter your answer in the box below.**

**Q3** Select below the kinds of asset that might qualify as possessions under P1-1, in accordance with the Court's case-law. **Select your response(s) below'. You can choose more than one answer.**

1. The right to inherit assets
2. A licence to sell alcoholic beverages
3. The clientele of an ongoing business
4. The profits expected from the exercise of a profession, which were reduced after a regulatory interference.

**Q4** Mario can challenge before the ECtHR the 1988 decree that incorporated its land into a national park. **Select your response(s) below.**

True

False

**Q5** What is a continuing violation and why is it important to determine its existence?

**Enter your answer in the box below.**

**Q6** Amnesty International fights for the restitution of land to its previous owners. Amnesty International's application before the Court, challenging state expropriatory measures, is admissible. **Select your response(s) below.**

True

False

**Q7** Consider the three-rules format of P1-1 (Rule 1 on peaceful enjoyment; Rule 2 on deprivation of possessions; Rule 3 on controlled use). Which of the following statements is (or are) correct?. **Select your response(s) below'. You can choose more than one answer.**

1. All three rules apply to every case of state interference with possessions.
2. Sometimes the only applicable Rule is Rule 1 on the peaceful enjoyment of possessions.
3. Even when Rule 1 does not apply, the general principle that it reflects can be used to interpret Rules 2 or 3.
4. If Rule 1 applies, there is no need to ascertain the application of Rules 2 or 3.

**Q8** What is a continuing violation and why is it important to determine its existence?

**Enter your answer in the box below.**

**Q9** In each case, the Court goes through a six-step procedure to determine whether there is a breach of P1-1. The sequence follows a logical structure. Put the steps in the right order.

- Is there a right to property in dispute? Check whether the claim concerns a "possession" covered by P1-1.
- Has there been a state interference with the possession?
- Which of the three rules of P1-1 applies?
- Review the legality of the interfering measure against the standard of legal certainty.
- Is the interference premised on the pursuit of a legitimate interest? Consider whether the aim of the measure corresponds to a public interest.
- Ascertain the proportionality of the interference.

## ANSWER KEY

**Q1 Feedback** (see §65) The governance of corporation is complicated: shareholders might disagree among themselves or with the board. It would be difficult to identify univocally the correct applicant. Moreover, shareholders might lack access to judicial remedies in domestic courts for breach of the company's rights. This would make it difficult to assess the requirement of exhaustion of local remedies.

**Q2 Feedback** Whereas intellectual property rights are certainly "possessions", P1-1 does not protect future possessions. Until after the registration there is no actual IP right and no possession.

Legitimate interests with monetary value are only protected if they are based on a clear non-contestable claim under domestic law. See ANHEUSER-BUSCH INC. v. PORTUGAL (2007) §§63-65.

**Q3** 1. False.

2. True.

3. True.

4. False.

**Q4** Feedback for True

### That's Not Right

Although Mario has exhausted the local remedies and has certainly suffered from a restriction to the use of its right to property, the Court would lack jurisdiction *ratione temporis*

Protocol I entered into force in Poland only in 1994, so the 1988 decree does not fall under its temporal scope

However, Mario can challenge the 1994 plan and the authorities' subsequent refusals to grant him a building permit. In the framework of this analysis, facts and measures pre-dating 1994 can be taken into account. See MATCZYŃSKI v .POLAND (2015)

Feedback for false

### That's Right

Although Mario has exhausted the local remedies and has certainly suffered from a restriction to the use of its right to property, the Court would lack jurisdiction *ratione temporis*

Protocol I entered into force in Poland only in 1994, so the 1988 decree does not fall under its temporal scope



However, Mario can challenge the 1994 plan and the authorities' subsequent refusals to grant him a building permit. In the framework of this analysis, facts and measures pre-dating 1994 can be taken into account. See MATCZYŃSKI v. POLAND (2015)

**Q5 Feedback** A continuing violation occurs when an instantaneous act or a state measure create a permanent state of affairs which restricts a Convention right

When a continuing violation is found, the Court might exercise its jurisdiction under the ECHR even if the state acts occurred in part before the entry into force of the Convention for that state, if the restriction continues after the critical point in time.

**Q6 Feedback for True**

### **That's Not Right**

NGOs are not direct or indirect victims of the interferences and, therefore, cannot bring a claim before the Court

NGOs can, however, provide support to the victims, for instance providing legal support and representation in proceedings before the Court, or submit third party interventions under Art. 36 ECHR

Feedback for false

### **That's Right**

NGOs are not direct or indirect victims of the interferences and, therefore, cannot bring a claim before the Court

NGOs can, however, provide support to the victims, for instance providing legal support and representation in proceedings before the Court, or submit third party interventions under Art. 36 ECHR.

**Q7 1.** False: Rule 1 is a general clause and applies when a state measure that interferes with property rights does not qualify as expropriation, or regulates the use of possessions

2. True

3. True

4. False: because Rules 2 and 3 are specific applications of Rule 1, the inverse is true: when Rule 2 or 3 applies, there is no need to apply Rule 1 (other than as auxiliary means of interpretation).

**Q8 Feedback** A continuing violation occurs when an instantaneous act or a state measure create a permanent state of affairs which restricts a Convention right.

When a continuing violation is found, the Court might exercise its jurisdiction under the ECHR even if the state acts occurred in part before the entry into force of the Convention for that state, if the restriction continues after the critical point in time.

## CHAPTER 2

### 2.1 STRUCTURE OF ARTICLE 1 PROTOCOL 1

#### THE THREE RULES

##### Learning objectives

At the end of this Chapter you will:

- Learn the structure of the ECtHR analysis of cases under Article 1 of Protocol 1.
- Be able to prepare cases in conformity with the ECHR standards.
- Be able to adjudicate property cases using ECHR standards.

##### Three rules of the Article 1 of Protocol No.1

In the *SPORRONG AND LÖNNROTH V. SWEDEN (1982)* case, the ECtHR stated that Article 1 of Protocol 1 contains "three distinct rules": " 61. ...*The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence in the same paragraph. The Third rule recognises that the states are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph*".

After ascertaining that there has been an interference with the right to property, the ECtHR usually establishes under which rule of the Article 1 of Protocol 1 the interference falls to be examined.

It assesses whether it amounts to a deprivation of property (rule 2) or has to be considered a control of use (rule 3) or examines it in the light of the first sentence of the (rule 1). Before inquiring whether the first general rule has been complied with, it must determine whether the last two are applicable.

##### a. Deprivation of Property (Rule 2)

The notion '*Deprivation of property*' is not clearly defined. Deprivation means in general that someone is being stripped off his title to a property.

There are two forms of deprivation of property:

##### Formal deprivation

Formal deprivation means that the owner is by an official act or a measure stripped of his/her property rights.

## EXAMPLE ONE

Expropriation for state needs (constructional needs).

### CHINNICI v. ITALY (2015)

**Facts:** The property was expropriated for town planning purposes.

Read the judgment [HERE](http://hudoc.echr.coe.int/eng?i=001-59843) <http://hudoc.echr.coe.int/eng?i=001-59843>

This interference amounted to a “deprivation of possessions” within the meaning of the second sentence of Article 1 of Protocol 1. (see also case of KHALIKOVA v. AZERBAIJAN (2015))

## EXAMPLE TWO

Confiscation of the property by the state authorities.

### BISTROVIĆ V. CROATIA

**Facts:** The applicants owned a house and a surrounding plot of land in Croatia. The “Croatian Roads”, a public company based in Zagreb, instituted expropriation proceedings for a part of land, with a view of building a motorway. The applicants opposed this proposal, asking that their estate be expropriated in its entirety. They argued that with only partial expropriation they, as farmers, would have no further use for the house and the small area around it, since the house and the agricultural land on which it was built represented an inseparable unity. In addition, the planned motorway would pass in close proximity to the house, thus causing significant noise pollution due to the high traffic frequency. The applicants’s claim was dismissed.

Read the judgment [HERE](http://hudoc.echr.coe.int/eng?i=001-80705) <http://hudoc.echr.coe.int/eng?i=001-80705>.

*“32. the applicants had been deprived of their property in accordance with the provisions of the Expropriation Act with a view of building a motorway, and that the expropriation thus pursued a lawful aim in the public interest. Accordingly, it is the second sentence of the first paragraph of Article 1 of Protocol No. 1 which is applicable in the instant case”.*

### **De facto deprivation**

According to the Court’s Jurisprudence “De facto deprivation of property” means that the owner is not formally expropriated, but that his ability to exercise property rights is limited in such a grave way that he factually does not have ownership anymore.

**In SPORRONG AND LÖNNROTH V. SWEDEN (1982) case the ECtHR held that;** “63. In the absence of a formal expropriation, that is to say a transfer of ownership, the Court considers that it must look behind the appearances and investigate the realities of the situation complained of. Since the Convention is intended to guarantee rights that are “practical and effective”, it has to be ascertained whether that situation amounted to a de facto expropriation, as was argued by the applicants”.

"...although the right [of peaceful enjoyment of possessions] lost some of its substance, it did not disappear...The Court observes in this connection that the [claimants] could continue to utilise their possessions and that, although it became more difficult to sell properties [as a result of the regulations], the possibility of selling subsisted".

**While the ECtHR concluded that the applicants had not formally been deprived of their property, it is established jurisprudence to examine whether a measure de facto deprives the applicant of his property.**

#### **Examples of de facto deprivation**

##### **PAPAMICHALOPOULOS AND OTHERS V. GREECE 1993)**

**Facts:** The Greek military government took possession of a privately owned land in order to set up a naval base and a holiday resort for officers and their families. Though no formal expropriation took place, the ECtHR noted that, as a result of the Greek measures, the applicants were unable to make use of their property or to sell, bequeath, mortgage or make a gift of it and they were even refused access to it. Read the judgment HERE <http://hudoc.echr.coe.int/eng?i=001-57836>.

*"41. The occupation of the land in issue by the Navy Fund represented a clear interference with the applicants' exercise of their right to the peaceful enjoyment of their possessions. The interference was not for the purpose of controlling the use of property within the meaning of the second paragraph of Article 1 of Protocol 1 (P1-1). Moreover, the applicants were never formally expropriated: Law no. 109/1967 did not transfer ownership of the land in question to the Navy Fund.*

*45. The Court considers that the loss of all ability to dispose of the land in issue, taken together with the failure of the attempts made so far to remedy the situation complained of, entailed sufficiently serious consequences for the applicants de facto to have been expropriated in a manner incompatible with their right to the peaceful enjoyment of their possessions".*

##### **BURGHELEA V. ROMANIA 2009)**

**Facts:** The applicant received through the reconstitution of the right of property a forest land in the neighbourhood of a barrier lake managed by Hidroelectrica.

The company solicited to the local authorities an agreement in principle from the owners of the nearby land to execute certain works regarding the expanding of the barrier lake, works which were to flood the aforementioned land. These agreements were obtained in the form of promises of sell and purchase, based on which Hidroelectrica deforested and flooded the plaintiff's land.

Later on, the plaintiff took back her agreement and initiated a lawsuit in order to be compensated for the use of her possession.

The action was dismissed primarily due to the existence of the promise of sell and purchase, sale which was not possible at the time because of the temporary interdiction of alienation stated by the Law 18/1991.

Read the judgment HERE <http://hudoc.echr.coe.int/eng?i=001-90903>.

## b. Control of the use of property (Rule 3)

### Regulation on use of possessions

The third rule of Article P1-1 provides for the state's power to control the use of property, i.e. to impose restrictions on its use. Whereas these measures fall short of expropriation, they interfere with the owner's freedom to dispose of possessions as they deem fit. The interference must strike a fair balance between the individual's interests and those of the community, otherwise it constitutes a breach.

Example of interference to the right of peaceful enjoyment of possession

#### CHASSAGNOU v. FRANCE(1999)

**Facts:** The applicants were forced to grant access and hunting rights to third parties on their lands, without any compensation other than the right to hunt elsewhere. Since the applicants opposed hunting, the lack of monetary compensation rendered the interference disproportionate. The Court found against France.

Read the judgment HERE <http://hudoc.echr.coe.int/eng?i=001-58288>.

The Court examined the measure (forcible transfer of hunting rights) and the applicable rule of P1-1;

"74. The Court notes that, although the applicants have not been deprived of their right to use their property, to lease it or to sell it, the compulsory transfer of the hunting rights over their land to an ACCA **prevents them from making use of the right to hunt, which is directly linked to the right of property, as they see fit**. In the present case the applicants do not wish to hunt on their land and object to the fact that others may come onto their land to hunt. However, although opposed to hunting on ethical grounds, **they are obliged to tolerate the presence of armed men and gun dogs on their land every year. This restriction on the free exercise of the right of use undoubtedly constitutes an interference with the applicants' enjoyment of their rights as the owners of property**. Accordingly, the second paragraph of Article 1 is applicable in the case."

The rights to derive profits from one's possession:

#### BITTÓ AND OTHERS v. SLOVAKIA (2014)

**Facts:** Slovak law imposed on landlords the obligations to comply maximum levels of rent which were very low and limited their capacity to derive profits from renting their possessions to tenants.

Read the judgment HERE <http://hudoc.echr.coe.int/eng?i=002-9258>.

"101. ...the rent control-scheme amounts to an interference with the applicants' rights under Article 1 of Protocol 1 as it prevents, or has prevented, them from freely negotiating a level of rent for their flats and has made the termination of the lease of their flats conditional to providing the tenants with adequate alternative accommodation. That interference constitutes a means of state control of the use of property. The application should therefore be examined under the second paragraph of Article 1 of Protocol 1 ...

114. The Court accepts that the shortage of flats available for rent at an affordable level after the fall of the communist regime called for a reconciliation of the conflicting interests of landlords and tenants, especially in respect of flats which had been restored to the original owners....

115. Nevertheless, the legitimate interests of the community in such situations call for a fair distribution of the social and financial burden involved in the transformation and reform of the country's housing supply. This burden cannot be placed on one particular social group, however important the interests of the other group or the community as a whole...

116. The above considerations are sufficient for the Court to conclude that the Slovak authorities failed to strike the requisite fair balance between the general interests of the community and the protection of the applicants' right of property."

#### **Control of use: fiscal measures**

Fiscal measures, as well as measures imposing sanctions or the payments of a fine are expressly contemplated by Rule 3, and are therefore equated to rules on control of use. State authorities enjoy a wide margin of discretion, but the measures can be reviewed if their application entails a disproportionate interference with the individuals' possessions.

#### **Seizure and sale of possessions of third parties by tax authorities:**

##### **GASUS DOSIER- UND FÖRDERTECHNIK GmbH v. THE NETHERLANDS(1995)**

Facts: Dutch tax authorities seized an industrial piece of machinery found in possession of a company (a concrete-mixer) with a view to carry out a forcible sale, the proceeds of which would cover the company's tax liabilities. The mixer, however, still belonged to a German company (the applicant), because its price had not been paid in full yet by the Dutch company. The applicant objected to the seizure, unsuccessfully retroactively.

Read the judgment [HERE](http://hudoc.echr.coe.int/eng?i=002-9622) <http://hudoc.echr.coe.int/eng?i=002-9622>.

"59. ... the most natural approach, in the Court's opinion, is to **examine Gasus's complaints under the head of "securing the payment of taxes", which comes under the rule in the second paragraph of Article 1 (P1-1)**. That paragraph explicitly reserves the right of Contracting States to pass such laws as they may deem necessary to secure the payment of taxes. The importance which the drafters of the Convention attached to this aspect of the second paragraph of Article 1 (P1-1) may be gauged from the fact that at a stage when the proposed text did not contain such explicit reference to taxes, it was already understood to reserve the states' power to pass whatever fiscal laws they considered desirable, provided always that measures in this field did not amount to arbitrary confiscation... Conferring upon a particular creditor the power to recover against goods which, although in fact in the debtor's possession, are legally owned by third parties is, in several legal systems, an accepted method of strengthening that creditor's position in enforcement proceedings.

70. ...Gasus could have eliminated their risk altogether by declining to extend credit to Atlas: they could have stipulated payment of the entire purchase price in advance or else refused to sell the concrete-mixer in the first place. It also accepts that the applicant company might have obtained additional security, for example in the form of insurance or a banker's guarantee, which pass the risk on to another party.

74. ...**the requirement of proportionality has been satisfied.**"

Procedural safeguards: [ROUSK v. SWEDEN \(2013\)](#)

**Facts:** Swedish authorities, to collect an enforceable tax debt, sold the applicant's home and then evicted him and his wife, without taking into account on-going proceedings relating to, among other things, an appeal against the writ of execution and a request for stay on sale of the property. The debt was minimal (approximately 800€) and he had been granted an extension for repayment on the day of the sale.

Read the judgment [HERE](http://hudoc.echr.coe.int/eng?i=001-123422) <http://hudoc.echr.coe.int/eng?i=001-123422>

"124. ... The Court finds that [the] conduct on the part of **the Enforcement Authority showed a serious lack of diligence having regard to the very grave consequences that the sale** and later the eviction entailed for the applicant.

125. Furthermore, the Court observes that in accordance with [Swedish law] a measure for enforcement already taken shall lapse, if possible, if respite from payment has been granted. Since the Enforcement Authority was officially informed about the respite on 8 September 2003, less than one week after the sale of the property and over one month before the eviction took place, and knew that the applicant's enforceable debt then amounted to only SEK 6,721, the Court notes that **the Enforcement Authority could have repealed the sale, as could the domestic courts upon appeal by the applicant**. To the Court, both the decision to uphold the sale and the ensuing eviction of the applicant appear **excessive and disproportionate, especially since the applicant had other assets, such as a car, which could have been seized and sold to cover what little remained of his enforceable debts**. This is particularly so because the authorities knew that the proceedings concerning the writ of execution were still ongoing and thus had not yet gained legal force."

The rate of taxes and charges: SVENSKA MANAGEMENTGRUPPEN AB v. SWEDEN (1985)

**Facts:** Swedish authorities introduced a new profit-sharing tax and a new supplementary pension charge. The applicant challenged these measures as unjustifiable interferences of property rights.

Read the judgment HERE <http://hudoc.echr.coe.int/eng?i=001-72454>.

"The circumstances of the present case show that the applicant is bound to pay a new tax which amounts to a certain percentage of its profits. Furthermore it has been established that the applicant must pay an increase in social pension charges amounting to 0.2 - 0.5 per cent. **The Commission cannot find that these obligations affect the applicant's guarantee of ownership or interfere with its financial situation to such an extent that this could be considered disproportionate** or an abuse of the Contracting Party's right under Article 1 of Protocol 1 (P1-1).

It may be true that the aim of these transactions includes the creation of a different policy in the economic field. However, **although opinions evidently differ as to the fairness of such policy the Commission considers that it was one which the Government were entitled to pursue.** Accordingly, the legislation concerning the employee investment funds did not infringe the applicant's rights under Article 1 of Protocol 1 (P1-1)."

**Control of use: fiscal measures**

**Taxes that are tantamount to confiscation:**

R.Sz. v. HUNGARY (2013)

Facts: The applicant had been employed in a state-owned company for eleven years. Upon termination (agreed with the employer) he received a severance payment, part of which was taxed at a rate of 98% under the relevant law, which applied retroactively.

Read the judgment HERE <http://hudoc.echr.coe.int/eng?i=001-121958>.

"32. ...The Court does not consider it necessary to rule on whether [Rule 2] applies in this case. The complexity of the factual and legal position prevents the impugned measure from being classified in a precise category. ...

33. ...the classification of a general measure taken in furtherance of a social policy of redistribution as a "control of use" of property rather than a "deprivation" of possessions is not decisive in so far as the principles governing the question of justification are substantially the same, requiring both a legitimate aim and the preservation of a fair balance between the aim served and the individual property rights in question.

34. ... The Court will examine the issue under the first paragraph P1-1, subject to the specific rule concerning the payment of taxes contained in Article 1 in fine.



56. ...the tax rate applied exceeds considerably the rate applicable to all other revenues, without determining in abstracto whether or not the tax burden was, quantitatively speaking, confiscatory in nature. ...

57. ...the applicant, who was entitled to severance pay according to his labour contract and whose acting in good faith has never been called into question, was subjected to the impugned measure notwithstanding the fact that the severance pay served the specific and recognised social goal of labour reintegration.

61. ...It affected the applicant being in good-faith standing and deprived him of the larger part of an acquired right (statutorily guaranteed to a large extent), serving the special social interest of labour-market reintegration. ... those who act in good faith on the basis of law or contracts should not be frustrated in their expectations without specific and compelling reasons. Therefore the measure cannot be held to be reasonably proportionate to the aim sought to be realised.

#### State control over the use of property

The third rule of Article P1-1 provides for the state's power to control the use of property, i.e. to impose restrictions on its use. Whereas these measures fall short of expropriation, they interfere with the owner's freedom to dispose of possessions as they deem fit. The interference must strike a fair balance between the individual's interests and those of the community, otherwise it constitutes a breach.

#### CHASSAGNOU v. FRANCE (1999)

**Facts:** The applicants were forced to grant access and hunting rights to third parties on their lands, without any compensation other than the right to hunt elsewhere. Since the applicants opposed hunting, the lack of monetary compensation rendered the interference disproportionate. The Court found against France.

Read the judgment [HERE](http://hudoc.echr.coe.int/eng?i=001-58288) <http://hudoc.echr.coe.int/eng?i=001-58288>.

The Court examined the measure (forcible transfer of hunting rights) and the applicable rule of P1-1;

"74. The Court notes that, although the applicants have not been deprived of their right to use their property, to lease it or to sell it, the compulsory transfer of the hunting rights over their land to an ACCA **prevents them from making use of the right to hunt, which is directly linked to the right of property, as they see fit.** In the present case the applicants do not wish to hunt on their land and object to the fact that others may come onto their land to hunt. However, although opposed to hunting on ethical grounds, **they are obliged to tolerate the presence of armed men and gun dogs on their land every year. This restriction on the free exercise of the right of use undoubtedly constitutes an interference with the applicants' enjoyment of their rights as the owners of property.** Accordingly, the second paragraph of Article 1 is applicable in the case."

### **The rights to derive profits from one's possession:**

#### **BITTÓ AND OTHERS v. SLOVAKIA (2014)**

**Facts:** Slovak law imposed on landlords the obligations to comply maximum levels of rent which were very low and limited their capacity to derive profits from renting their possessions to tenants.

**Read the judgment HERE** <http://hudoc.echr.coe.int/eng?i=002-9258>.

"101. ...the rent control-scheme amounts to an interference with the applicants' rights under Article 1 of Protocol 1 as it prevents, or has prevented, them from freely negotiating a level of rent for their flats and has made the termination of the lease of their flats conditional to providing the tenants with adequate alternative accommodation. That interference constitutes a means of state control of the use of property. The application should therefore be examined under the second paragraph of Article 1 of Protocol 1 ...

114. The Court accepts that the shortage of flats available for rent at an affordable level after the fall of the communist regime called for a reconciliation of the conflicting interests of landlords and tenants, especially in respect of flats which had been restored to the original owners....

115. Nevertheless, the legitimate interests of the community in such situations call for a fair distribution of the social and financial burden involved in the transformation and reform of the country's housing supply. This burden cannot be placed on one particular social group, however important the interests of the other group or the community as a whole...

116. The above considerations are sufficient for the Court to conclude that the Slovak authorities failed to strike the requisite fair balance between the general interests of the community and the protection of the applicants' right of property."

### **Control of use: fiscal measures**

Fiscal measures, as well as measures imposing sanctions or the payments of a fine are expressly contemplated by Rule 3, and are therefore equated to rules on control of use. State authorities enjoy a wide margin of discretion, but the measures can be reviewed if their application entails a disproportionate interference with the individuals' possessions.

### **Seizure and sale of possessions of third parties by tax authorities:**

#### **GASUS DOSIER- UND FÖRDERTECHNIK GmbH v. THE NETHERLANDS (1995)**

**Facts:** Dutch tax authorities seized an industrial piece of machinery found in possession of a company (a concrete-mixer) with a view to carry out a forcible sale, the proceeds of which would cover the company's tax liabilities. The mixer, however, still belonged to a German company (the applicant), because its price had not been paid in full yet by the Dutch company. The applicant objected to the seizure, unsuccessfully retroactively.

**Read the judgment HERE** <http://hudoc.echr.coe.int/eng?i=002-9622>.

"59. ... the most natural approach, in the Court's opinion, is to **examine Gasus's complaints under the head of "securing the payment of taxes", which comes under the rule in the second paragraph of Article 1 (P1-1)**. That paragraph explicitly reserves the right of Contracting States to pass such laws as they may deem necessary to secure the payment of taxes. The importance which the drafters of the Convention attached to this aspect of the second paragraph of Article 1 (P1-1) may be gauged from the fact that at a stage when the proposed text did not contain such explicit reference to taxes, it was already understood to reserve the states' power to pass whatever fiscal laws they considered desirable, provided always that measures in this field did not amount to arbitrary confiscation... Conferring upon a particular creditor the power to recover against goods which, although in fact in the debtor's possession, are legally owned by third parties is, in several legal systems, an accepted method of strengthening that creditor's position in enforcement proceedings.

70. ...Gasus could have eliminated their risk altogether by declining to extend credit to Atlas: they could have stipulated payment of the entire purchase price in advance or else refused to sell the concrete-mixer in the first place. It also accepts that the applicant company might have obtained additional security, for example in the form of insurance or a banker's guarantee, which pass the risk on to another party.

74. ...**the requirement of proportionality has been satisfied.**"

#### **Procedural safeguards: ROUSK v. SWEDEN (2013)**

**Facts:** Swedish authorities, to collect an enforceable tax debt, sold the applicant's home and then evicted him and his wife, without taking into account on-going proceedings relating to, among other things, an appeal against the writ of execution and a request for stay on sale of the property. The debt was minimal (approximately 800€) and he had been granted an extension for repayment on the day of the sale.

Read the judgment [HERE](http://hudoc.echr.coe.int/eng?i=001-123422) <http://hudoc.echr.coe.int/eng?i=001-123422>.

"124. ... The Court finds that [the] conduct on the part of **the Enforcement Authority showed a serious lack of diligence having regard to the very grave consequences that the sale** and later the eviction entailed for the applicant.

125. Furthermore, the Court observes that in accordance with [Swedish law] a measure for enforcement already taken shall lapse, if possible, if respite from payment has been granted. Since the Enforcement Authority was officially informed about the respite on 8 September 2003, less than one week after the sale of the property and over one month before the eviction took place, and knew that the applicant's enforceable debt then amounted to only SEK 6,721, the Court notes that **the Enforcement Authority could have repealed the sale, as could the domestic courts upon appeal by the applicant**. To the Court, both the decision to uphold the sale and the ensuing eviction of the applicant appear **excessive and disproportionate, especially since the applicant had other assets, such as a car, which could have been seized and sold to cover what little remained of his enforceable debts**. This is particularly so because the authorities knew that the proceedings concerning the writ of execution were still ongoing and thus had not yet gained legal force."

**The rate of taxes and charges: SVENSKA MANAGEMENTGRUPPEN AB v. SWEDEN (1985)**

**Facts:** Swedish authorities introduced a new profit-sharing tax and a new supplementary pension charge. The applicant challenged these measures as unjustifiable interferences of property rights.

Read the judgment HERE <http://hudoc.echr.coe.int/eng?i=001-72454>.

"The circumstances of the present case show that the applicant is bound to pay a new tax which amounts to a certain percentage of its profits. Furthermore it has been established that the applicant must pay an increase in social pension charges amounting to 0.2 - 0.5 per cent. **The Commission cannot find that these obligations affect the applicant's guarantee of ownership or interfere with its financial situation to such an extent that this could be considered disproportionate** or an abuse of the Contracting Party's right under Article 1 of Protocol 1 (P1-1).

It may be true that the aim of these transactions includes the creation of a different policy in the economic field. However, **although opinions evidently differ as to the fairness of such policy the Commission considers that it was one which the Government were entitled to pursue.** Accordingly, the legislation concerning the employee investment funds did not infringe the applicant's rights under Article 1 of Protocol 1 (P1-1)."

**Control of use: fiscal measures**

**Taxes that are tantamount to confiscation:**

**R.Sz. v. HUNGARY(2013)**

**Facts:** The applicant had been employed in a state-owned company for eleven years. Upon termination (agreed with the employer) he received a severance payment, part of which was taxed at a rate of 98% under the relevant law, which applied retroactively.

Read the judgment HERE <http://hudoc.echr.coe.int/eng?i=001-121958>.

"32. ...The Court does not consider it necessary to rule on whether [Rule 2] applies in this case. The complexity of the factual and legal position prevents the impugned measure from being classified in a precise category. ...

33. ...the classification of a general measure taken in furtherance of a social policy of redistribution as a "control of use" of property rather than a "deprivation" of possessions is not decisive in so far as the principles governing the question of justification are substantially the same, requiring both a legitimate aim and the preservation of a fair balance between the aim served and the individual property rights in question.

34. ... The Court will examine the issue under the first paragraph P1-1, subject to the specific rule concerning the payment of taxes contained in Article 1 in fine.

56. ...the tax rate applied exceeds considerably the rate applicable to all other revenues, without determining in abstracto whether or not the tax burden was, quantitatively speaking, confiscatory in nature. ...

57. ...the applicant, who was entitled to severance pay according to his labour contract and whose acting in good faith has never been called into question, was subjected to the impugned measure notwithstanding the fact that the severance pay served the specific and recognised social goal of labour reintegration.

61. ...It affected the applicant being in good-faith standing and deprived him of the larger part of an acquired right (statutorily guaranteed to a large extent), serving the special social interest of labour-market reintegration. ... those who act in good faith on the basis of law or contracts should not be frustrated in their expectations without specific and compelling reasons. Therefore the measure cannot be held to be reasonably proportionate to the aim sought to be realised.

### **Peaceful enjoyment of possessions**

The first rule is often said to be of a general nature and includes all situations which interfere with the individual's property rights, but do not constitute deprivation of property or a measure of control of use.

After ascertaining that there has been an interference with the right to property which does not amount to a deprivation of property or can not be considered as a control of use, the Court examines it in the light of the first sentence of Article 1 of Protocol 1 to the ECHR.

#### MATCZYŃSKI v. POLAND (2015)

**Facts:** The applicant was banned from developing his property by virtue of the local development plan which was in force when he acquired the plots and, subsequently, by the plans of 1994 and 2006, according to which no construction of any buildings on the applicant's property was allowed. At the time when there was no local land development plan, the refusals to develop the applicant's property were based on the relevant provisions of the Act of 16 April 2004 on Conservation of Nature.

Read the judgment [HERE](http://hudoc.echr.coe.int/eng?i=001-159196t) <http://hudoc.echr.coe.int/eng?i=001-159196t>.

"96. The Court notes that the adoption of the local land development plans and the inclusion of the applicant's property into the area of the Wigry National Park did not deprive the applicant of his possessions but subjected the use of those possessions to certain restrictions.

The inability to develop his or her own property constitutes a limitation of the rights normally enjoyed by a property owner. The Court is therefore of the view that there was interference with the peaceful enjoyment of the applicant's possessions. The measures complained of did not amount to expropriation. Likewise, they cannot be regarded as a control of the use of property. Accordingly, the interference falls to be examined under the first sentence of Article 1 of Protocol 1".

LOIZIDOU V. TURKEY (1996)

**Facts:** The applicant was a Greek Cypriot who claimed a violation of Article 1 of Protocol 1 in relation to a house she owned and had been forced to leave behind in northern Cyprus after the Turkish occupation of that part of the island in 1974. She alleged that she had been continuously prevented from having access to her property by the Turkish forces.

Read the judgment HERE <http://hudoc.echr.coe.int/eng?i=001-58007>.

*"62. With respect to the question whether Article 1 (P1-1) is violated, the Court first recalls its finding that the applicant, for purposes of this Article (P1-1), must be regarded to have remained the legal owner of the land.*

*63. However, as a consequence of the fact that the applicant has been refused access to the land since 1974, she has effectively lost all control over, as well as all possibilities to use and enjoy, her property. The continuous denial of access must therefore be regarded as an interference with her rights under Article 1 of Protocol 1 (P1-1). Such an interference cannot, in the exceptional circumstances of the present case to which the applicant and the Cypriot Government have referred, be regarded as either a deprivation of property or a control of use within the meaning of the first and second paragraphs of Article 1 of Protocol 1 (P1-1-1, P1-1-2). However, it clearly falls within the meaning of the first sentence of that provision (P1-1) as an interference with the peaceful enjoyment of possessions. In this respect the Court observes that hindrance can amount to a violation of the Convention just like a legal impediment.*

SARGSYAN v. AZERBAIJAN(2015)

**Facts:** The applicant, an ethnic Armenian, had lived in Gulistan in the Shahumyan region of the Azerbaijan Soviet Socialist Republic for most of his life until his forced displacement in 1992. He claims to have had a house and outhouses there. The applicant was displaced as a result of an armed conflict.

Read the judgment HERE <http://hudoc.echr.coe.int/eng?i=002-10620>.

*"218. The Court notes that the parties did not comment on the rule applicable to the case. It reiterates its finding that the applicant was not deprived of his rights in respect of the house and land in Gulistan. It follows that the case does not involve a deprivation of property within the meaning of the second sentence of the first paragraph of Article 1 of Protocol 1. Nor has it been claimed that the situation complained of was the result of any measures aimed at the control of the use of property. The Court therefore considers that the situation of which the applicant complains falls to be examined under the first sentence of the first paragraph, as it concerns a restriction of the applicant's right to the peaceful enjoyment of his possessions".*

BRONIOWSKI V. POLAND (2004)

**Facts:** The applicant's submission under Article 1 of Protocol 1 is that the Polish state, which initially granted an entitlement to compensatory property, subsequently made it impossible for him by obstruction and inaction, both legislative and administrative, and by extra-legal practices to benefit from that entitlement and that, ultimately, by virtue of the recent legislation, it extinguished his legal interest.

Read the judgment HERE <http://hudoc.echr.coe.int/eng?i=002-4356>.

*"136. Having regard to the complexity of the legal and factual issues involved in the present case, the Court considers that the alleged violation of the right of property cannot be classified in a precise category. In any event, the situation mentioned in the second sentence of the first paragraph is only a particular instance of interference with the right to peaceful enjoyment of property as guaranteed by the general rule laid down in the first sentence. The case should therefore more appropriately be examined in the light of that general rule."*

SAFARYAN v. ARMENIA (2016)

**Facts:** The applicant was prevented from dividing her property and transferring title to the relevant parts of it to her four children. Applicant's request had been refused because her property was situated in an expropriation zone and included unauthorized constructions.

Read the judgment HERE <http://hudoc.echr.coe.int/eng?i=001-160089>.

*"47. As to the nature of the interference, the Court notes that there was no deprivation of property in the present case but rather, as a result of the refusal of the authorities to formalise the transaction of donating her property to her children, the applicant's right to make use of her property freely was restricted. The interference did not amount to control of the use of property either since it did not pursue such an aim. The Court considers therefore that the applicant's complaint falls to be dealt with under the first sentence of the first paragraph of Article 1 of Protocol 1"*

VIJATOVIĆ v. CROATIA (2016)

**Facts:** The applicant was a holder of specially protected tenancies of state-owned flats. He had the right to purchase under favourable conditions the flat she occupied, such right having been granted to persons in her position in 1995 by the state authorities. Domestic courts denied the applicant the right to purchase that flat on the ground that the applicant had lodged her purchase request outside the accepted time-limit.

Read the judgment HERE <http://hudoc.echr.coe.int/eng?i=001-160629>.

*"44. Having concluded that the applicant's claim to purchase the flat she occupied amounted to a "possession" within the meaning of Article 1 of Protocol 1, the Court considers that the decisions of the domestic courts denying the applicant the right to purchase that flat amounted to an interference with her right to peaceful enjoyment of her possessions.*

*45. The Court considers that the situation complained of should be examined in the light of the general rule contained in the first paragraph, first sentence, of Article 1 of Protocol 1. In order to be compatible with the general rule of Article 1 of Protocol 1, any interference must be in accordance with the law, in the public interest, and proportionate to the aim pursued."*

## **2.2 THE STRUCTURE OF THE ARTICLE 1 OF PROTOCOL NO. 1**

### **CONTENT AND OBJECTIVES**

The European Court of Human Rights analyses interference with property rights in accordance to three rules established in Article 1 of Protocol No. 1 of the European Convention on Human Rights (ECHR).

Learning objective of this chapter:

- Improved knowledge on how to identify compliance and breaches of property rights;
- Strengthened capacity to adjudicate property rights cases in compliance with the ECHR standards and effectively raise allegations related to property rights breaches.

### **DEPRIVATION OF PROPERTY (SECOND RULE)**

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions", Article 1 of Protocol No. 1, ECHR

The essence of deprivation of property is the formal or/and *de facto* extinction of legal rights of the owners.

The European Court of Human Rights found violation of Article 1 of Protocol No. 1 involving deprivation of property rights in some cases against Albania:

In case *Vrioni and others v. Albania* (2009), the applicant obtained a final judgment awarding him a title of property. This judgment was never enforced and quashed in supervisory review proceedings. The Court found that a notion of possession includes existing possessions, assets or claims. The fact that the judgment was not enforced deprived the applicant of the possibility to enforce his ownership title and breached the principle of legal certainty. This deprivation of property was found in violation of Article 1 of Protocol No. 1 of the Convention.



In case *Marini v. Albania* (2007), the applicant held 50% stake in a company. The second 50% stake belonged to the State. Following repeated actions of the State, the applicant progressively lost decision-making power in the company. There were also changes in the applicant's powers exercised as a stakeholder, his ability to run the company, control its assets and receive its profits. Considering the nature of the applicant's possessions and the circumstances of the case, the Court did not conclude deprivation of property, but only a violation of peaceful enjoyment of possessions.

### **CONTROL OF THE USE OF PROPERTY (THIRD RULE)**

"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", Article 1 of Protocol No. 1, ECHR

The control of the use of the property is a measure taken by the State to control the use of property in the general interest or to secure the payment of taxes or other contributions or penalties.

The inconsistency of national case law can result in violations of Article 1 of Protocol No. 1, as was the case in the judgments on the legal conformity of construction permits delivered by administrative organ (*Mullai and Others v. Albania* (2010)). In this case, the Court concluded: "there was no formal expropriation of the property in question, that is to say a transfer of ownership. Nor can it be said that there was a *de facto* deprivation. The impugned measures imposed limitations on the individual applicants' and the applicant company's enjoyment of their proprietary interests" (§110). The Court found that "the interference must be considered as a control of the use of the applicants' property falling within the scope of the second paragraph of Article 1 of Protocol No. 1" (§111).

### **PEACEFUL ENJOYMENT OF POSSESSION (FIRST RULE)**

"The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties", Article 1 of Protocol No. 1, ECHR

The peaceful enjoyment of possession is a general rule including all situations, which interfere with the individual's property rights, but does not constitute deprivation of property or control of the use of property.

In cases *Ramadhi and Others v. Albania* (2007) and *Driza v. Albania* (2007), the ECtHR found that the authorities' failure over a number of years to enforce the judgments and/or decisions in the applicants' favour amounted to an interference with their right to the peaceful enjoyment of their possessions for which the Government had not produced any satisfactory explanation. A lack of funds could not justify a failure to enforce a final and binding judgment debt owed by the State. The ECtHR concluded violation of Article 1 of Protocol No. 1 of the Convention.

## Examples of deprivation of property and right to compensation in the case law of national courts of Albania:

The Joint College of the High Court, on its decision no 6/2007 has interpreted that the right to compensation according to the legislation on restitution and compensation of the property, although it is a credit right, it has the origin and the basis on the property right over the land which is not returned to the former owners only because by the law it is considered as occupied.

([http://www.gjykataelarte.gov.al/web/Vendime\\_Unifikuese\\_39\\_1.php](http://www.gjykataelarte.gov.al/web/Vendime_Unifikuese_39_1.php))

In decision No. 23/2002, the Joint College of the High Court interpreted that the law on restitution and compensation of property does not constitute a new manner of acquiring ownership of the land, but is considered a correction of the injustice, and, for that purpose, *ipso lege* it has abrogated all the previous legal acts, by which the property was unjustly taken to the owners. The law does not create a new situation (i.e. does not have a constitutive effect), but it reestablishes the legitimacy and justice.

([http://www.gjykataelarte.gov.al/web/Vendime\\_Unifikuese\\_39\\_1.php](http://www.gjykataelarte.gov.al/web/Vendime_Unifikuese_39_1.php))

## QUESTIONS

**Q1** The Court stated that Article 1 of Protocol 1 contains;

**Select your response(s) below.**

1. Three distinct rules: The first rule enounces the principle of peaceful enjoyment of property, the second rule covers deprivation of possessions, and the third rule recognises that the states are entitled, amongst other things, to control the use of property.
2. Two distinct rules: The first rule enounces the principle of peaceful enjoyment of property and the second rule covers deprivation of possessions.
3. Two distinct rules: The first rule enounces the principle of peaceful enjoyment of property, and the second rule rule recognises that the states are entitled, amongst other things, to control the use of property.

**Q2** The Court must determine, before considering whether the last rule was complied with, whether the first two are applicable. **Select your response(s) below.**

True

False

**Q3** De facto deprivation of property means that the owner is not formally expropriated, but that his ability to exercise property rights is limited in such a grave way that he factually does not have ownership anymore. **Select your response(s).**

True

False

**Q4** Formal deprivation means that...

**Select your response(s) below.**

1. The owner is by an official act or measure stripped of his property rights.
2. The owner's ability to exercise property rights is limited.
3. The owner's ability to use the property is limited.
4. The owner lost all ability to dispose of the property

**Q5** The compulsory transfer of property from one individual to another may not constitute a legitimate means for promoting the public interest. **Select your response(s) below.**

True

False

**Q6** The government granted the City Council permits to expropriate the applicants property during a period of 5 years, regardless of actual expropriations taking place or not. During this period which was further extended for 20 years, construction or alteration of the properties were prohibited. Under which rule should the interference be examined?

**Select your response(s) below.**

1. The interference must be examined under the second paragraph of P1-1, because prohibitions on construction clearly amounted to a control of "the use of the property.
2. The interference must be examined under the second sentence of the first paragraph of P1-1, because that situation amounted to a de facto expropriation
3. The interference must be examined under the first sentence of the first paragraph of P1-1, because it does not fall within the ambit of the abovementioned paragraphs.

**Q7** Tenants in Slovenia complained that, in the framework of the country's move to a market economy, their special tenancy rights were affected (for instance, they had to pay higher rents, or leave houses returned to the previous owners). However, because their rights have not been removed, the applicants cannot claim a violation of P1-1.

**Select your response(s) below.**

True

False

**Q8** Select the true statement or statements.

**Select your response(s) below.**

1. A national rule imposing a cap on rents falls under P1-1.
2. Every measure that affects the value of a possession constitutes a de facto deprivation of property under Rule 2 of P1-1.
3. Even if it is not an express requirement of P1-1, expropriation measures must be necessary and proportionate.

4. Whether a fiscal measure is considered to fall under Rule 2 (expropriation) or Rule 3 (control of use, fiscal measure), it will have to comply with the 'fair balance' requirement.

**Q9** Rule 2 and Rule 3 are, ultimately, specific instances of Rule 1, because they concern particular instances of state interferences which can affect the individual's right to enjoy possessions peacefully.

**Select your response(s) below.**

True

False

## ANSWER KEY

- Q1** 1. That's not right  
2. That's right  
3. That's not right

**Feedback** In SPORRONG AND LÖNNROTH V. SWEDEN (1982) case, the Court stated that Article 1 of Protocol 1 contains "three distinct rules": "61. ...The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence in the same paragraph. The Third rule recognises that the states are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph"

**Q2** Feedback for True

### That's Not Right

The Court must determine, before considering whether the first rule was complied with, whether the last two are applicable.

(SPORRONG AND LÖNNROTH V. SWEDEN (1982), judgment, Application no. 7151/75; 7152/75, par. 61).

Feedback for False

### That's Right.

The Court must determine, before considering whether the first rule was complied with, whether the last two are applicable.

(SPORRONG AND LÖNNROTH V. SWEDEN (1982), judgment, Application no. 7151/75; 7152/75, par. 61).

**Q3** Feedback for True

### That's Not Right

In the SPORRONG AND LÖNNROTH V. SWEDEN (1982) case, the Court stated that

" 63. In the absence of a formal expropriation, that is to say a transfer of ownership, the Court considers that it must look behind the appearances and investigate the realities of the situation complained of. Since the Convention is intended to guarantee rights that are "practical and effective", it has to be ascertained whether that situation amounted to a de facto expropriation, as was argued by the applicants".

Feedback for False

In the **SPORRONG AND LÖNNROTH V. SWEDEN (1982)** case, the Court stated that

**That's right.**

"63. In the absence of a formal expropriation, that is to say a transfer of ownership, the Court considers that it must look behind the appearances and investigate the realities of the situation complained of. Since the Convention is intended to guarantee rights that are "practical and effective", it has to be ascertained whether that situation amounted to a de facto expropriation, as was argued by the applicants"

**Q4** 1. That's not right.

2. That's right.

3. That's not right.

4. That's not right.

**Feedback**

In **BISTROVIC v.CROATIA** (2007), for instance, the Court held that "in the present case that the applicants had been deprived of their property in accordance with the provisions of the Expropriation Act with a view of building a motorway, and that the expropriation thus pursued a lawful aim in the public interest. Accordingly, it is the second sentence of the first paragraph of Article 1 of Protocol No. 1 which is applicable in the instant case (see, among other authorities, the judgments in *Mellacher and Others v. Austria*, 19 December 1989, Series A no. 169, pp. 24-25, § 42 and *Papachelas v. Greece* [GC], no. 31423/96, § 45, ECHR 1999- II)." (§32).

**Q5** Feedback for True

That's not Right

In **JAMES AND OTHERS V. UK** (1986) case, the Court noted that

"40. ... the compulsory transfer of property from one individual to another may, depending upon the circumstances, constitute a legitimate means for promoting the public interest.

41. ...In particular, the fairness of a system of law governing the contractual or property rights of private parties is a matter of public concern and therefore legislative measures intended to bring about such fairness are capable of being "in the public interest", even if they involve the compulsory transfer of property from one individual to another

Feedback for False

That's right

In JAMES AND OTHERS V. UK (1986) case, the Court noted that

"40. ... the compulsory transfer of property from one individual to another may, depending upon the circumstances, constitute a legitimate means for promoting the public interest.

41. ...In particular, the fairness of a system of law governing the contractual or property rights of private parties is a matter of public concern and therefore legislative measures intended to bring about such fairness are capable of being "in the public interest", even if they involve the compulsory transfer of property from one individual to another."

**Q6** 1. That's not Right

2. That's right

3. That's not right

**Feedback** In SPORRONG AND LÖNNROTH V. SWEDEN (1982) case the Court held that «62. It should be recalled first of all that the Swedish authorities did not proceed to an expropriation of the applicants' properties. The applicants were therefore not formally.

"deprived of their possessions" at any time: they were entitled to use, sell, devise, donate or mortgage their properties

.... However, although the right in question lost some of its substance, it did not disappear. The effects of the measures involved are not such that they can be assimilated to a deprivation of possessions. ....There was therefore no room for the application of the second sentence of the first paragraph in the present case.

64. The prohibitions on construction clearly amounted to a control of "the use of [the applicants'] property", within the meaning of the second paragraph".

65. On the other hand, the expropriation permits were not intended to limit or control such use. Since they were an initial step in a procedure leading to deprivation of possessions, they did not fall within the ambit of the second paragraph. They must be examined under the first sentence of the first paragraph.»

**Q7** Feedback for True

That's not Right

The Slovenian measures can be reviewed under Rule 3, relating to the state's right to enforce the necessary measures to control the use of property.

A case in point is BERGER-KRALL AND OTHERS v. SLOVENIA (2014), see in particular the paragraphs 181-184.

Feedback for False

That's Right

The Slovenian measures can be reviewed under Rule 3, relating to the state's right to enforce the necessary measures to control the use of property

A case in point is BERGER-KRALL AND OTHERS v. SLOVENIA (2014), see in particular the paragraphs 181-184

**Q8.** Feedback 1. Correct

2. No, to qualify as de facto deprivation of property a measure must affect the value or the availability of the possession in such grave way that the individual is virtually deprived of it.

3. Correct

4. Correct

**Q9** Feedback for true

**That's not Right**

Rule 2 and Rule 3 are, ultimately, specific instances of Rule 1

Feedback for False

**That's Right**

Rule 2 and Rule 3 are, ultimately, specific instances of Rule 1



## CHAPTER 3

### 3.1 PERMISSIBLE RESTRICTIONS AND PROPORTIONALITY

#### A. When are interferences permissible?

##### ANASTASIA'S MISADVENTURE

1. Anastasia lives in Hungary. Due to a physical disability, her capacity to work was reduced by 67%, according to a check performed by the authorities in 2001.

She received thereafter a disability allowance.

2. Due to a change in the law governing the calculation of disability, her loss of work capacity was reduced to 40% on 1<sup>st</sup> December 2009. Her health status remained unchanged.
3. As a consequence, Anastasia lost her disability allowance as of 1<sup>st</sup> January 2010. Anastasia's challenges of the withdrawal of her benefit proved unsuccessful in domestic courts. She subsequently received a 50% disability assessment, in principle sufficient to receive a benefit, but the new regime required a minimum period of social cover that Anastasia could not meet.

**Can Anastasia challenge Hungary's measures revoking her benefit? Are these measures justifiable under P1-1?**

#### **Justifiable restrictions of the right to property**

The right to property protected under P1-1 is not absolute in nature. As seen in Chapters X and Y, interferences with the right to property can be justified, if they satisfy certain conditions.

The purpose of this chapter is to explore these conditions, using the case-law of the Court as a support.

#### **The limitation of property rights**

Irrespective of which Rule or Rules apply, the Court will exercise a balancing test between the gravity of the restriction and competing public interests.

The interest of finding a balanced interaction between competing interests informs the whole Convention and is reflected in the structure of P1-1.

Read carefully [the text of P1-1](#) and note the qualifying language pointing to the application of a right that is subject to limitations.

## Protection of property

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

The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

## The margin of appreciation

In matters of balancing, the state might enjoy some latitude to adopt the measure that best conforms to its policies. The ECtHR operates as a **subsidiary organ** that does not replace state authorities but review their acts for compliance with the minimum standards of the Convention.

As a result, especially when there is no consensus across the Parties of the Council of Europe with respect to a specific right, **states might be afforded a certain margin of appreciation** with respect to their policies.

In this chapter, the operation of the margin of appreciation (**MoA**) will be signalled by this picture (**yellow traffic light**)

Think of Anastasia's case: Hungarian authorities are best positioned to determine access to state-issued benefits.

Read how the Court described this doctrine in the landmark case of *James and others v UK*, which in turn relied on the seminal *Handyside* judgment (both P1-1 cases)

### JAMES AND OTHERS v. UK(1986)

Facts: Under UK legislation, long leasehold tenants could acquire the property of the houses without the consent of the landlords, who submitted an application to the Court. The Court found in favour of the UK, holding that the measures fell within its margin of appreciation.

"46. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is "in the public interest". Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment both of the existence of a problem of public concern warranting measures of deprivation of property and of the remedial action to be taken (see, mutatis mutandis, the Handyside judgment of 7 December 1976, Series A no. 24, p. 22, para. 48). Here, as in other fields to which the safeguards of the Convention extend, the national authorities accordingly enjoy a certain margin of appreciation.

Furthermore, the notion of "public interest" is necessarily extensive. In particular, as the Commission noted, the decision to enact laws expropriating property will commonly

involve consideration of political, economic and social issues on which opinions within a democratic society may reasonably differ widely. The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is "in the public interest" unless that judgment be manifestly without reasonable foundation. In other words, although the Court cannot substitute its own assessment for that of the national authorities, it is bound to review the contested measures under Article 1 of Protocol 1 (P1-1) and, in so doing, to make an inquiry into the facts with reference to which the national authorities acted."

### **How balancing operates for each Rule**

Press the buttons below to find out more about how balancing operates for each of the three rules.

**Choose the first chapter to begin and then review each section in turn.**

#### **Rule 1 (peaceful enjoyment)**

SPORRONG AND LONNROTH v. SWEDEN(1982)

Facts: the applicants' properties were subject to expropriation permits and construction limitations which affected their value. They received no compensation from the state. The Court found against Sweden.

"69. The fact that the permits fell within the ambit neither of the second sentence of the first paragraph nor of the second paragraph does not mean that the interference with the said right violated the rule contained in the first sentence of the first paragraph.

For the purposes of the latter provision, the Court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights ... **The search for this balance is inherent in the whole of the Convention and is also reflected in the structure of Article 1 (P1-1).**"

#### **Rule 2 (deprivation)**

HOLY MONASTERIES v. GREECE(1994)

Facts: the Greek state expropriated the property of the monasteries. The Court found a breach when the transfer had not been agreed by the monastery.

"70. An interference with peaceful enjoyment of possessions must strike a "fair balance" between the demands of the general interests of the community and the requirements of the protection of the individual's fundamental rights ... The concern to achieve this balance is reflected in the structure of Article 1 (P1-1) as a whole ..., including therefore the second sentence, which is to be read in the light of the general principle enunciated in the first sentence ... In particular, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure depriving a person of his possessions ....

71. 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 and a total lack of compensation can be considered justifiable under Article 1 (P1-1) only in exceptional circumstances. Article 1 (P1-1) does not, however, guarantee a right to full compensation in all circumstances, since legitimate objectives of "public interest" may call for less than reimbursement of the full market value."

### **Rule 3 (control of use)**

#### **SCOLLO V. ITALY(1995)**

Facts: the applicant owned a flat, and tried unsuccessfully to evict the tenant for twelve years. Italian authorities did not assist him to recover the flat. The Court found against Italy.

"32. As the Court stressed in the Mellacher and Others judgment previously cited (p. 27, para. 48), the second paragraph of Article 1 of Protocol 1 (P1-1) must be construed in the light of the principle laid down in the first sentence of the Article (P1-1).

Consequently, an interference must strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights ... The concern to achieve this balance is reflected in the structure of Article 1 (P1-1) as a whole ..., and therefore also in its second paragraph (P1-1). There must be a reasonable relationship of proportionality between the means employed and the aim pursued ...."

### **Anastasia's only hope: challenge the balance of the Hungarian measures**

Whether the Hungarian measures denying Anastasia's benefit amount to de facto deprivation (Rule 2), control of the use of (and access to) property (Rule 3) or simply hinder the peaceful enjoyment of her property (Rule 1), the critical matter is whether they are justified and respect the balance of interests sanctioned by the Convention and enshrined in P1-1

### **What are the applicable criteria to justify a restriction?**

**Essentially, state-imposed restrictions on the right to property will be justified if they satisfy three criteria.**

The restriction must be **lawful** (prescribed by the law and respectful of rule of law standards)

The restriction must pursue a **public or general interest**

The restriction must be **proportionate** to the aim pursued (necessary in a democratic society)

### **The justification criteria for P1-1 interferences**

#### **BÉLÁNÉ NAGY v. HUNGARY(2016)**

Facts: after a change in the law, the applicant lost the disability pension. Although a test demonstrated that she met the required disability level, a new requirement, relating to her contributions, payments barred her from receiving the allowance. The Court found in her favour.

"112. An essential condition for an interference ... to be deemed compatible with [P1-1] is that it **it should be lawful**.

113. Moreover, any interference by a public authority with the peaceful enjoyment of possessions can only be justified if **it serves a legitimate public (or general) interest**. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to decide what is "in the public interest". Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment as to the existence of a problem of public concern warranting measures interfering with the peaceful enjoyment of possessions ....

115. In addition, [P1-1] also requires that any interference **be reasonably proportionate to the aim sought to be realised** .... The requisite fair balance will not be struck where the person concerned bears an individual and excessive burden ..."

#### **How do these conditions interact with each other?**

These three conditions determine the interference's compliance with P1-1. The last one (necessity) entails a value judgment, and its purpose is to ascertain whether the restriction is proportionate (or, which is the same, to make sure that it does not impose an excessive burden on the individual). **Should only one of them not be met, there will have been a violation of the Convention.**

For instance, if a restriction fails to meet the test of *lawfulness*, the finding of breach is determined even without looking at its *proportionality*.

#### **Read the extract from *Iatridis v. Greece* below.**

##### **IATRIDIS v. GREECE (1999)**

Facts: Greek authorities evicted the applicant from the land he had leased legally for several years, on which he operated an open-air cinema. The Court found in the applicant's favour.

"95 ... 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."

#### **Preliminary question: is there an interference at all?**

Of course, the first step is to determine that an interference exists at all. There is no interference when there is no protected possession (see chapter 1), for instance because a licence has expired or was withdrawn under the conditions set by the law.

Likewise, there is no interference when the value of the possession is trivial.

*If you want to learn more on this, you can review the HELP course on admissibility criteria.*

### **Straightforward breaches**

At times, the factual matrix of the case might lead to a straightforward finding of breach, without the need to check the various conditions to justify the restriction. For instance, a clear and unmitigated restriction of property, unaccompanied by a putative justification offered by the State, would directly qualify as breach without further analysis:

**Read the extract from *Sirbu and Others v. Moldova* below.**

#### SIRBU AND OTHERS v. MOLDOVA(2004)

Facts: some public officers were due a salary increase for two years. Even after a court order, the state did not pay. The Court found in the applicants' favour.

"32. By failing to comply with the judgments of the Centru District Court the national authorities **prevented the applicants** from having their compensation paid and **from enjoying the possession of their money**. The Government **have not advanced any justification** for this interference and the Court considers that lack of funds cannot justify such an omission (...)

33. **There has accordingly been a violation** of Article 1 of Protocol 1 to the Convention."

### **Lawfulness**

The requirement of lawfulness is explicitly mentioned only in the first paragraph of P1-1 (and, implicitly, in the second paragraph's reference to "laws" controlling the use of property). However, it is inherent in the whole ECHR, and applies to all restrictions .:

**Read the extract from *Sirbu and Others v. Moldova* below.**

#### VISTINS AND PEREPJOLKINS v. LATVIA(2012)

Facts: the state nationalised the applicants' land for public use, awarding them nominal compensation. The Court found against Latvia, for failing to strike the right balance.

"95. ... Article 1 of Protocol 1 requires that any interference by a public authority with the peaceful enjoyment of possessions should be lawful: the second sentence of the first paragraph of that Article authorises the deprivation of possessions "subject to the conditions provided for by law". Moreover, the rule of law, one of the fundamental principles of a democratic society, is a notion inherent in all the Articles of the Convention."

## What is “lawfulness”?

Like the notion of “possession” (see **“Legal Framework and Scope”** ), the notion of “law” does not depend on formalistic distinctions set domestically.

The requirement of lawfulness is inspired by the principles of legal certainty and fairness, so it must respond to a pragmatic construction.

An interference is prescribed by law if it is provided for in a (sub)statutory or constitutional source, an International instrument to which the state is a party, including EU law. Importantly, the Court has declared that case-law can be a valid legal basis under national law for the purpose of determining the lawfulness of restrictions

(see SPACEK S.R.O. v. CZECH REPUBLIC (1999), §54).

### **Review of lawfulness and Margin of Appreciation**

Court looks at the ‘quality’ of domestic law rather than its content. The subsidiary role of the Court, reflected in the doctrine of the margin of appreciation, results in a very deferent review of *how* domestic law is interpreted and applied.

### VISTINS AND PEREPJOLKINS v. LATVIA(2012)

“98. ...the national authorities are in principle better placed than an international court to evaluate local needs and conditions. In matters of general social and economic policy, on which opinions within a democratic society may reasonably differ widely, the domestic policy-maker should be afforded a particularly broad margin of appreciation ... This also holds true in respect of urban and regional planning policies.”

Even if the Court does normally refrain from second-guessing national authorities’ application of domestic law, it will review its conformity with the Convention.

### BEYELER v. ITALY(2000)

Facts: Italy exercised the right of pre-emption and bought at a low price a Van Gogh painting that the applicant was trying to sell. The Court found a breach, mainly because Italy failed to adjust the compensation to the current value of the painting.

“110. The Court is, nonetheless, required to verify that the manner in which domestic law is interpreted and applied – even where the requirements have been complied with – does not entail consequences at variance with the Convention standards. From that stance, the element of uncertainty in the statute and the considerable latitude it affords the authorities are material considerations to be taken into account in determining whether the measure complained of struck a fair balance.”

**Think of Anastasia’s case: even without objecting to the content of the Hungarian measures, certain aspects of their application might warrant scrutiny.**

### **The standards of lawfulness – the Rule of Law**

The Court has developed the principle of lawfulness of restrictions in its case-law, and has broken it down into distinct parameters, each deriving from the general principle of the rule of law.

The Court referred to this principle by using the concept of the “quality of Law” (see JAMES v. UK). Law is *really* law only if it has certain qualities, which guarantee its conformity with the standards commonly associated with the rule of law. **Among them, the Court most often refers to the headings listed below. ‘Protection from Arbitrariness’ explores the issues further.**

### **Protection from Arbitrariness**

The primary safeguard of the rule of law is the protection against arbitrary measures. A mere existence of a domestic legal basis connected to the restriction cannot suffice to prove the latter’s lawfulness. To be really “law”, the domestic source cannot result in arbitrary interferences.

#### VISTINS AND PEREPJOLKINS v. LATVIA(2012)

“66. However, the existence of a legal basis in domestic law does not suffice, in itself, to satisfy the principle of lawfulness. In addition, the legal basis must have a certain quality, namely it must be compatible with the rule of law and must provide guarantees against arbitrariness. In this connection it should be pointed out that when speaking of “law”, Article 1 of Protocol 1 alludes to the very same concept as that to which the Convention refers elsewhere when using that term ...”

### **Protection from arbitrariness through proceedings**

Another commonplace in the Court’s case-law is the finding that all state-made interference(s) can be challenged in fair and accessible proceedings.

#### BRUNCRONA v. FINLAND(2004)

Facts: the applicants failed to have their property rights over land established judicially. The courts instead upheld the state property on the same land, considering the lease of the applicants terminated. The Court found against Finland.

“69. Although Article 1 of Protocol 1 contains no explicit procedural requirements, the proceedings at issue must also afford the individual a reasonable opportunity of putting his or her case to the responsible authorities for the purpose of effectively challenging the measures interfering with the rights guaranteed by this provision. In ascertaining whether this condition has been satisfied, a comprehensive view must be taken of the applicable procedures ....”

### **Protection from arbitrariness through procedural safeguards**

The domestic law that provides for the restriction, moreover, must come with the additional procedural safeguards that reflect the delicate balance that should inform all state-imposed restrictions of fundamental rights (see SANOMA UITGEVERS BV v. THE NETHERLANDS (2010), § 88)

#### KUSHOGLU v. BULGARIA (2007)



Facts: the applicants sought in courts to have a contract declared null and void, in order to recover property sold under necessity. The courts rejected their claims, without providing a clear reason. The Court found against Bulgaria.

"52. ... According to the Court's established case-law reflecting a principle linked to the rule of law and, therefore, to the requirement of lawfulness, judgments of courts and tribunals should adequately state the reasons on which they are based, although that does not mean that a detailed answer to every argument is required (see, mutatis mutandis, *Suominen v. Finland*, no. 37801/97, § 36, 1 July 2003 and *Hirvisaari v. Finland*, no. 49684/99, § 30, 27 September 2001)."

### **Accessibility, precision and foreseeability**

Regardless of its content, domestic law that interferes with property rights must be clear and available for everyone to consult with ease. The Court has elaborated on these fundamental aspects of the rule of law and has formulated the criteria of accessibility, precision and foreseeability.

#### **GUIISO-GALLISAY v. ITALY(2005)**

Facts: Italy expropriated the applicants' land without a formal procedure, and provided only partial compensation. The Court found against Italy.

"82. ... the legal norms upon which the deprivation of property is based should be sufficiently accessible, precise and foreseeable in their application. ...

83. ... The Court remains convinced that the existence as such of a legal basis is not sufficient to satisfy the principle of lawfulness and considers it useful to examine the issue of the quality of the law."

### **RECAP**

Restrictions must be prescribed by some legal source that respects rule of law standards. This is the primary condition for a justifiable interference. See how the Court applies it.

#### **CENTRO EUROPA 7 S.R.L. AND DI STEFANO v. ITALY(2012)**

**Facts: Italian authorities failed for several years to allocate the due frequencies to a broadcasting companies, and provided it with insufficient compensation. The Court found against Italy.**

"155. The Court further notes that the authorities did not observe the deadlines set in the licence, as resulting from Law no. 249/1997 and the judgments of the Constitutional Court, thereby frustrating the applicant company's expectations. The Government have not shown that the applicant company had effective means at its disposal to compel the authorities to abide by the law and the Constitutional Court's judgments. Accordingly, it was not afforded sufficient guarantees against arbitrariness. ...

187. The first and most important requirement of Article 1 of Protocol 1 is that any interference by a public authority with the peaceful enjoyment of possessions should

be lawful ... In particular, the second paragraph recognises that States have the right to control the use of property, provided that they exercise this right by enforcing "laws". The principle of lawfulness also presupposes that the relevant provisions of domestic law are sufficiently accessible, precise and foreseeable in their application.

Having regard to the foregoing, the Court considers that the domestic legislative framework lacked clarity and precision and did not enable the applicant company to foresee, with sufficient certainty, the point at which it might be allocated the frequencies and be able to start performing the activity for which it had been granted a licence, this notwithstanding the successive findings of the Constitutional Court and the ECJ. It follows that the laws in question did not satisfy the foreseeability requirements established by the Court in its case-law."

### Public Interest

**P1-1 expressly provides** for the possibility that the enjoyment of property is limited by state policies that pursue public or general interests. An interference with property rights **must pursue a general interest**.

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

The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property **in accordance with the general interest** or to secure the payment of taxes or other contributions or penalties

For instance, nationalisation of private land to build a railway bridge can comply with P1-1.

**Think of Anastasia's story: what general interests did Hungarian authorities pursue when changing the requirements to access a disability allowance?**

### General interest necessary for all Rules

Even if the references to the public and general interests appear only in Rules 2 and 3, the format of P1-1 is such that it reflects the principle of balancing in general. Therefore, since all balancing presupposes a public interest, Rule 1 equally implies the necessity that all interferences pursue a public interest.

### BEYELER v. ITALY (2000)

"111. ... the existence of a "public interest" required under the second sentence, or the "general interest" referred to in the second paragraph, are in fact corollaries of the principle set forth in the first sentence, so that an interference with the exercise of the right to the peaceful enjoyment of possessions within the meaning of the first sentence of Article 1 must also pursue an aim in the public interest."

## **General interests and MoA**

In the review of state's asserted goals, the subsidiary role of the Court comes into play. States enjoy a wide discretion to determine their social priorities and the attending policies. It is normally for the national judge to review the validity and merits of the putative interests behind the challenged measures

Even budgetary policies can be regarded, as such, to pursue a legitimate public aim. Consider the case BÉLÁNÉ NAGY v. HUNGARY(2016). The state had changed the law regulating the requirement to receive disability benefits. This change resulted in the applicant being withdrawn an allowance – an interference with her possessions under P1-1. The Court simply conceded without much elaboration “the interference complained of pursued the communal interest in protecting the public purse, by means of rationalising the system of disability-related social-security benefits.” (§ 121)

Whereas the Court can sanction the state's failure to mention any public interest BURDOV v. RUSSIA (2002), § 41), rarely does the review lead to the refusal of the state's alleged interest.

## **General interest implicit in the state measure**

Consider this example. In this case, not only did the Court accept the public interest of avoiding extra public expenditure. It also identified a general interest that the state had not pointed out expressly: the public purpose can be inferred from the measure.

### **AMBRUOSI v. ITALY(2000)**

Facts: a lawyer acted in successful claims for the recovery of taxes, and obtained the direct discharge of her fees. An Italian measure offset these fees between the parties, retroactively. The Court found against Italy.

“28. The Government has not indicated what aim they had pursued by enacting [the interference]. The Court however can gather from the elements of the case that the aim of the offsetting of legal costs was to protect the public purse from the relevant expenditure. The Court is satisfied that the interference at issue was “in the public interest” within the meaning of Article 1 of Protocol No. 1.”

## **General interest as autonomous notion of ECHR law**

The notion of ‘public interest’ (like that of ‘possession’ and ‘law’, see above) is an autonomous concept and does not depend on domestic definitions. Again, the Court has used its power to interpret the principle to adopt an extensive reading. See how the Court explained that a taking of private property for the benefit of private individuals can be, in fact, aimed at the public interest:

### **JAMES AND OTHERS v. UK(1986)**

“41. Neither can it be read into the English expression “in the public interest” that the transferred property should be put into use for the general public or that the community generally, or even a substantial proportion of it, should directly benefit

from the taking. The taking of property in pursuance of a policy calculated to enhance social justice within the community can properly be described as being "in the public interest". In particular, the fairness of a system of law governing the contractual or property rights of private parties is a matter of public concern and therefore legislative measures intended to bring about such fairness are capable of being "in the public interest", even if they involve the compulsory transfer of property from one individual to another."

### **Can an interference ever be challenged for its failure to pursue a general interest?**

When the state does not suggest a public aim and the Court finds none on its own, the measure cannot be justified. Otherwise, there is a very limited chance of challenging interferences under this criterion.

However, if the state fails to act upon its asserted purpose after the interference is carried out, its conduct might call into question the genuine existence of a public interest.

For instance: In MOTAIS DE NARBONNE v. FRANCE (2002), § 19, the Court found a breach of P1-1 on account of a significant delay between a decision to expropriate property and the actual undertaking of a project in the public interest which had formed the basis of the expropriation.

### **General interests and MoA with regard to Rule 3**

The existence of a general interest is the essence of Rule 3, regarding the national regulation of property's use. Unsurprisingly, the Court affords states a wide discretion when it comes to general measures that discipline the domestic regime of property rights

#### SCOLLO v. ITALY(1995)

"28. The second paragraph (P1-1) reserves to states the right to enact such laws as they deem necessary to control the use of property in accordance with the general interest.

Such laws are especially common in the field of housing, which in our modern societies is a central concern of social and economic policies.

In order to implement such policies, the legislature must have a wide margin of appreciation both with regard to the existence of a problem of public concern warranting measures of control and as to the choice of the detailed rules for the implementation of such measures. The Court will respect the legislature's judgment as to what is in the general interest unless that judgment is manifestly without reasonable foundation ..."

### **General interests accepted by the Court – a gallery**

The ECtHR has rarely questioned the validity or merits of the general interests invoked by the state. See a few examples.

**Read the reasoning of the Court in each case.**

## **Housing**

### **MELLACHER AND OTHERS v. AUSTRIA(1989)**

Facts: The applicants complained about the state law which set a maximum rent for their houses, de facto reducing the rent agreed with the tenant. The Court found no breach of P1-1, deeming the interference proportionate.

“47. The Court observes that the explanatory memorandum submitted to the Austrian Parliament at the time of the introduction of the 1981 legislation sets out the reasons justifying the new measures. The easing of rent controls, in 1967, had increased the disparities between rents for equivalent apartments. The re-introduction, in 1974, of legislation regulating the letting of lower quality apartments did not have the desired effects and accentuated the tendency towards apartments being kept vacant. This gave rise to an urgent need to effect an overall reform of the law and to develop a new system for fixing rents. Accordingly, the 1981 Rent Act was intended to reduce excessive and unjustified disparities between rents for equivalent apartments and to combat property speculation.

Through these means, the Act also had the aims of making accommodation more easily available at reasonable prices to less affluent members of the population, while at the same time providing incentives for the improvement of substandard properties.

In the Court’s view, the explanations given for the legislation in question are not such as could be characterised as being manifestly unreasonable. The Court therefore accepts that the 1981 Rent Act had a legitimate aim in the general interest.”

## **Reduction of alcoholic consumption**

### **TRE TRAKTÖRER AKTIEBOLAG v. SWEDEN (1989)**

Facts: The applicants’ restaurant lost the licence to serve alcoholic beverages, as a sanction for tax and accounting wrongdoing. The Court found no breach of P1-1

“56. The applicant company did not contest the legitimacy of the aim of the 1977 Act, and agreed with the Government that it was to implement the long-standing Swedish policy of restricting the consumption and abuse of alcohol. However, it criticised the actual measures of implementation taken by the National Board of Health and Welfare and the County Administrative Board. It complained, first, that they were adopted on the basis of section 64(2), as amended with effect from 1 July 1982, and therefore represented a retroactive application of this section to facts which had taken place in 1980-1981; and secondly, that they did not pursue the aforesaid aim, but sought to obtain the payment of taxes, thus constituting an abuse of power (détournement de pouvoir).

57. By subjecting the sale of alcoholic beverages to a system of licences, the Swedish legislature took measures to implement the national policy in this field. This was in line with Swedish social policy generally and the Court does not doubt that the aim so pursued was the control of the use of property in accordance with the general interest.”

## **Environmental protection**

### FREDIN v. SWEDEN (No. 1) (1991)

Facts: The state authorities withdrew an exploitation permit, thus prohibiting the use of a gravel pit owned by the applicants. The withdrawal was based on environmental protection reasons. The Court found no breach of P1-1.

"48. The applicants did not contest the legitimacy of the aim of the 1964 Act, that is the protection of nature. The Court recognises for its part that in today's society the protection of the environment is an increasingly important consideration."

## **Fairness in the granting of visas**

### PAULET v. THE UNITED KINGDOM (2014)

Facts: An Ivorian national obtained employment in the UK using a false French passport. When the forgery was discovered, his savings were confiscated. The Court found against the UK.

"60. The Government submitted that in implementing and enforcing a regime for confiscating the proceeds of crime, it sought to combat serious crime and provide a deterrent against the commission of further or other offences and reduce the profits available for use in future criminal activity. However, pursuit of such legitimate aims was not restricted to cases concerning drug-trafficking or organised crime. In the present case, restrictions on the entitlement of persons such as the applicant to seek and obtain work in the United Kingdom were also in the general or public interest because otherwise persons who had applied to enter the United Kingdom through the visa system would be aggrieved that others could "skip the queue" and retain the benefits of their criminal conduct. ...

64. ... it is clear from Phillips v. the United Kingdom, no. 41087/98, § 51, ECHR 2001- VII, that confiscation orders fall within the scope of the second paragraph of Article 1 of Protocol 1, which, inter alia, allows the Contracting States to control the use

## **Prevention of unregulated hunting**

### CHASSAGNOU v. FRANCE (1999)

Facts: The applicants were forced to grant hunting rights to others on their lands, without any other compensation than the right to hunt elsewhere. Since the applicants opposed hunting, the lack of monetary compensation rendered the interference disproportionate.

"78. ... The Government pointed out that hunting was an activity with very firm roots in French rural tradition. However, the rule that no one had the right to hunt on land he did not own had been disregarded for many years in an area covering well over half of France. One of the main objectives of the Loi Verdeille, therefore, had been the establishment of a unit of management, without which any rational organisation of hunting, consistent with respect for the environment, had become impossible. In addition, the ACCAs played an educational role, thanks to hunters' participation in the running of the association and the formulation of hunting policy and to the self-policing discipline imposed on all members, whether hunters or not, by the rules of the association and the hunting regulations, with penalties to back them up. ...

79. The Court considers that in view of the aims which the Loi Verdeille assigns to the ACCAs, as listed in section 1 thereof, and the explanations provided on this subject, it is undoubtedly in the general interest to avoid unregulated hunting and encourage the rational management of game stocks."

### **Control of art market**

#### **BEYELER v. ITALY(2000)**

Facts: Italy exercised the right of pre-emption and bought at a low price a Van Gogh painting that the applicant was trying to sell. The Court found a breach, mainly because Italy failed to adjust the compensation to the current value of the painting

"112. In the instant case the Court considers that the control by the state of the market in works of art is a legitimate aim for the purposes of protecting a country's cultural and artistic heritage. The Court points out in this respect that the national authorities enjoy a certain margin of appreciation in determining what is in the general interest of the community ...

113. As regards works of art by foreign artists, the Court observes that the Unesco Convention of 1970 accords priority, in certain circumstances, to the ties between works of art and their country of origin ... . It notes, however, that the issue in this case does not concern the return of a work of art to its country of origin. That consideration apart, the Court recognises that, in relation to works of art lawfully on its territory and belonging to the cultural heritage of all nations, it is legitimate for a State to take measures designed to facilitate in the most effective way wide public access to them, in the general interest of universal culture."

### **Fighting drug trafficking**

#### **AIR CANADA v. THE UNITED KINGDOM(1995)**

Facts: UK authorities seized an aircraft of the applicant, on which a load of drug had been discovered. The plane was returned only after the payment of a sanction. The applicant challenged the forfeiture of the plane in UK courts. The Court found no breach of P1-1.

"41. ... the seizure of the applicant's aircraft and its release subject to payment were undoubtedly exceptional measures which were resorted to in order to bring about an improvement in the company's security procedures. These measures were taken following the discovery of a container, the shipment of which involved various transport irregularities, holding 331 kilograms of cannabis resin (see paragraph 7 above). Moreover, this incident was the latest in a long series of alleged security lapses which had been brought to Air Canada's attention involving the illegal importation of drugs into the United Kingdom during the period 1983-87 (see paragraph 6 above). In particular, Air Canada - along with other operators - had been warned in a letter dated 15 December 1986 from the Commissioners that, where prohibited goods have been carried, they would consider exercising their powers under the 1979 Act including the seizure and forfeiture of aircraft.

42. Against this background there can be no doubt that the measures taken conformed to the general interest in combating international drug trafficking."

## **Protection of tenants**

### AQUILINA v. MALTA(2015)

Facts: the applicant challenged Maltese legislation which prevented him from charging rent at market value. The Court found against Malta.

"56. Furthermore, a measure aimed at controlling the use of property can only be justified if it is shown, inter alia, to be "in accordance with the general interest". Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the "general" or "public" interest. The notion of "public" or "general" interest is necessarily extensive. In particular, spheres such as housing of the population, which modern societies consider a prime social need and which plays a central role in the welfare and economic policies of Contracting States, may often call for some form of regulation by the state. In that sphere, decisions as to whether, and if so when, it may fully be left to the play of free market forces or whether it should be subject to state control, as well as the choice of measures for securing the housing needs of the community and of the timing for their implementation, necessarily involve consideration of complex social, economic and political issues. Finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, the Court has on many occasions declared that it will respect the legislature's judgment as to what is in the "public" or "general" interest unless that judgment is manifestly without reasonable foundation... .

57. That the interference was lawful has not been disputed by the parties. The Court finds that the restriction arising from the 1979 amendments was imposed by Act XXIII of 1979 and was therefore "lawful" within the meaning of Article 1 of Protocol 1. It further considers that the legislation at issue in the present case pursued a legitimate social policy aim, namely the social protection of tenants ... . It is, however, also true that the relevance of that general interest may have decreased over time, particularly after 2008, the years at issue in the present case. This matter will therefore be reverted to in the Court's assessment as to the proportionality of the impugned measure."

## **Proportionality**

The overarching principle of P1-1 is the fair interaction between the needs of society and restriction suffered by the individual. See BRONIEWSKI V. POLAND (2004) §150:

"[each state action or omission affecting property rights] must strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights"

### ***Rationes of the proportionality test***

There must be a proportion between the aim sought and the means used. The guiding rule for a state that seeks to comply with the Convention is to avoid measures that impose or justify an excessive burden on the individual. This principle entails two tests:



The requirement of proportionality of the interfering measure means that the adopted measure must be the least restrictive (among those which are similarly effective); but also

It prohibits all measures that entail a disproportionate sacrifice for the individual's right, relative to their contribution to the sought purpose – even when there is no alternative measure of equal efficiency.

**Think back to Anastasia's story: the interference was lawful and pursued a general interest. Was it also proportionate? If not, which aspect of the proportionality test was not met?**

### **Measures that are unnecessarily restrictive**

An interference can fail the proportionality test because a less restrictive measure is available that is equally effective in securing the achievement of the general interest pursued.

#### BÉLÁNÉ NAGY v. HUNGARY(2016)

"123. The Court notes that the applicant was subjected to a complete deprivation of any entitlements, rather than to a commensurate reduction in her benefits, such as by, for example, **calculating an allowance *pro rata* on the basis of the existing and missing days of social cover ...** in view of the fact that her social-security cover was only 148 days short of the required length.

### **Proportionality *stricto sensu***

Alternatively, an interference can fail the proportionality test simply because it imposes on the individual an excessive sacrifice. This is called sometimes proportionality *stricto sensu*. See how the Court used it in a case relating to custom sanctions:

#### MAMIDAKIS v. GREECE(2007)

Facts: The applicant was sanctioned for smuggling oil which was destined for exportation. Even if the fine was lawful, the Court found a breach, because the amount of the fine made the interference disproportionate.

"47. Regarding the requirement of proportionality between the interference with the applicant's right and the public interest pursued, the Court must assess the severity of the fine imposed. Indeed, it notes that the applicant was personally levied a total fine of 3,008,216 euros and has also been declared jointly responsible for the fines imposed to other persons for breaches of customs regulation for a total amount of 4,946,145 euros. No doubt these are extremely high sums, up to ten times the taxes underlying the infringement. This also brought the dissenting judges of the State Council to consider that the disputed fine was an excessive burden, even for very large companies, and that it thus resulted in the confiscation *de facto* of the applicant's property, in violation of P1-1 ...

48. Under these circumstances, even taking into account the margin of appreciation available to the contracting Parties in this matter ... the Court finds that the imposition of the fine jeopardised the financial position of the applicant in such a way that it is a manifestly disproportionate measure relative to the legitimate aim pursued.” (Translation, original in French)

### **Margin of Appreciation with respect to proportionality**

The proportionality test is essentially a value-based judgment. States are often granted some margin of appreciation, as local authorities are better positioned to gauge the needs of society and the importance of the pursued goal. To preserve its subsidiary role, the Court often finds that the restriction is not disproportionate, especially with respect to wide social and economic reforms.

### **JAMES AND OTHERS v. UK (1986), §47:**

“...[E]liminating what are judged to be social injustices is an example of the functions of a democratic legislature. More especially, modern societies consider housing of the population to be a prime social need, the regulation of which cannot entirely be left to the play of market forces. The margin of appreciation is wide enough to cover legislation aimed at securing greater social justice in the sphere of people’s homes, even where such legislation interferes with existing contractual relations between private parties and confers no direct benefit on the state or the community at large.”

### **When does the Court find a breach of proportionality?**

There is no mathematical formula. The Court takes into account several factors to reach a pragmatic understanding of the balance. See three instances.

### **Sudden and arbitrary change of conditions to receive benefit (Rule 1)**

#### **BÉLÁNÉ NAGY v. HUNGARY (Chamber)(2015)**

“55. ...the applicant was wholly denied the social security entitlements which would have been otherwise due to her in view of her ill health. It is noteworthy from the perspective of proportionality that she was totally divested of her pension/allowance, due to a new condition of eligibility instead of being obliged to endure a reasonable reduction, commensurate with the proportion of her accumulated social security cover, that is, 947 days instead of 1,095

56. The Court considers that this course of events amounts to a drastic change in the conditions of the applicant’s access to disability benefits which she was unable to foresee or pre-empt, in that her legitimate expectation of receiving disability pension, if in need and on the strength of the previously paid payroll burdens, was completely removed; and she was never in a position to rectify her situation.

57. Having regard to the above considerations, the Court finds that the applicant was made to bear an excessive and disproportionate individual burden. Consequently, there has been a violation of Article 1 of Protocol 1.”

## **Expropriation without adequate compensation (Rule 2)**

### KANALA v. SLOVAKIA(2007)

Facts: The applicant's property was bought at auction during enforcement proceedings, at a price below market value. The Court found against Slovakia.

"53. The taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference that cannot be justified under Article 1 of Protocol 1.

61. ... there is no apparent public interest justification for such a financially advantageous transaction to have been permitted by the domestic law at the time in disregard of the actual value of the property and hence of the applicant's and the creditor's legitimate interests. In the Court's view, striking a fair balance between the competing interests required that the applicant should have been allowed an opportunity to have his property sold at a price corresponding to its market value."

## **Cancellation and non-renewal of tobacco licenses (Rule 3)**

### VÉKONY v. HUNGARY(2015)

Facts: After a legislative change, the applicant lost the licence to sell tobacco products and was unable to obtain a new one. The Court found against Hungary.

"35. ... a disproportionate and arbitrary control measure does not satisfy the requirements of protection of possession under Article 1 of Protocol 1. It is noteworthy that the applicant's licence was extinguished without compensation ... or the possibility of judicial redress. The very short period provided to licence holders to make adequate arrangements to respond to the impending change to their source of livelihood was not alleviated by any positive measures on behalf of the state, for example, the adoption of a scheme of reasonable compensation. Moreover, it has not been suggested that the applicant, although his family enterprise was active in the lawful selling of products harmful for the health, was in any breach of the law ... The measure was introduced by way of constant changes of the law and with remarkable hastiness, the loss of the old licence was automatic, and the non-acquisition of a new one was not subject to any public scrutiny or legal remedy.

36. The Court finds that the measure did not offer a realistic prospect to continue the possession because the process of granting of new concessions was verging on arbitrariness, given that (i) the existence of the previous licence was disregarded; (ii) the possibility of a former licence-holder to continue tobacco retail under the changed conditions accommodating the policy of protection of minors was not considered in the new scheme ...; (iii) the concession system enabled the granting of five concessions to one tenderer which objectively diminished the chances of an incumbent licence holder, in particular of those individuals, such as the applicant's family, whose livelihood had depended for many years on the possibility of tobacco sale, now lost ... and, finally, (iv) the lack of transparent rules in the awarding of the concessions, which took place (v) without giving any privilege to a previous licence-holder, such as limiting the scope of the first round of tendering to such persons."

## **Relevant factors for proportionality test – gallery**

The ECtHR can take several factors into account to make a finding on proportionality. Here are a few.

### **Duration of the interference**

#### **FLERI SOLER AND CAMILLERI v. MALTA(2006)**

Facts: The applicant's property was requisitioned by the Government and used for forced lease over 65 years, during which he received nominal rent. The Court found against Malta.

"78. Having regard to the small amount of rent paid to the applicants, the minimal profit that the latter could obtain from their building, the fact that the applicants' property has been occupied for almost sixty-five years and the above-mentioned restrictions on the landlords' rights, the Court holds that a disproportionate and excessive burden has been imposed on the applicants. The latter have been required to bear most of the financial costs of providing a working environment for government departments and public offices performing their duties for the benefit of the community as a whole (see, mutatis mutandis, Hutten-Czapska, cited above, § 225). It follows that the Maltese state failed to strike the requisite fair balance between the general interests of the community and the protection of the applicants'

### **Availability of procedural safeguards**

#### **FLERI SOLER AND CAMILLERI v. MALTA(2006)**

Facts: The applicant's property was requisitioned by the Government and used for forced lease over 65 years, during which he received nominal rent. The Court found against Malta.

"70. In assessing compliance with Article 1 of Protocol 1, the Court must make an overall examination of the various interests in issue, bearing in mind that the Convention is intended to safeguard rights that are "practical and effective". It must look behind appearances and investigate the realities of the situation complained of. In cases concerning the operation of wide-ranging housing legislation, that assessment may involve not only the conditions for reducing the rent received by individual landlords and the extent of the state's interference with freedom of contract and contractual relations in the lease market, but also the existence of procedural safeguards ensuring that the operation of the system and its impact on a landlord's property rights are neither arbitrary nor unforeseeable. Uncertainty – be it legislative, administrative or arising from practices applied by the authorities – is a factor to be taken into account in assessing the State's conduct. Indeed, where an issue in the general interest is at stake, it is incumbent on the public authorities to act in good time, in an appropriate and consistent manner ...."

### **Gravity of consequences on applicant**

#### **M.C. AND OTHERS v. ITALY(2013)**

Facts: The applicants had received compensation from Italy for the contamination contracted after blood transfusions. During the judicial proceedings launched to reassess the compensation obtained, Italy passed a law impeding the adjustment and

reassessment of compensation. The applicants failed to have their compensation reassessed, even after the Constitutional Court declared the unconstitutionality of the new law. The Court found against Italy.

"84. Dans ce contexte, la Cour doit prendre en compte les pathologies dont les requérants sont ou étaient affectés, six d'entre eux étant décédés au cours de cette procédure (paragraphe 31 ci-dessus). Elle accorde par ailleurs une importance particulière au fait que, selon les informations fournies par les requérants – qui n'ont pas été démenties par le gouvernement défendeur –, l'IIIS représente plus de 90 % du montant global de l'indemnité versée aux intéressés. De plus, cette dernière vise (ou visait) à couvrir les coûts des traitements sanitaires des requérants ou de leurs de cujus et, ainsi qu'il ressort de l'expertise médicale envoyée par les requérants, le pronostic concernant les chances de survie et de rétablissement de ceux-ci est (ou était) strictement lié au bénéfice des indemnités ....

85. De l'avis de la Cour, l'adoption du décret-loi no 78/2010 a donc fait peser une « charge anormale et exorbitante » sur les requérants et l'atteinte portée à leurs biens a revêtu un caractère disproportionné, rompant le juste équilibre entre les exigences de l'intérêt général et la sauvegarde des droits fondamentaux des individus .... »

#### **Availability and adequacy of compensation**

##### PLATAKOU v. GREECE (2001)

Facts: The applicant complained that her compensation application was mistakenly declared inadmissible, and that she was thereafter granted insufficient compensation, equal to a quarter of the value of the expropriated property. The Court found against Greece.

"55. The Court reiterates that an interference with the right to the peaceful enjoyment of possessions must strike a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (see, among other authorities, Sporrang and Lönnroth v. Sweden, judgment of 23 September 1982, Series A no. 52, p. 26, § 69). 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 that cannot be considered justifiable under Article 1 of Protocol 1 (see The Holy Monasteries v. Greece, judgment of 9 December 1994, Series A no. 301-A, p. 35, § 71)."

#### **Sudden nature of the interference**

##### VÉKONY v. HUNGARY (2015)

Facts: After a legislative change, the applicant lost the licence to sell tobacco products and was unable to obtain a new one. The Court found against Hungary.

"34. The Court further observes that only ten months elapsed between the enactment of the impugned law on 11 September 2012 and the deadline for terminating the applicant's tobacco retail (14 July 2013). Moreover, from the moment the applicant was informed that he had not been granted a licence (23 April 2013), less than three months

elapsed until he had to stop selling tobacco .... In the context of a business benefiting from a tobacco retail licence for nearly twenty years previously, these transitory periods can hardly be regarded as sufficient. The Court has previously found that proceedings related to the renewal or invalidation of licences that are arbitrary, discriminatory, or disproportionately harsh violate the second paragraph of Article 1 of the Protocol. Furthermore, authorities must follow a “genuine and consistent policy” regarding licensing .... The lack of safeguards against arbitrariness and the lack of a reasonable opportunity of putting the case of the persons affected to the responsible authorities for the purpose of effectively challenging the measures interfering with their possession ... as well as the question of lawfulness of the applicant’s own conduct ... are issues to be taken into consideration. ....”

### **Social inequity of the housing reform**

#### **BERGER-KRALL AND OTHERS v. SLOVENIA (2014)**

Facts: After independence, Slovenia passed a housing reform whereby, among other things, tenants were no longer entitled to pay state-set rents and enjoy the special protections entailed by the previous scheme of “specially protected tenancy”. The move to market economy rents was considered lawful – i.e. proportionate - by the Court.

“208. ... it is worth noting that the applicants enjoyed and continue to enjoy, more than 22 years after the enactment of the Housing Act 1991, special protection which goes beyond that usually afforded to tenants’ rights. In particular, the lease contracts were concluded for an indefinite period (see paragraph 19 above) and were transmissible, also for an indefinite period, to the spouse or long term partner of the tenant (see paragraph 69 above). The latter did not have to pay a full market rent, but only an administratively-determined non-profit rent, meant to cover only the depreciation, management and routine maintenance of the dwelling and the cost of the capital invested (see paragraphs 79-86 above). It is shown by the data submitted by the Government (see paragraph 239 below), and not contested by the applicants, that they were paying sums comprised between EUR 49.16 and EUR 280.78 per month and that in spite of a market rental price of between EUR 6 and EUR 11 per square metre, the applicants were charged between EUR 1.13 and EUR 3.33 per square metre. The Court concludes that the non-profit rent imposed on the applicants was significantly lower than the rents charged on the free market, and that the fact that they still enjoyed such favourable terms more than 22 years after the enactment of the housing reform shows that the transition to a market economy was conducted in a reasonable and progressive manner. Moreover, none of the applicants has shown that the level of the non-profit rent was excessive in relation to his or her income.”

### **Domestic courts’ failure to review the proportionality of the interference**

#### **PAULET v. THE UNITED KINGDOM (2014)**

Facts: An Ivorian national obtained employment in the UK using a false French passport. When the forgery was discovered, his savings were confiscated. The Court found against the UK.

“67. It is clear that in assessing whether or not the confiscation order in the present case was “oppressive” and thus an “abuse of process”, the Court of Appeal did ask whether or not the order was in the public interest. However, having decided that it was, they did not go further by exercising their power of review so as to determine “whether the

requisite balance was maintained in a manner consonant with the applicant's right to 'the peaceful enjoyment of his possessions', within the meaning of the first sentence of Article 1" (see *Sporrong and Lönnroth v. Sweden*, cited above, § 69). On the contrary, the Court of Appeal made it clear that the abuse of process jurisdiction had to be exercised "sparingly". In particular, it noted that

"the responsibility for deciding whether properly to seek a confiscation order is effectively vested in the Crown. When it does so, the court lacks any corresponding discretion to interfere with that decision if it has been made in accordance with the statute".

68. Consequently, the Court cannot but conclude that at the time the applicant brought the domestic proceedings, the scope of the review carried out by the domestic courts was too narrow to satisfy the requirement of seeking the "fair balance" inherent in the second paragraph of Article 1 of Protocol 1."

### **The applicant's failure to limit the impact of the interference**

#### **AQUILINA v. MALTA (2015)**

Facts: the applicant challenged Maltese legislation which prevented him from charging rent at market value. The Court found against Malta.

"63. Moreover, the applicant could not increase the rent more than as provided for by the recent amendments. The Court points out that in the application of the 1979 and subsequent amendments to his case, he was in an even worse position as regards the amount of rent payable because of an error in the [Rent Board] proceedings, which he admitted ... . In fact it is not disputed that the RRB had based its decision on a regime which was not applicable to the property at issue, thus providing a lower rent, and that the applicant had not appealed. In this connection, the Court does not find it necessary to determine whether an appeal before the RRB would have been possible in the instant case, as in any event it has not been contested that, even if the proper law was applied, the RRB could not have awarded more than what was established by law which, according to the applicant, was not a fair amount of rent. It follows, however, that this further perjurioration in the rent payable is attributable to him, and the assessment of the proportionality of the measure will thus take into account what he would have received in rent under the applicable regime complained of, as also amended in 2009 and 2010, and not what he actually received. ..."

### **3.2 PERMISSIBLE RESTRICTIONS AND PROPORTIONALITY IN ALBANIAN LEGAL ORDER**

#### **CONTENT AND OBJECTIVES**

Under Article 1 of Protocol No. 1, the state-imposed restrictions on the right to property will be justified if they satisfy three criteria: the restriction must be lawful (prescribed by the law and respectful of rule of law standards); it must pursue a public or general interest; and it must be proportionate to the aim pursued (necessary in a democratic society).

Learning objective of this chapter:

- Improved familiarity with the acceptable justifications of state-imposed restrictions on the right to property (lawfulness, public interest, proportionality) and their application in the Albanian legal context;
- Development of capacity to identify, at the national level, cases, which raise human rights issues involving non-compliance with principle of lawfulness or proportionality and consequently, and to find remedy for the eventual breaches of property rights at the national level.

#### **INTERFERENCE**

The right to property is not absolute and can be restricted. However, interference with property rights is allowed only if the following conditions are fulfilled cumulatively:

- It is prescribed by law
- It is in the public interest
- It is necessary in a democratic society

#### **LAWFULNESS**

Interference in property rights must satisfy the requirement of legality and be in accordance to legislation, the Constitution and international treaties. The State can restrict the enjoyment of possession, but this restriction must have a source in domestic law, which must have a certain qualitative characteristics and appropriate procedural safeguards to ensure protection against arbitrariness.

In case *Iatridis v. Greece* (1999), the Greek authorities evicted the applicant from the land he had leased legally for several years, on which he operated an open-air cinema. The Court found in the applicant's favour. The Court stated 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" (§ 95).



In case *Ramadhani and Others v. Albania*, the Court observed that “the interference with the applicants’ right to the enjoyment of their possessions stems from the continuing failure to pay them the compensation stemming from the Commission’s decisions and to return to the first three applicants the property of which they had been recognised as the owners by the Land Commission” (§76).

### **Notion of legality in the case law of national courts of Albania**

The Constitutional Court delivered Decision No. 25/2014 ([http://www.gjk.gov.al/web/Vendime\\_perfundimtare\\_100\\_1.php](http://www.gjk.gov.al/web/Vendime_perfundimtare_100_1.php)) on abrogation of the Council of Ministers Decision No. 932 of 30 September 2013 on the unification of competencies of the National Urban Construction Inspectorate (INUK) in areas of national importance and territory as inconsistent with the Constitution of the Republic of Albania. In this decision, the Constitutional Court accepted the constitutional complaint of a group of Members of Albanian Parliament and the National Association of Expropriated “Property through Justice”, arguing that: “Regarding the other criterion that the legislator must respect in establishing a limitation, the fair proportion between the interference and the situation that dictates it, the Court has held that this condition imposes on the lawmaker to identify the real need to intervene in individual rights in a concrete situation. The balance of the intervention, with the situation that dictated the intervention, imposes the lawmaker to implement such legal means/tools, which must be effective, i.e. Selected in such a way as to be appropriate to pursue the goals. In addition, the use of these tools/means should be indispensable, which means that the goal cannot be achieved by other means. The necessity, also, entails the use of less harmful means for subjects, which human rights are violated. The requirement of proportionality of the restriction to the situation that dictates it is embodied in the requirement of necessity, usefulness and proportionality, in the strict sense of imposed restrictions. Observance of these conditions requires careful analysis in every concrete case, facing the public interest that dictates the limitation to those rights, and also assessing the type of limitation. In this regard, the Court emphasizes that observance of the fulfilment of the above conditions of restraint/limitation requires a degree of different treatment, depending on the individual rights and freedoms subject to the restriction (see Dec. No. 16 of 25 July 2008, and Dec. No. 4 of 23 February 2011 of the Albanian Constitutional Court).

In accordance with the above constitutional criteria and its jurisprudence, the Court considers that the restriction/limitation of the right to property has not been established in accordance with the criteria of Article 17 of the Constitution. They do not satisfy the formal criterion to provide the limitation by a law approved by the Assembly. Also, it is not clear why the Council of Ministers has chosen this way to restore legitimacy to those areas where the constructions have been built not in accordance with the requirements of the legislation on construction in the territory. The public interest, which is claimed by the Council of Ministers as the aim sought to be achieved through the restriction/limitation of the right to property, cannot be protected by arbitrary actions of administrative bodies and beyond the provisions of the law, as envisaged in the content of DCM No. 932/2013.”

## GENERAL INTEREST

All intervention in an individual's property rights may be justified only if it pursues legitimate aim in the general (public) interest. The national authorities are better placed to establish what is public interest until their judgment is manifestly ill founded and leads to arbitrariness.

In case *Beyeler v. Italy* (2000), Italy exercised the right of pre-emption and bought at a low price a Van Gogh painting that the applicant was trying to sell. The Court found a breach, mainly because Italy failed to adjust the compensation to the current value of the painting: "(...) the existence of a "public interest" required under the second sentence, or the "general interest" referred to in the second paragraph, are in fact corollaries of the principle set forth in the first sentence, so that an interference with the exercise of the right to the peaceful enjoyment of possessions within the meaning of the first sentence of Article 1 must also pursue an aim in the public interest." (§111).

In case *Ramadhi and Others v. Albania* the Court stated that: "(...) the administrative authorities' commitment to the implementation of the Property and Land Acts, the proceedings were very complex because the authorities were called upon to determine the manner and the funds for the fulfilment of their obligations pursuant to those Acts" (§ 82).

### **Notion of public interest in the case law of national courts of Albania**

The Constitutional Court delivered Decision No. 30/2005 on abrogation as inconsistent with the Constitution of the Republic of Albania of Articles 3.2, 3.5, 5, 6.1, 6.2, 7, 8.2, 8.3, 8.4, 9 and 13.2 of Law no. 9235 on the restitution and compensation of property, of 29 July 2004. In its decision, the Constitutional Court rejected the application of the National Association of Expropriated "Property through Justice", reasoning that: "the Constitutional Court finds that one of the constitutional criteria that applies to these legal provisions mentioned above is the public interest. Any interference with property may be justified only if it is in the public or general interest. Acquisition of property under a calculated policy to achieve social justice within the community can be precisely described as a policy in the public interest. Therefore, the right of a lawmaker to limit the scope of private property, because of the existence of the public interest, is recognised. In order for the interference to the right to property be justified, there must be a proportional relationship between the means used and the aim pursued to be achieved. On this basis, the legal system should contain a series of procedural safeguards to ensure that its impact on property rights should not be arbitrary or unpredictable. From this perspective, the Constitutional Court does not consider as unjustified the legal exclusion of limiting the restitution and compensation of agricultural land provided in Article 6 of the Law. This legal provision provides as a restriction on the restitution and compensation of agricultural land up to 60 hectares, but this measure does not only exceed incomparably the minimum of the surface area imposed by Law No. 7699 on value compensation of the former owners of agricultural

land of 21 April 1993, but it is estimated by the lawmaker depending on the situation dictating the circumstances surrounding the agricultural land in Albania”.

### **PROPORTIONNALITY**

Interference must strike a fair balance between the requests of general interest of the community and the requirements of individual's fundamental rights. There will be no fair balance if an individual and excessive burden is put on an individual property owner.

“The Court must therefore establish whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. In the circumstances of the instant case, the Court is called upon to determine whether the time necessary for the domestic authorities to pay the applicants compensation and to effectively return to the first three applicants the properties to which they were entitled disturbed that balance and whether it placed an excessive burden on them” (Ramadhi and Others v. Albania, § 78).

“The Court considers that by failing to comply with the Commission's decisions of 1995 and 1996 and the District Court's of 4 February 2000, the national authorities left the applicants in a state of uncertainty with regard to the realisation of their property rights. Furthermore, for a considerable period of time, the authorities prevented them from enjoying the possession of their money and land” (Ramadhi and Others v. Albania, § 81).

“(…) the Government has not produced any convincing evidence to justify the failure of the domestic authorities over so many years to determine the final amount of the compensation due or to return to the first three applicants the plot of land now allocated to third parties. This has resulted in an interference with the applicants' property rights, which in the Court's view is such as to have placed an excessive burden on them” (Ramadhi and Others v. Albania, §83).

### **Notion of proportionality in the case law of national courts of Albania**

The Civil College of the High Court of Albania in its decision no. 1829 of 27 September 2011, ([http://www.gjykataelarte.gov.al/web/Vendime\\_Viti\\_2011\\_693\\_1.php](http://www.gjykataelarte.gov.al/web/Vendime_Viti_2011_693_1.php)) quashed the decision of the Court of Appeal, regarding the value of expropriation, reasoning that: “The value estimated in the Expert Act dated 23.01.2006 is 3.400 ALL of m2 of land, while the Expert's Act does not contain attached any document to justify the calculation of this value (as may be e letter from IPRO, property transfer contrast, in the same or neighbour areas with the property in case, data from real estate companies, etc.”

Furthermore, this College has stated that: “it is well-recognized that the principle that the owner should be compensated based on the market value for the expropriated

property (Article 41 paragraph 4 of the Albania Constitution), but that this value cannot go beyond the concept of purpose of expropriation. This value should be in full proportion to the purpose for which the expropriation takes place, as well as to the community's benefit from this expropriation. The lawmaker, in terms of market value, has in mind the fact that (i) the property should be expropriated for public interest, (ii) the benefits of the community and the owner who is expropriated from the realization of new works, such as the increase in the value of his property (iii) the amount of compensation must be satisfactory for expropriation, but not extreme."

## **MARGIN OF APPRECIATION**

The States have a margin of appreciation in striking fair balance between the need and necessity of the restriction. The margin of appreciation has its source in the principle of subsidiarity, which means that the European Court of Human Rights has a subsidiary role to national jurisdictions.

In case *Bélané Nagy v. Hungary* (2016), the Court found that, the budgetary policies can be regarded, as such, to pursue a legitimate public aim. Hungarian legislator had changed the law regulating the requirement to receive disability benefits. This change resulted in the applicant being withdrawn an allowance – an interference with her possessions under Article 1 of Protocol No.1. The Court simply conceded without much elaboration "the interference complained of pursued the communal interest in protecting the public purse, by means of rationalising the system of disability-related social-security benefits." (§ 121)

In case *Ramadhani and others v. Albania*, the Court reiterated that the "States have a wide margin of appreciation to determine what is in the public interest, especially where compensation for nationalisation or expropriation is concerned, as the national legislature has a wide discretion in implementing social and economic policies. However, that margin of appreciation is not unlimited and its exercise is subject to review by the Convention institutions" (§ 79).

## **Notion of margin of appreciation in the case law of national courts of Albania**

The Constitutional Court in its decision no. 35/2007, on abrogation as inconsistent with the Constitution of the Republic of Albania of articles 1, 2, 4, 11, 17, 18, 41, 42, 75, 78 of the Law No. 9482 on the legalization, urbanization and integration of illegal constructions of 3 April 2006 rejected the application of the National Association of Expropriated "Property through Justice", arguing that: Referring to the European Court "the notion of public interest must be understood thoroughly, in particular regarding the decisions to issue the expropriation laws, which take into account political, economic and social grounds. From the above, the Constitutional Court concludes that, since the law on legalizations has as object the legalization of the illegal constructions and especially the urbanization of areas, informal blocks of informal constructions and their integration into the territorial infrastructure development of the country, improving the living conditions, there is a 'public interest' that can justify the expropriation of the legitimate owners and transfer of their property to the new owners of illegal building. The Constitutional Court considers that the determination made by the law on legalization according to which the ownership of expropriated land does not remain the state's but is transferred to the owner who legalized the building itself does

not constitute an obstacle that this determination may be considered as necessary for the public interest.”

## QUESTIONS

**Q1** Whereas Article 10 of the Convention on freedom of expression provides for the possibility to adopt restrictive measures, P1-1 does not mention it. It follows that measures restricting property rights can never be justified under the Convention, unlike measures which restrict freedom of expression.

**Select your response(s) below.**

True

False

**Q2** List at least three legitimate aims that a state can pursue when passing measures that restrict property rights.

**Enter your answer in the box below.**

**Q3** Choose the right statements.

**Select your response(s) below.**

1. The Court always performs the test of proportionality for interferences with the right to property.
2. An interference that finds its domestic legal basis in the case-law can satisfy the test of lawfulness.
3. The Court does not review the application of domestic law as such but only its compliance with the Convention.
4. Because of subsidiarity it is impossible to challenge a measure with respect to the requirement of a legitimate aim.

**Q4** Upon Jean’s criminal conviction for money laundering, his land was confiscated by the French authorities. French law did not provide for this criminal sanction, but given

the gravity of Jean's crimes, the punishment is clearly proportionate and the land was used to build an orphanage. Did France breach P1-1?

**Select your response(s) below.**

1. Yes
2. No
3. Some data is missing

**Q5** List at least three elements that will determine whether a given measure meets the requirements of lawfulness.

**Enter your answer in the box below.**

**Q6** The availability of compensation is relevant to determine the proportionality of interferences with the right to property only when Rule 2 (deprivation) applies.

**Select your response(s) below.**

True

False

**Q7** Choose the right statements.

**Select your response(s) below.**

1. The ECtHR can apply the margin of appreciation when considering whether an application is admissible.
2. The MoA can determine the outcome of the proportionality test.
3. States have a wider MoA in the implementation of political and economic policies.
4. Political and economic policies are immune from review by the ECtHR because of the MoA.

**Q8** Which of these elements are relevant in the assessment of proportionality?

**Select your response(s) below.**

1. The existence of alternative measure which restrict the right less, and are equally effective in implementing a legitimate aim.
2. Whether the interference pursues a legitimate aim.

3. The analysis of whether the interference ultimately imposes an excessive burden on the individual.

4. Whether the interference was attributable to non-state actors.

**Q9** What is the meaning of "proportionality *stricto sensu*"?

**Enter your answer in the box below.**

**Q10** To find a breach of P1-1, the Court must ascertain that the interference does not meet one or more of the three requirements of legality, public-general interest and proportionality.

**Select your response(s) below.**

Yes

No

It depends on which rule is applied

## ANSWER KEY

### Q1 Feedback for True

#### That's Not Right

In fact, P1-1 provides expressly for the possibility to expropriate property in certain circumstances, and to pass laws necessary to control the use of property. As regards Rule 1 (peaceful enjoyment) the possibility to pass lawful, necessary and proportionate measure was confirmed by the Court. The underlying principle is the search for a fair balance, which is inherent in the whole of the Convention and is also reflected in the structure of P1-1.

Feedback for false

#### That's right

In fact, P1-1 provides expressly for the possibility to expropriate property in certain circumstances, and to pass laws necessary to control the use of property. As regards Rule 1 (peaceful enjoyment) the possibility to pass lawful, necessary and proportionate measure was confirmed by the Court. The underlying principle is the search for a fair balance, which is inherent in the whole of the Convention and is also reflected in the structure of P1-1.

### Q2 Feedback

- The restriction must be **lawful** (prescribed by the law and respectful of rule of law standards)
- The restriction must pursue a **public or general interest**
- The restriction must be **proportionate** to the aim pursued (necessary in a democratic society)

**Q3 1.** False: if the measure does not pass the lawfulness test, there is no need to review the fair balance one

2. True

3. True

4. False: successful challenges can be mounted, for instance, if the state indicates no general interest, or if the measure bears no rational connection with the interest indicated, or when the state fails to act upon that interest after the interference

**Q4 1.** That's not Right

2. That's Right

3. That's not Right



## Feedback

The interference clearly failed the test of lawfulness, making it irrelevant whether it was proportionate (or taken to pursue a general interest, for what matters). No other information is necessary to find a breach

See VARVARA v. ITALY (2013), §85:

“The Court has already noted that the offence in respect of which the confiscation was imposed on the applicant was not provided for by law within the meaning of Article 7 of the Convention and was arbitrary (see paragraphs 72-73 above). Accordingly, the Court finds that the interference with the applicant’s right to the peaceful enjoyment of his property was contrary to the requirement of lawfulness and was arbitrary, and that there was a violation of Article 1 of Protocol 1. This finding dispenses the Court establishing whether or not a fair balance was

**Q5** Feedback. Several can be listed, some of which overlap. Good answers will refer to these elements or connected concepts

- Publicity;
- Accessibility;
- Absence of arbitrariness;
- Availability of procedural safeguards;
- Procedural fairness;
- Non-retroactivity;
- Legal certainty;
- Foreseeability;
- Precision;
- Prescribed in law;
- Compliance with the rule of law.

**Q6** Feedback for False

### **That’s Right**

The availability of compensation is relevant to determine the proportionality of interferences with the right to property **not** only when Rule 2 (deprivation) applies. For an example of compensation being considered in the analysis of the proportionality of the interference under Rule 3 (control of use), see CHASSAGNOU v. FRANCE(1999).

Feedback for True

### **That’s not right.**

The availability of compensation is relevant to determine the proportionality of interferences with the right to property **not** only when Rule 2 (deprivation) applies. For an example of compensation being considered in the analysis of the proportionality of the interference under Rule 3 (control of use), see CHASSAGNOU v. FRANCE

**Q7** Feedback: 1. False: the MoA concerns only the merits of an application.

2. True.

3. True.

4. False: in spite of the latitude enjoyed by states in these areas, the Court's mandate to ensure the compliance with the Convention is valid. The consequence of a wider MoA can be that breaches will be harder to find, but there is no immunity

**Q8** Feedback: 1. True

2. False. This is a preliminary condition: without a legitimate aim there cannot be proportionality

3. True

4. False. This is a matter of attribution (the Convention only binds states, and normally they are not responsible for acts of private entities or international organisations)

**Q9** This expression indicates a review of the absolute ratio between the gravity of the interference and the pursued aim, irrespective of the availability of more efficient alternative measures

Even when there is no less-restrictive measure available, an interference can be regarded as disproportionate when it imposes an excessive burden on the individual

**Q10** 1. That's not Right

2. That's Right

3. That's not Right

Feedback

A breach is found whenever any one of the requirements is not met. There is no need that all three are breached. For instance, a measure that pursues a legitimate public aim but is not proportionate will breach P1-1

## CHAPTER 4

### 4.1 COMPENSATION AND RESTITUTION

#### Compensation

##### The function of compensation

Compensation is not expressly required under P1-1. However, the existence of compensation is a critical element in assessing whether the state measures strike a 'fair balance' between the interest of the individual and the public purposes. In other words, compensation matters in the proportionality test of any interference, especially in case of expropriation.

- Compensation to ensure fair balance

The availability and amount of compensation granted by the state are central in order to ascertain the proportionality of the interference.

#### **PLATAKOU v. GREECE, 11 January 2001**

**Facts:** After Greece expropriated the applicant's building, it refused to grant compensation, because the bailiff had failed to serve the application in time. The Greek government, in any case, valued the building approximately one quarter of its assessed value. The Court found against Greece.

"55. The Court reiterates that an interference with the right to the peaceful enjoyment of possessions must strike a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights ... 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 that cannot be considered justifiable under Article 1 of Protocol 1."

- Compensation for Expropriation

Read how the Court described the function of compensation in the landmark case of *James and others v UK*. Compensation is critical to the proportionality test, because it provides a comparator for the taking. A proportion between the value of the property taken and the amount of compensation indicates that the interference might be justified.

#### JAMES AND OTHERS v. UK(1986)

Facts: Under UK legislation, long leasehold tenants could acquire the property of the houses without the consent of the landlords, who submitted an application to the Court. The Court found in favour of the UK, holding that the measures fell within its margin of appreciation.

"54. ...under the legal systems of the Contracting States, **the taking of property in the public interest without payment of compensation is treated as justifiable only in exceptional circumstances** not relevant for present purposes. As far as Article 1 [of Protocol No. 1] is concerned, the protection of the right to property it affords would be largely illusory and ineffective in the absence of any equivalent principle.

Clearly, compensation terms are material to the assessment whether the contested legislation respects a fair balance between the various interests at stake and, notably, whether it does not impose a disproportionate burden on the applicant..."

- Compensation for interferences other than Expropriation

Even when there is no deprivation of property, and the interference falls under one of the other 'rules' of P1-1 (on the enjoyment of possessions and the control of use), compensation can be helpful in the proportionality analysis.

#### CHASSAGNOU v. FRANCE(1999)

Facts: The applicants were forced to grant hunting rights to others on their lands, without any other compensation than the right to hunt elsewhere. Since the applicants opposed hunting, the lack of monetary compensation rendered the interference disproportionate.

"82. ... the 1964 Act does not contemplate any measure of compensation for landowners opposed to hunting, who, by definition, do not wish to derive any advantage or profit from a right to hunt which they refuse to exercise. ...

85. ... Compelling small landowners to transfer hunting rights over their land so that others can make use of them in a way which is totally incompatible with their beliefs imposes a disproportionate burden which is not justified under the second paragraph of Article 1 of Protocol 1"

#### HUTTEN CZAPSKA v. POLAND (2006)

In this pilot case, Polish landlords challenged rent-control laws that imposed maximum rent levels so low that they would not even cover maintenance costs. The Court acknowledged that limitations on the use of flats were possible and sought to cure a shortage of affordable housing.

However, the Polish measures did not strike a fair balance, as they placed the burden of the housing reform only on the landlords, depriving them of the right to profit from their properties. Poland passed general measures to implement the judgment, thereby reaching a settlement with the claimants but also compensating other people in the same situation.

### HUTTEN-CZAPSKA v. POLAND(2006)

“221. ... [the State has not] instituted any procedure or statutory mechanism enabling landlords to mitigate or compensate for losses incurred in connection with the maintenance or repairs of property as the Constitutional Court has advised on many occasions...

222. ... it is clear that not much progress in that field can, and will, be achieved unless the above-mentioned general defects of the Polish housing legislation are removed rapidly and the entire system is reformed in a manner ensuring genuine and effective protection of this fundamental right in respect of other similarly situated persons.”

#### **How much compensation is due?**

As a principle, full compensation should be provided in case of takings. Compensation below the full market value of the possession can also be proportionate, if the public interest pursued by the state measures is particularly important (or if the interference does not amount to expropriation).

However, there must be at least a reasonable relation between the value of the possession and the compensation offered.

In the case of Scordino v. Italy, Italian law set the method of calculation for compensation due for expropriation for public purposes.

In 1992, a law was passed which provided for less than full market value of the property, and applied retroactively.

The Court considered Italy’s asserted purposes for the measures, namely budgetary considerations and policy reasons. Whereas compensation below full market value is not per se unlawful, the Court found a breach of P1-1 in the instant case, since the great gulf between the market value and the compensation awarded did not find justification in the aims pursued by the interference.

### **SCORDINO v. ITALY(2006)**

“101. In the instant case the final amount of the compensation was fixed at ITL 82,890 per square metre, whereas the estimated market value of the land at the date of the expropriation was ITL 165,755 per square metre ... Consequently, the compensation for expropriation is far lower than the market value of the property in question. Furthermore, tax was subsequently deducted from it at a rate of 20% ...

102. The present case concerns a distinct expropriation, and one which was neither carried out as part of a process of economic, social or political reform nor linked to any other specific circumstances. Accordingly, in this case, the Court does not discern any legitimate objective “in the public interest” capable of justifying less than reimbursement of the market value.

103. Having regard to all the foregoing considerations, the Court considers that the compensation awarded to the applicants was inadequate, given the low amount awarded and the lack of public-interest grounds capable of justifying less than compensation at the market value of the property. Accordingly, the applicants have had to bear a disproportionate and excessive burden which cannot be justified by a legitimate aim in the public interest pursued by the authorities."

### **Full market value at the time of the taking**

There might be cases in which the market value of the possession has changed considerably over time. The Court, in principle, considers that **the full market value shall be assessed at the time of the taking**. This is a critical element when the state provides compensation measured on the historical evaluation of the property (e.g., the purchase price).

### TUNAITIS v. LITHUANIA(2015)

Facts: The applicant had bought their property from the State at nominal price (28€) after dissolution of the Soviet Union. After the previous owner recovered the land in civil proceedings, the applicant was awarded 35€ in compensation. The Court found the interference disproportionate, given the amount of compensation granted.

"40. After the applicant lost his title to the land, he was paid LTL 122 (EUR 35), the nominal price of the land in 1994. According to the assessment submitted by the applicant, the market value of the plot in July 2008 was LTL 35,000 (EUR 10,136). While no estimates in this regard have been made by the domestic authorities, the Court finds it reasonable to conclude that the market value of the land in 2008, when the final judgment of the Supreme Court was adopted, was higher than the nominal price paid by the applicant in 1994. It should also be noted that the LTL 122 returned to the applicant had obviously suffered considerable devaluation and could not be reasonably related to the value of the land fourteen years later. Accordingly, the Court finds that the compensation of LTL 122 paid to the applicant in 2008 was clearly insufficient for the purchase of a new comparable plot of land ....

41. ... In line with the Court's case-law in similar cases concerning expropriation of property, the balance mentioned above is generally achieved where compensation paid to the person whose property has been taken reasonably relates to its "market" value as determined at the time of the expropriation ... **It follows that the amount of compensation for the applicant's loss of title to the land must be calculated using the value of the property on the date ownership was lost..."**

### **Exceptions to the duty of full compensation**

If the community interests implemented by the interference are of particular importance, the fair balance might be struck even without full compensation. States are granted a wide margin of appreciation to pass laws in the context of a change of political and economic regime which might affect private possessions.

### JAHN AND OTHERS v. GERMANY(2005)

Facts: The applicants had inherited land assigned to their ascendants during the Soviet occupation of Germany, in 1945. In 1992 a new law required the transfer without compensation of such land to the State, unless the owners were using it for agricultural purposes. The Court did not find a breach of P1-1.

"94. Compensation terms under the relevant legislation are material to the assessment whether the contested measure respects the requisite fair balance and, notably, whether it imposes a disproportionate burden on the applicants. In this connection, the Court has already found that the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference and a total lack of compensation can be considered justifiable under P1-1 only in exceptional circumstances ....

95. ... [domestic law] does not provide for any form of compensation for the applicants. As it has already been established that the interference in question satisfied the condition of lawfulness and was not arbitrary, the lack of compensation does not of itself make the state's taking of the applicants' property unlawful .... Accordingly, it remains to be determined whether, in the context of a lawful deprivation of property, the applicants had to bear a disproportionate and excessive burden. ...

116. ... **Given the "windfall" from which the applicants undeniably benefited as a result [the 1945 land reform], the fact that this correction was made without paying any compensation was not disproportionate....** It should also be noted in that connection that the [1992 measures] did not benefit the state only, but in some cases also provided for the redistribution of land to farmers."

### **Less than full market value compensation – other scenarios**

In the case JAHN AND OTHERS v. GERMANY (2005), the lack of compensation was justified in light of the fact that the possession had been transferred to the applicants at no cost, and the interference pursued important societal purposes. The Court considered compensation below full market value to be lawful in other scenarios. Here are a few:

#### JAMES AND OTHERS v. UK

In JAMES AND OTHERS v. UK (1986), the Court justified the leasehold-reform legislation allowing long-term tenants to acquire their property, even if freeholders received less than full market value. The reform was carried out in the context of social and economic reform, and the burden on freeholders was not unreasonable.

#### LITHGOW AND OTHERS v. UK

In LITHGOW AND OTHERS v. UK (1986), the Court found that the compensation awarded to the shareholders of certain companies which were expropriated was

reasonable, even if below full market value. The interference sought to secure economic reorganisation in certain strategic industries.

#### PAPACHELAS v. GREECE

In PAPACHELAS v. GREECE (1999), the Court found that the slight difference between the awarded compensation and the market value fell within the margin of appreciation.

#### FORMER KING OF GREECE AND OTHERS v. GREECE

In other cases, nation-wide social reforms justified the wider margin of appreciation which resulted in compensation below market value. These included the transition from monarchy to republic (THE FORMER KING OF GREECE AND OTHERS v. GREECE (2003)); the transition to a democratic regime (BRONIOWSKI v. POLAND (2004)); the reunification of Germany (JAHN AND OTHERS v. GERMANY (2005), above);

#### **How can the Court review the amount of compensation?**

The Court's task is to determine whether the compensation provided by the state strikes a fair balance (i.e., makes the interference proportionate). There is no scientific formula for compensation and the state normally enjoys some margin of appreciation, but the Court can take all matters into account, including:

##### a. Adequacy

The adequacy of the amount in view of the loss of source of income caused by the interference (In LALLEMENT v. FRANCE (2002), the compensation was deemed insufficient because it did not cover this head of loss. The Court awarded 150,000 € (in just satisfaction).

##### b. Increase

The increase in value occurred during the expropriation procedures (in MALAMA v. GREECE (2001), the Court noted that the 75-year delay in paying compensation contributed in making the amount insufficient. The Court awarded 487,060 € in pecuniary damages and 10,000€ in non-pecuniary damages.

##### c. Impact

The impact on the applicant in light of the circumstances (in PINCOVÁ AND PINC v. THE CZECH REPUBLIC (2002), the applicants had bought a house from the state, and lived there for 42 years.

After the previous owner successfully recovered the property (which had been confiscated), they were compensated only of the purchase price.

The Court found that the amount did not cover non-pecuniary damages and did not take into account the applicants' difficulty in finding an alternative accommodation.)

The Court awarded 35,000€ in non-pecuniary damages. See also TUNAITIS v. LITHUANIA (2015).



### **BISTROVIC v. CROATIA (2007)**

Read how the Court reviewed the compensation awarded to the applicants, whose land had been expropriated in part to build a motorway. They had received compensation for the agricultural land expropriated, but no special indemnity for the ensuing depreciation of their adjacent house.

#### BISTROVIC v. CROATIA(2007)

"42. ... the Court notes that the applicants argued that the future motorway would pass two to three metres from their house and that the estate had lost its hitherto pleasant surroundings, a huge courtyard and low noise exposure, all of which had made the property very suitable for agricultural activity. **The Court notes that none of these factors were taken into account by the domestic authorities when fixing the compensation for the applicants' expropriated property.**

43. Furthermore, throughout the domestic proceedings the applicants asserted that the expert's report serving as a basis for assessing the effects of the motorway on their remaining property had been drawn up without the expert ever visiting the actual site, which had resulted in their house being erroneously drawn. The Court considers that it was necessary to have these facts established in a precise manner by further verifying the applicants' argument that their house had been erroneously drawn on the map of the land plot. Only after such verification of all factors concerning the effects of the motorway construction on the applicants' remaining property, such as the decrease in the value of their estate, the possibility of selling it and the applicants' interest in further use of the remaining estate, would it be possible for the domestic authorities to fix adequate compensation in the expropriation proceedings.

44. The Court therefore finds that, by failing to establish all the relevant factors for establishing the compensation for the applicants' expropriated property, and by failing to grant indemnity for the decrease in the value of their remaining estate, the national authorities have failed to strike a fair balance between the interests involved and have failed to make efforts to ensure adequate protection of the applicants' property rights in the context of expropriation proceedings which involved the ultimate interference on the part of the state with these rights."

### **ĐURIĆ AND OTHERS v. BOSNIA AND HERZEGOVINA (2015)**

Read how the Court reviewed the compensation awarded to the applicants, taking issue not so much with the amount, but with the modalities of the payment. In particular, the Court noted that the delay of the payment interfered disproportionately with the applicants' rights.

#### ĐURIĆ AND OTHERS v. BOSNIA AND HERZEGOVINA(2015)

Facts: A Bosnian court had ordered the Republika Srpska – a State entity – to pay war damages to the applicants. The settlement scheme, set in a 2004 law, provided for payment in the forms of bonds with 10-year maturity, to be paid in yearly instalments

from 2014 to 2023. The timeframe for enforcement of the court orders was first extended to thirteen years, then twenty years (starting from 2013).

"30. As regards the enforcement time-frame, the Court takes the view that, while the system of staggering the enforcement of final judgments may be accepted in exceptional circumstances (see *Immobiliare Saffi v. Italy* [GC], no. 22774/93, § 74, ECHR 1999- V), the proposed time-frame of 20 years is too long in the light of the lengthy delay which has already occurred. The Court is aware of the Republika Srpska's significant public debt as well as of the number of non-enforced judgments and the number of cases pending before the domestic courts. It reiterates however that it is not open to a state authority to cite lack of funds as an excuse for not honouring a judgment debt...

Moreover, it was the Republika Srpska's legal system that allowed for the creation of such a high number of judgments awarding war damages: civil actions for war damages were brought under the ordinary rules of tort law ... .. While a search for 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 is inherent in the whole of the Convention, the consequence of the respondent State's action in delaying for another 20 years the enforcement of these judgments is to impose an individual and excessive burden on the creditors concerned"

## Restitution of property - The ECHR Approach

### Taking or nationalisation of property after World War II

After the Second World War, communist regimes in central and Eastern Europe as well as social-democratic governments in Western Europe introduced a number of reforms in order to implement their economic policies.

There was a fundamental difference in the implementation of these policies and their scale since the social-democratic method of expropriation generally followed the rule of law principles and provided for adequate compensation.

### Central-and-eastern Europe characteristics

One of the characteristics of the communist rule in central and eastern Europe was massive taking of private property into public ownership or control, without (adequate) compensation.

Following major changes in political regimes in the 80's and 90's, expectations rose for this property to be returned *in natura* or for compensation to be awarded, either to those who had been dispossessed or to their descendants.

The Convention organs considered a number of claims against central and eastern European states in connection with expropriated or confiscated property and with different legal situations created following the return of property to previous owners.

### Legislation pertaining to the restitution of property

After the change of the political regimes, restitution measures were adopted in many countries in central and eastern Europe. However, since **Article 1 of Protocol 1 (P1-1) does not guarantee the right to acquire property, the Convention organs held that P1-1 cannot be interpreted as imposing any general obligation on the Contracting States to return property which was transferred to them before they ratified the Convention.**

Nor does P1-1 impose any restrictions on the Contracting States' freedom to determine the scope of property restitution or to choose the conditions under which they agree to restore property rights of former owners.

The Contracting States enjoy a wide margin of appreciation with regard to the exclusion of certain categories of former owners.

Review the case of *Von Maltzan v. Germany* for more information.

**Facts:**

The case concerned the indemnification and compensation terms afforded, after Germany's reunification, for expropriation of property occurred either after 1949 in the GDR or, more frequently, between 1945 and 1949 in the former Soviet Occupied Zone of Germany.

The Court held that since the state elected to redress the consequences of certain acts that were incompatible with the principles of a democratic regime but for which it was not responsible, it had a wide margin of appreciation in the implementation of that policy.

**It therefore declared the application inadmissible.**

**A new property right conferred by the restitution legislation**

However, once a Contracting State, having ratified the ECHR including Protocol No. 1, enacts legislation providing for the full or partial restoration of property confiscated under a previous regime, such legislation may be regarded as generating a new property right protected by Article 1 of Protocol 1 for persons satisfying the requirements for entitlement (see VON MALTZAN AND OTHERS v. GERMANY (2005) and BRONIOWSKI v. POLAND (2004), § 125).

The claimants should therefore fulfil all conditions set by domestic legislation – typically the nationality or permanent residence requirements or any other condition. A person who complains of a violation of his or her right to property must therefore first show that such a right existed in the framework of domestic proceedings.

**Different HR issues in restitution cases**

The applicability of a guarantee of property rights to restitution disputes involves the human rights constraints on effecting any restitution.

These include the need to respect the interests of persons currently in possession of the property subject to a restitution claim (Article 8), as well as the requirements of the right to a fair hearing (Article 6) and the prohibition on discrimination (Article 14). All of these can have a potentially significant impact on both the content of restitution measures and the procedure for their implementation.

It is important to note that even if the applicant does not fulfil the statutory conditions for the return of property and the property P1-1 complaint is inadmissible *ratione materiae*, guarantees under Article 6 do apply to the domestic procedure.

KOPECKY v. SLOVAKIA(2004)

**Facts:**

The state had confiscated a set of coins belonging to the applicant's father.

The applicant was unable, to show where the coins were at the moment of the restitution request, as required under domestic law. Therefore, the Court held that the applicant's claim did not qualify as an "asset" for the purposes of Article 1 of Protocol 1.

**The hope of recognition of a property right**

In such cases, the Convention organs have also consistently held that the hope of recognition of a property right which it has been impossible to exercise effectively cannot be considered a "possession" within the meaning of Article 1 of Protocol 1, nor can a conditional claim which lapses as a result of the non-fulfilment of the condition (see, for instance, PRINCE HANS-ADAM II OF LIECHTENSTEIN v. GERMANY (2001), §§ 82 and 83).

**The doctrine of the instantaneous act**

In respect of lawful expropriations before the entry into force of the Convention, the Convention organs have applied previously established case-law, noting that deprivation of ownership or of another right *in rem* is in principle an instantaneous act, which does not produce a continuing situation of "deprivation of a right". As a result, a claim regarding a breach occurred before the entry into force of the Convention falls outside the jurisdiction *ratione temporis* of the Court and is inadmissible.

BREZNY v. SLOVAK REPUBLIC(1996)

Facts: The legislation of the then Czech and Slovak Federal Republic provided for restitution of confiscated possessions in certain circumstances, including permanent residence of the applicant. The applicants challenged this requirement.

Given that the applicants did not fulfil all legal conditions under domestic law, the Commission declared their application inadmissible.

VISTIŇŠ AND PEREPJOLKINS v. LATVIA(2012)

Facts: The case concerned the expropriation of land in the 1990s, after the entry into force of the Convention for Latvia, in connection with the enlargement of the Free Port of Riga. The expropriation was based on a special law derogating from the normal rules of expropriation.

The Court found that the difference between the current value of the expropriated plots for land-tax purposes and the compensation awarded was very disproportionate and therefore that Latvia had not struck a fair balance between the public interest and the applicants' fundamental rights. In the just-satisfaction judgment (2014), the Court held that the Latvian Government had to pay EUR 339,391.98 to Mr Vistiņš and EUR 871,271.12 to Mr Perepjolkins in respect of pecuniary damage.

## Exceptions and Special Issues

An exception to the doctrine of the instantaneous act is a situation in which the ownership was not validly lost before the ECHR entered into force. There are also special situations that can be reviewed below.

### The doctrine of the continuous violation

#### VASILESCU v. ROMANIA(1998)

Facts: The applicant's golden coins were unlawfully taken in 1966 by the militia. In the 1990s, the applicant lodged the claim for restitution of her property.

Given that the initial taking had been unlawful, the Court considered that the applicant was still the owner of the property in question. Furthermore, the loss of all ability to dispose of the property in issue, taken together with the failure of the attempts made thus far to have the situation remedied by the national authorities and courts, had entailed sufficiently serious consequences. Therefore, the applicant has been the victim of a de facto confiscation.

### Use of extraordinary remedies

The Court found a violation BRUMĂRESCU v. ROMANIA (1999), where the property already returned to the owner had been taken away again, further to the use of extraordinary legal remedies.

#### **Facts:**

In 1950, the applicant's parents' house in Bucharest was nationalised without compensation. In 1993, the Bucharest Court of First Instance held that the nationalisation had been unlawful and the applicant regained possession of the house. Subsequently, the Supreme Court quashed that judgment, further to the application by the Procurator-General.

The Court found that the effect of the Supreme Court of Justice's judgment had been to deprive the applicant of the rights of ownership of the house vested in him by the final judgment in his favour at first instance and that Article 1 of Protocol 1 was violated.

### Balance - rights of [previous] owners and third persons

#### PINCOVA AND PINC V. THE CZECH REPUBLIC(2002)

Facts: In 1967, the applicants bought a forester's house with a barn and cowshed from a state-owned undertaking which had itself acquired the property in 1948 after it had been confiscated without compensation from the former owners. After the change, the son of the previous owners sought recovery of the property, arguing that the first

applicant and her husband had acquired it at a price lower than its true value, and was successful. Some compensation was paid to them.

The Court considered that the applicants had acquired their possessions in good faith, unaware that they had been confiscated and without being able to influence the sale conditions or the purchase price. The applicants had been the owners of the house during 28 years and the sum reimbursed to them was not sufficient to enable them to buy alternative accommodation. The applicants had had to bear an individual and excessive burden which had upset the fair balance required to be struck between the general interest and protection of the right to peaceful enjoyment of possessions.

### **Restitution of Religious Property**

A special issue is the restitution of property that was previously in the ownership of religious communities and has important cultural value. The restitution of former religious property is often the subject of special rules.

#### EPARHIJA BUDIMLJANSKO-NIKŠIČKA v. MONTENEGRO (2012)

Facts: Some plots of land in Montenegro, formerly owned by the diocese Budimljansko-Nikšićka and its churches and monasteries, was expropriated after World War II.

As to the question whether the applicants had a legitimate expectation that their restitution request would be determined in their favour, the Court noted that they had relied on legislation whose key provisions had been declared unconstitutional before the Convention had entered into force in respect of Montenegro and before they had filed their request. It was therefore unrealistic that the request would be determined at all. The application was considered inadmissible.

#### LUPENI GREEK CATHOLIC PARISH AND OTHERS v. ROMANIA (2015)

Facts: Certain places of worship belonging to the Greek Catholic Church were transferred to the Orthodox Church under the totalitarian regime. A special law applied, regulating the legal status of such property. The case was referred to, and is currently pending before the Grand Chamber.

## **4.2 RESTITUTION AND COMPENSATION IN ALBANIAN LEGAL ORDER**

Learning objectives of this chapter:

- Enhanced skills to interpret recent Albanian legislation on compensation and restitution in accordance with ECHR standards;
- Analysis of property rights according to the methodology of the Constitutional Court (CC);
- Identification of property rights and knowledge on standards for public administration and national courts;
- Raising awareness of the importance of procedural elements of administrative and judicial processes on the matter of property rights;
- Reflection on the eventual consequences that can occur from property rights breaches by public administration and national courts.

### **APPLICATION OF ARTICLE 1 OF PROTOCOL NO. 1 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS TO ALBANIAN LEGAL ORDER**

#### **1998 CONSTITUTION OF THE REPUBLIC OF ALBANIA**

Text approved by referendum on 22 November 1998 and amended on 13 January 2007  
Translated under the auspices of OSCE-Albania

##### **Article 11**

1. The economic system of the Republic of Albania is based on private and public property, as well as on a market economy and on freedom of economic activity.
2. Private and public property are equally protected by law.
3. Limitations on the freedom of economic activity may be established only by law and for important public reasons.

##### **Article 17, Constitution of the Republic of Albania**

1. The limitation of the rights and freedoms provided for in this Constitution may be established only by law for a public interest or for the protection of the rights of others. A limitation shall be in proportion with the situation that has dictated it.
2. These limitations may not infringe the essence of the rights and freedoms and in no case may exceed the limitations provided for in the European Convention on Human Rights.

##### **Article 18**

1. All are equal before the law.
2. No one may be unjustly discriminated against for reasons such as gender, race, religion, ethnicity, language, political, religious or philosophical beliefs, economic condition, education, social status, or parentage.



3. No one may be discriminated against for the reasons mentioned in paragraph 2 without a reasonable and objective justification.

#### **Article 41**

1. The right of private property is guaranteed.
2. Property may be acquired by gift, inheritance, purchase, or any other classical means provided by the Civil Code.
3. The law may provide for expropriations or limitations in the exercise of a property right only in the public interest.
4. Expropriations or limitations of a property right that amount to expropriation are permitted only against fair compensation.
5. In the case of disagreements related to the amount of compensation, a complaint may be filed in court.

#### **Article 42**

1. The liberty, property, and rights recognized in the Constitution and by law may not be infringed without due process.
2. Everyone, to protect his constitutional and legal rights, freedoms, and interests, or in the case of charges against him, has the right to a fair and public trial, within a reasonable time, by an independent and impartial court specified by law.

#### **Article 1, Law No. 133/2015 on the Treatment of Property and finalization of the Process of Compensation of Property**

a) The regulation and provision of a just compensation on the property rights issues raised from the expropriations, nationalizations or confiscations pursuant to the criteria of Article 41 of the Constitution, and Article 1 of Protocol No. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

(...)

### **LAW NO. 133/2015 ON THE TREATMENT OF PROPERTY AND FINALIZATION OF THE PROCESS OF COMPENSATION OF PROPERTY**

#### **Legislative and jurisdictional background**

During the communist regime (1944-1992), the Albanian government expropriated thousands of property owners by seizing their plots of land and buildings.

In 1993, the restitution law (no. 7698/1993) was established. Under this law, the parties did not have a right to lodge an appeal against the decision of competent administrative commission to higher authority. The former owners of the land have the right to request the restitution of the property up to 60 hectares. This law was changed many times. No provisions on deadline to request for compensation/restitution.

In 1998, the new Constitution was established. It mentioned explicitly the property rights and it expressed concept of restitution and compensation (Article 41 (§15 of Venice Commission Opinion).

In 2004, the new restitution law (no. 9235/2004 "*On Property Restitution and Compensation*") abolished the 1993 law, transposing the public interest and fair compensation from the new Constitution of Albania. This law has enlarged the means of the compensation of the property. The restitution was not limited in size.

This law instituted the State Committee on Property Restitution and Compensation (Komiteti Shtetëror për Kthimin dhe Kompensimin e Pronave), composed of five members elected by Parliament. Its role was to decide on the lawfulness of district committees' decisions on restitution and compensation claims.

For the first time the Albanian State was requiring to establish the compensation fund. The Council of Ministers was to establish the rules and the criteria to be applied. It provides for the enforcement of decisions awarding compensation within the first six months of each financial year. Following its entry into force, anyone entitled to claim restitution or compensation was required to lodge an application by 30 September, 2007, and they should be examined till 31 June 2008.

In 2006, the 2004 law was amended (no. 9583/2006). The State Committee in charge of the restitution/compensation was abolished. The monocratic organ was created and it is called Agency of Restitution and Compensation of Property under Ministry of Justice. The regional commissions became regional offices of Agency. The Law postponed the deadline to lodge application till 31 December 2008 and the deadline for examination of cases was fixed on 30 June 2009.

In accordance to the Law of 23 December 2009 No. 1207, all regional offices were to be removed and decision-making powers were given to the central Agency. The deadline was once again postponed until 31 December 2011.

In 2012 the law was established to postpone deadline to 30 April 2013 (no.55/2012).

In these years, the Constitutional Court of Albania issued a number of decisions related to property rights, some of which are outlined below:

Decision no. 26/2005 on abrogation as inconsistent with the Constitution of the Republic of Albania of Article 9 of the Law on restitution and compensation of property No. 9235, adopted on 29 July 2004. The Constitutional Court accepted the application of an association of tenants in former privately-owned state houses and stated that: "the amendment of the law favorable (beneficial) to a certain group of the population is not justified by any essential public interest. It is true that the amended provision favors the owners of houses, but on the other hand it discriminates against another group (though small in size), violating the minimum right to life, that of having housing. To deny the right of the tenants to become owners, to terminate/interrupt the lease/rent

contract without guaranteeing alternative housing, is considered an action that cannot be justified in the light of the public interest.”<sup>3</sup>

Decision no. 30/2005 on abrogation as inconsistent with the Constitution of the Republic of Albania of Articles 3.2, 3.5, 5, 6.1, 6.2, 7, 8.2, 8.3, 8.4, 9 and 13.2 of Law on the restitution and compensation of Property No. 9235, adopted on 29 July 2004. The Constitutional Court rejected the application of the National Association of Expropriated “Property through Justice”, stating that: “the regulation of property restitution and compensation in its origin aims to correct/rectify, to the extent possible, “within the country’s economic and social conditions” the injustices of the previous regime, committed to the detriment of private property through the nationalization, expropriation, confiscation or otherwise unfair means.”

Decision no. 43/2011 on abrogation as inconsistent with the Constitution of the Republic of Albania, of the Law No. 10308 amending Law No. 9235 on the restitution and compensation of the property. The Constitutional Court accepted the complaint of the National Association of Expropriated “Property through Justice” and the Albanian Helsinki Committee, stating that: “The legal framework that regulates the process of restitution and compensation of property throughout its history in the Republic of Albania, has recognized the right of private parties to appeal against a decision of a state body which refuses the recognition, restitution or compensation of property both in the administrative and court proceedings. The ownership titles obtained through these decisions of the former CCPC cannot be annulled or overruled by iure empire, therefore unilaterally, by administrative decisions issued by the relevant public authorities, in the present case by the Director of the ACRP. The exercising of such

competence creates a state of legal insecurity that cannot be corrected by solutions that impose uncertain actions that do not guarantee the return to lawfulness.”

Decision no. 1/2013 on abrogation as inconsistent with the Constitution of the Republic of Albania, of the Normative Act No. 03 and of the Law no. 82/2012 on the liberation of residencies to their lawful owners from homeless citizens or residents in residencies that are property of expropriated subjects, adopted respectively on 1 August 2012 and on 13 September 2012. The Constitutional Court rejected the application of the Association of Tenants of State owned houses, Formerly Private Properties, reasoning that: “the nature of the laws providing for the recognition, restitution and compensation of property confiscated under the former communist regime in itself

---

<sup>3</sup> In pilot-judgment *Hutten-Czapska v. Poland* (2006), Polish landlords challenged rent-control laws that imposed maximum rent levels so low that they would not even cover maintenance costs. The Court acknowledged that limitations on the use of flats were possible and sought to cure a shortage of affordable housing. However, the Polish measures did not strike a fair balance, as they placed the burden of the housing reform only on the landlords, depriving them of the right to profit from their properties. “[the State has not] instituted any procedure or statutory mechanism enabling landlords to mitigate or compensate for losses incurred in connection with the maintenance or repairs of property as the Constitutional Court has advised on many occasions” (§ 221). Poland passed general measures to implement the judgment, thereby reaching a settlement with the claimants but also compensating other people in the same situation.

generates a new property right in favour of persons who satisfy the conditions of entitlement to the right, the right protected by Article 1 of Protocol No. 1 to the ECHR. The legislation of the property restitution, particularly if accompanied by the implementation of social and economic reforms, is unlikely to achieve an all-inclusive justice in the various conditions of a large number of different individuals involved. For this reason, it is primarily the task of the authorities responsible and, in particular, of the legislative power to assess the advantages and disadvantages of the available legislative alternatives, given that this is a political decision. In this light, the Court considers that the legal provisions of the act under review aim not only to establish a fair balance in the realization of the social interest of the social grouping, that of the tenants, residing in formerly owned dwellings of expropriated subjects, but above all these measures have a direct effect on guaranteeing the constitutional right to property. The ultimate solution to this problem as a matter not only of public interest, but above all of constitutional nature is a priority, as the right to property is one of the main pillars behind the economic system and the development of the country”.

Following ECHR judgement *Manushaqe Puto and Others* (November 2014) the Court found structural problem - failure to enforce final domestic judicial and administrative decisions related to the right of restitution or compensation.

In 2015, there was a new Law abolishing the previous law (9235/2004 as amended).

### **Recent developments**

According to the explanatory report to the Law 133/2015, “[t]he Law [No. 133/2015] is proposed to focus on the protection and guaranteeing the constitutional right of ownership, to ensure it[s] restoration in cases of unfair removal, in accordance with the principle of legal certainty and the rule of law, and the exercise of the right to expropriation of property following fair compensation and in complete balance with the public interest”.

It created a new scheme; there is no restitution anymore and only compensation (Law No. 133/2015 "On the Treatment of Property and Finalization of the Process of Compensation of Property" provides that the Agency for Restitution and Compensation of Property is transformed in Agency of the Treatment of Property.

It clearly defines the competent authority that will manage this process determines completion of the review and award decisions for requests that are untreated, within a

period of 3 year. It sets completion of compensation for all decisions within a period of 10 years, guaranteeing the repayment of this obligation through annual financial fund established by law. It establishes sanctions in case of non-compliance with the obligations stipulated in this law. The law introduced the deadline of 3 years for examination of compensation applications and 10 years to settle compensation issues (Article 11 of the Law).

Agency delivers administrative decisions – decisions are subject of review by different judicial jurisdictions: financial compensation: Administrative Appeal Court related to: physical compensation: Civil Appeal Court.

On 21 April 2016 the President of the Republic of Albania, 1/5 of the MPs, State Advocate, Republican Party, Association of Legitimate Owners "Shqiptaret", Association "Krahina Jone", Association "Bregdeti", Association "Pronesi me Drejtesi" lodged a complaint to the Albanian Constitutional Court regarding constitutionality of the Law No. 133/2015.

In 2016, the Albanian Constitutional Court asked an opinion of the Venice Commission on compatibility of the new law with the ECHR property rights standards (No. 861/2016). In accordance with this opinion, the lower amount of compensation paid to the former owners meets the requirement of proportionality as set out in Article 1 of Protocol 1 to the ECHR (see §54, §45-56).

In 2017, the Albanian Constitutional Court, having taken into consideration the Venice Commission Opinion, issued its decision (no. 1) and found Article 6 §§ 3 and 5 of the Law 133/2015 to be unconstitutional.

The Constitutional Court observed that the content of paragraph 1 and 2 of Article 6, law No 133/2015 materializes the main principles of the compensation formula. The rest of Article 6 regulates specific situations which judging by their content lead one to the conclusion that they have been conceptualized as a new expropriation given that they foresee the re-evaluation of those properties that have already been recovered or compensated. In this regard, these two provisions create issues related to legal certainty, more specifically resulting in uncertainty and unpredictability of the legislation.

Taking into consideration Albania's specific situation, it can be argued that the new and effective legislation fulfils the criteria of proportionality provided by Article 1, Protocol 1 of ECHR. According to the Constitutional Court, the interference seems to have a legitimate aim given that the aim of law 133/2015 is to effectively solve the problem of former property owners through its recognition and compensation within a reasonable time of 10 years.

With regard to the claims of the applicants related to the scheme of financial compensation provided by Article 7 of this Law, the Constitutional Court failed to reach the required majority to take decision on merits, therefore it decided to reject the claim.

## II. COMPARATIVE OVERVIEW OF LEGISLATION AND CASE LAW INVOLVING RESTITUTION AND COMPENSATION RIGHTS

After the Second World War, the communist authorities expropriated in mass private property owners. In the early 1990s, the restitution measures were adopted in many countries: under so-called "restitution laws" (Albania, Bulgaria, Lithuania, and "the former Yugoslav Republic of Macedonia"); under "rehabilitation laws" (the Czech Republic, Germany, Moldova, Russia, Slovakia and Ukraine) and under "property legislation" (Bulgaria, the Czech Republic, Estonia, Germany, and Slovenia).

The restitution and compensation is not an absolute right and is subject to numerous conditions and restrictions.

In some countries, there are conditions *ratione personae* imposed as regards expatriated owners for them to be eligible for restitution or compensation: citizenship (Lithuania, Moldova); permanent residence (Estonia, Slovakia) or rehabilitation because of political repression (Russia, Ukraine).

Certain categories of properties are excluded from restitution. For example, buildings, which lost their original character (Estonia); property destroyed or which passed in private ownership (Moldova, Russia and Ukraine).

Some legislation imposes temporal restrictions on the lodging of claims for restitution and compensation like Albania or Estonia.

Another property equivalent to nationalised or confiscated one is provided in many countries (Albania, Bulgaria, Germany, Montenegro, "the former Yugoslav Republic of Macedonia"). If no exchange is possible, the authorities can propose a sum of money, compensation vouchers (Bulgaria, Hungary), State securities or bonds (Slovenia, "the former Yugoslav Republic of Macedonia") or shares in a public company (Albania and Bulgaria).

The value of compensation is calculated according to market value (Lithuania, Poland, Serbia) or time of property expropriation ("the former Yugoslav Republic of Macedonia"). In Germany, the value of expropriation is taken of the period before expropriation and then multiplied by a coefficient laid down by law. In other countries, there is cap on compensation (Russia, Ukraine).

### **BRONIOWSKI V. POLAND (2004)**

The applicant's grandmother was repatriated after Poland's eastern border had been redrawn along the Bug River after World War II. Poland undertook to compensate those who repatriated and had to abandon their properties. However, since the change of the legislation in 1990, local administration, while still obliged to meet these compensation claims, has had insufficient land to meet the various demands. The applicant, entitled to compensatory property, has not yet received compensation for the property abandoned by his grandmother.

A violation of Article 1 of Protocol 1 because the applicant's entitlement to compensation for property abandoned in the territories beyond the Bug River has not been satisfied.

The Court found a violation of the applicant's right to property. Considering the impact on the applicant over many years of the Bug River legislative scheme as operated in practice, the Court concluded that, as an individual, the applicant had had to bear a disproportionate and excessive burden which could not be justified in terms of the legitimate general community interest pursued by the authorities. Accordingly, there had been a violation of Article 1 of Protocol 1.

In view of the systemic problem connected with the malfunctioning of domestic legislation and practice caused by the failure to set up an effective mechanism to implement the "right to credit" of Bug River claimants ... Poland must secure, through appropriate legal measures and administrative practices, the implementation of the property right in question in respect of the remaining claims. The Court noted that the issue was not satisfactorily resolved for some 80,000 claims.

### **Measures adopted by the Polish authorities**

" (...) The Polish Parliament passed the July 2005 Act on realisation of the right to compensation for property abandoned beyond the present borders of the Republic of Poland, which entered into force on 7 October 2005. Pursuant to its Section 13, the compensation for the Bug River property may be secured through two different channels, depending on the claimant's choice: either, offsetting the indexed value of the original property against the sale price of the state property acquired through an auction procedure, or by receiving a pecuniary benefit, i.e. cash payment secured by the Compensation Fund.

Entitled claimants could lodge requests for compensation until the end of 2008. The legal ceiling for compensation in respect of property abandoned beyond the Bug River was set at 20% of its original value."<sup>4</sup>.

### **MARIA ATANASIU AND OTHERS V. ROMANIA (2010)**

The applicants were owners of a nationalized flat. They lodged a restitution claim under Law No. 10/2001 for the damage sustained on account of the nationalization of an area of land used by university. In March 2006, the High Court of Cassation and Justice established her right to compensation. In June 2010, the claim was supposed to receive priority treatment.

The ECHR found violation of Article 6 (access to court) and Article 1 of Protocol No. 1 (unjustified absence of compensation and uncertainty when the applicants may receive it).

---

<sup>4</sup> <http://hudoc.exec.coe.int/eng?i=001-95484>

In accordance with Article 46, the pilot judgment was delivered. The ECHR drew attention to Resolutions in which the CM requested the national authorities to ensure respect of ownership rights indicating eventual solutions how to achieve this aim: amendment of existing restitution mechanism establishing coherent judicial and administrative practice. The Romanian Government submitted that it aimed to lay down binding time-limits for each administrative step, provided that the measure was realistic and subject to review by the courts. Other considered solutions were the overhauling legislation making the compensation scheme more foreseeable or setting a cap on compensation awards and paying them in installments over a longer period.

In response to this pilot judgment, the Romanian authorities adopted Law No. 165/2013 which entered in force on 20 may 2013 to remedy in particular: existence of two ownership titles for one lot of land; cancellation of ownership title in case when the ownership was not contested by third party; issuing decision on compensation without a precise amount of awarded compensation; non enforcement of final decision awarding compensation and lack of response from authorities in case of action engaged for compensation<sup>5</sup>.

#### **GRATZINGER AND GRATZINGEROVA v. THE CZECH REPUBLIC, (2002) 69§**

The applicants were US nationals whose property had been confiscated by the former Czechoslovak Socialist Republic. After the political changes in the Czech republic, the legislation provided that restitution claims may only be submitted by Czech nationals.

The Court held that the applicants did not have a "legitimate expectation" that a current, enforceable claim would be determined in their favour. The belief that the law then in force would be changed to the applicants' advantage was not a form of legitimate expectation protected under P1-1. The application was declared inadmissible.

#### **MUTISHEV v. AND OTHERS BULGARIA (2009)**

The applicants were expropriated from a plot of land of more than 100 hectares of farmland, which was collectivised during the communist era. The authorities failed to execute a final judgement in their favour restoring this ownership. The ECHR found violation of Article 1 of Protocol No. 1.

Mutishev is a leading case for two other cases and pending before the Department for the Execution of Judgments.

#### **DRIZA V. ALBANIA and RAMADHI V. ALBANIA (2007)**

In *Driza*, the applicant's father was owner of plots of lands expropriated during the communist regime. The applicant's son under the Property Restitution and Compensation Act 1993 challenged this expropriation decision. The authorities declared it as unlawful and ordered restitution in lieu. The decision has been never

---

<sup>5</sup> [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=090000168070298d](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=090000168070298d)



enforced because the plots of land were occupied by third persons. Instead, the applicant was awarded compensation, which has however never been paid.

In *Ramadhi and Others*, the applicants were owners of plots of land expropriated during communist period. Following the applicants' property claim, the national authorities ordered restitution and awarded compensation. The plots of land were effectively recovered but the compensation has never been paid. The applicants obtained also restitution order to other plots of land, which has never been enforced.

The ECHR found the non-enforcement of judgments and administrative decisions for the restitution of property and payment of compensation owing to systemic failings in domestic legal order amounted to interference with the right to the peaceful enjoyment of possessions and in breach with Article 13 (respectively in conjunction with Article 1 of Protocol No. 1 and 6) and Article 1 of Protocol No. 1.

The pilot judgment was issued in accordance with Article 46 calling upon the State authorities to remove all obstacles to the award of compensation under the Property Act in order to decrease a number of applicants deprived of their right to the peaceful enjoyment of property through the non-enforcement of judgments and decisions awarding them compensation.

#### **MULLAI V. ALBANIA (2010)**

The applicants registered a limited liability company in Albania. They lodged a request for building permit, which was delivered and declared by a court as valid. The applicants started the construction works, which were suspended following dispute over this building permit. The final judgment on building permit was quashed. Consequently, the building permit has never been enforced. The applicants complained about lack of legal certainty. The ECHR found violation of Article 6 § 1 and Article 1 of Protocol No. 1.

#### **CAUSH DRIZA V. ALBANIA (2011)**

The applicant was expropriated from his plot of land in 1947. He engaged the proceedings to obtain compensation for this confiscated property. The court awarded compensation in-kind to him and his siblings for the value of their plot of land. The applicant complained about unfairness of proceedings and that the authorities failed to enforce the judgment in his favour.

The ECHR found violation of Article 6 § 1, 13 and Article 1 of Protocol No. 1.

#### **MANUSHAQE PUTO AND OTHERS V. ALBANIA (2012)**

The applicants were owners of various plots of land expropriated by the former communist authorities in 1944-1992. In 1993, the relevant legislative reforms have started to award compensations to these former owners. Consequently, the authorities, between 1994 and 1999, recognized the applicants' property claims and the applicants were entitled to compensation. However, some of the owners recovered part of their land without receiving financial compensation in lieu for the remainder and this despite legal acts enacted since *Ramadhi* judgment. The Court found violation of

Article 13, because it found that there was no sufficient redress on account of prolonged non-enforcement of commission decisions on compensation. The non-financial compensation was not effective, as it couldn't be justified that such an award was made. The financial compensation was awarded only in respect of the entire property expropriated and for a maximum of equivalent of 200 square meters. The unsuccessful claimants could have submitted a new property claim in the following year and without non-pecuniary damage for delays occurred in enforcement.

The ECHR found also violation of Article 6 § 1 and Article 1 of Protocol No. 1.

The pilot-judgment was delivered in accordance with Article 46 and applied because of the important number of compensation cases and urgency of solving this problem efficiently at the domestic level in Albania. Consequently, the national authorities were obligated to take general measures to establish an effective mechanism of compensation within eighteen months after judgment's delivery.

## QUESTIONS

**Q1** Is just satisfaction an automatic consequence when the Court finds a breach of P1-1?

**Select your response(s) below.**

Yes

No

**Q2** Have a look at the statements below. Which of them are true?

**Select your response(s) below.**

A. In case of a breach, the Court will afford just satisfaction in the form of pecuniary damages, unless the state proves that the damage was not connected to the breach.

B. It is for the applicant to show always that pecuniary damage has resulted from the violation or violations alleged.

C. The applicant must always prove that any damage suffered is not caused by acts other than the breach alleged.

**Q3** What kinds of damage can just satisfaction cover? Briefly explain the meaning of each category of damage.

**Enter your answer in the box below.**

### **Scenario 1**

The applicant L.K was born and lives in Vlora.

On December 1, 1993, the Commission for Restitution and Compensation of Properties recognized the title of ownership over a plot of land of 2000 square meters, of which 1500 square meters were physically returned. For the 500 square meters, the applicant will be compensated in one of the forms provided by law.

The applicant L.K was born and lives in Vlora.

On an unspecified date on 2006, the applicant has requested to the responsible authority for the property issues (at that time the Agency for Restitution and Compensation of Properties), to be compensated for the property in question. His request was left without action by this body.

On 10 February 2017, with the entry into force of the new property law, the applicant has requested again to the responsible organ for the property issues (the Agency for Treatment of Properties) asking information on his application to obtain the compensation.

In its response, the Agency for Treatment of Properties has rejected the right of compensation recognized by the 1993's decision, reasoning that: "according to the criteria provided by the new property law if the assessment of returned property by a final decision results to be higher than Assessment of the land known for compensation, the expropriated subject is considered compensated "(Article 7/2 of the Law).

### **Question**

Do you think there is an interference with the right to property under Article 1 of Protocol 1, in terms of legitimate expectation?

Do you think the applicant has legal ground to bring this case before a court to restore his right of property?

### **Scenario 2**

The applicant A.P was born in Tirana. On 19 September 2000, Commission for Restitution and Compensation of Properties in Tirana recognized the title of ownership over a plot of land of 3000 square meters of which 750 square meters were physically returned to the applicant and for the 2250 square meters, he would be financially compensated.

On an unspecified date in 2005, the applicant has requested to the responsible authority for the property issues (at that time the the Agency for Restitution and

Compensation of Properties), seeking the financial compensation for the property recognized to him by the decision of 2000. The Property Restitution and Compensation

Agency did not accept the applicant's request and addressed him to resolve the case in the court. The applicant has filed a lawsuit with the court.

The Court of First Instance has accepted the lawsuit while the court of appeal revoked/quashed the decision of the First Instance Court and ordered the retrial of the case by the First Instance Court.

During the retrial of the case in the Court of First Instance, the new Law on Property Treatment was approved. In the light of the new law, the court of first instance decided to strike the case out of judicial jurisdiction by interpreting that the new law extends the effects and applies, also, to the execution of all decisions for the recognition of the right to compensation and to those that are unexecuted until now, as well as to the cases which are still under the judicial review.

More specifically, this law extends the effects also on the financial evaluation for:

- a) The execution of all decisions issued by administrative or judicial bodies, in our country, which, have not yet been implemented, on the recognition of the right to compensation;
- b) Cases currently under examination in courts of all tiers, in the High Court, as well as in the European Court of Human Rights, concerning their financial evaluation.

The applicant filed a special appeal against the decision of the court of first instance to the High Court.

### **Question**

1. Do you think that the new law on property meets the standards of an effective domestic remedy in the light of Article 13 of the Convention, taking into account that complex and long-term procedures are being created during the implementation of these provisions for the former owners?

**For illustration purpose:**

**Law no. 133/2005**

### **Article 19**

#### **Appeal against the financial evaluation**

Any interested party has the right to appeal against the financial evaluation of the PMA, which establishes the value of the property, to the Administrative Court of Appeal, within 30 (thirty) days of the publication, and only for the amount of compensation value.

## **Article 29**

### **Appeal**

The interested parties and the State Advocate Office have the right to file an appeal against the decision of the PMA on the recognition of the right, within 30 days from notification of such decision, to the Appeals Court, pursuant to the rules of the Code of Civil Procedures of the Republic of Albania.

2. If the decision of the ATP (or former PAK) disposes of both the right to compensation (property value) and recognition, the same decision shall be subject of 2 different judicial review proceedings (administrative and civil); So, do you think that during the application of this law, there is a risk to create multiple, parallel and interrelated judicial proceedings raising substantially for the same legal act issued by the same state authority?

## ANSWER KEY

### Q1 Feedback for "No"

#### **That's Right.**

When the Court finds a breach of the Convention, it can afford just satisfaction to the injured individual only if it deems it necessary.

For instance, it can be the case that a finding of violation is considered to be sufficient reparation, without ordering monetary compensation, see for instance DUDGEON v. THE UNITED KINGDOM (ARTICLE 50) (1983), § 14

In other cases, specific performance might be ordered (re-trial of the individual, release from jail, etc).

### Q2 Feedback for B

#### **That's Right**

It is for the applicant to show always that pecuniary damage has resulted from the violation or violations alleged.

### Q3 Feedback

The Court can afford just satisfaction with respect to a) pecuniary damage (both for loss suffered and for future losses), b) non-pecuniary damage (financial

compensation for non-material harm, for example mental or physical suffering) and c) cost and expenses sustained by the individual in domestic proceedings and before the Court, in trying to obtain redress for the breach

The answers to scenario 1 and 2 are not provided and the participants are invited to discuss their ideas together.

## CHAPTER 5

### 5.1 THE RELATIONSHIP BETWEEN ARTICLE 1 PROTOCOL 1 AND OTHER ECHR ARTICLES

#### Learning objectives

Welcome to the fifth chapter of this course. By the end of this chapter you will have learned:

- How Article 1 of Protocol 1, interrelates with Article 3, 6, 8, 10, 13, 14.
- The relevance of;
  - prohibition of torture,
  - right to fair trial,
  - right to respect for private and family life,
  - freedom of expression,
  - right to an effective remedy,
  - and prohibition of discrimination

in the context of the protection of property rights.

#### Introduction

The Article 1 of Protocol 1 guarantees the right to property and interacts with other rights protected by the ECHR. As property rights are considered as civil rights, they are covered by the guarantees of Article 6.1 and 13 of the Convention. Thus, the beneficiaries of property rights are also beneficiaries of different procedural rights, such as access to court, the right to fair trial and the enforcement of final judicial decisions. If a person's home is expropriated, destroyed or is otherwise inaccessible, then the right to home, established by Article 8 of the Convention, is interfered with. The legal provisions according to which the authorities can interfere with property rights (i.e. in the field of fiscal or environmental regulations) normally make a distinction between different social and economic groups, which in itself means discrimination. Article 14 of the Convention proscribes such a distinction, and thus it constitutes an additional protection beyond P1-1. There are also other provisions of the Convention that can interact with P1-1, such as Article 3 (prohibition of torture and inhuman or degrading treatment) and Article 10 (freedom of expression). However, these are marginal interactions.

#### Relationship between A1 –P1 and Other Articles

On this page, you have the opportunity to explore the nature of Article 1 Protocol 1 and its relationship with other articles in the European Convention on Human Rights.

## **Article 1 of Protocol 1 and Article 3 of the Convention – The prohibition of torture**

Applicants sometimes raise complaints concerning social or pension insurance entitlements relying on the right to property under P1-1, but also prohibition of inhuman and degrading treatment under Article 3. E.g. they claim that their insufficient amount of pension and social benefits may raise an issue under Article 3, because it is below the level of subsistence.

In most such cases, the European Court of Human Rights (hereafter *the Court or ECtHR*) found that the amount of the applicant's pension and the additional social benefits did not cause damage to the applicant's physical or mental health, and that the minimum level of severity required by Article 3 of the Convention was not attained, see LARIOSHINA v. RUSSIA (2002).

In other cases, the Court did not find that the deprivation of a military pension amounted to inhuman and degrading treatment PREDOJEVIĆ AND OTHERS v. SLOVENIA (2004).

## **Article 1 of Protocol 1 and Article 6 of the Convention – Right to a Fair Trial**

Most often, applicants raise ECHR Article 6 with P1-1. Here, it is the right to court and the excessive length of proceedings that are the main problematic areas in the context of the proceedings regarding the right to property SIERPIŃSKI v. POLAND (2009).

**Review the issues below.**

### **Application of Article 6 and A1 - P1**

The ECtHR examines the complaints under either P1-1 or Article 6. First, the case is analysed according to the Articles referred to by the applicant. Second, the case is analysed under P1-1 when the result of the domestic proceedings is decisive and under Article 6 when the main focus is on the proceedings.

If the applicant raises only P1-1 and there is a potential procedural issue, the Court can treat the procedural requirements as a part of the substantive property right DENISOVA AND MOISEYEVA v. RUSSIA (§ 64) (2010).

### **Non-enforcement and arbitrariness of judicial decisions.**

In any event, an intervention in property rights can never be unforeseeable or arbitrary BRONIEWSKI v. POLAND (§151) (2004), IMMOBILIARE SAFFI v. ITALY (§ 54) (1999). In some cases, the Court is forced to conclude that there has been a breach of Article 1 of Protocol 1 and, in the same time, of Article 6 of the Convention. In case BURDOV v. RUSSIA (§§ 37 and 41) (2002), the Court found violation of both Articles as the national judgement, which awarded compensation to an applicant engaged in the emergency operations at the site of the Chernobyl nuclear plant disaster, was not enforced (see also: POZNAKHIRINA v. RUSSIA (2005), TRAPEZNIKOVA v. RUSSIA (2008)).



## Inconsistency of national case law

The inconsistency of national case law can also result in violations of P1-1, as was the case for example in the judgements on legal conformity of construction permits delivered by administrative organ MULLAI AND OTHERS v. ALBANIA (2010).

## Excessive length of proceedings

As regards the problem of excessive length of proceedings, there are two groups of cases. Firstly, there are cases where the length of proceedings causes acquisitive prescription in favour of the other party in the proceedings.

In these cases, the Court found violations of P1-1 and Article 6 as in ZWIERZYŃSKI v. POLAND (2001). Secondly, there are cases in which, according to the Court, only the right to fair trial was breached, even if the proceedings involve the property rights, for example: BENNICH-ZALEWSKI v. POLAND (2008).

## Article 1 of Protocol 1 and ECHR Article 8 – Right to respect for private and family life

Sometimes, a breach of property rights established by P1-1 is combined with a breach of the **right to home** under Article 8. The notion of home was defined in case GILLOW v. THE UNITED KINGDOM (1986). The right to home is breached when an applicant's home is destroyed AKDIVAR AND OTHERS v. TURKEY (1996) or seized SAGHINADZE AND OTHERS v. GEORGIA (2010), see also: KHAMIDOV v. RUSSIA (2007) or when the applicant no longer has access to it CYPRUS v. TURKEY (2014). In case NIEMIETZ v. GERMANY (1992), the police proceeded with a search of a lawyer's office during criminal proceedings against a third party. The Court interpreted "private life" and "home" as including certain professional or business activities or premises. The Court concluded that the search and seizure of documents were "in accordance with the law" and had legitimate aims, but were not "necessary in a democratic society", particularly in the context of the confidentiality inherent in the lawyer's profession.

The guarantees of the Convention raise the same issues in the case of **persons evicted from land**. In case CHAPMAN v. THE UNITED KINGDOM (2001), the applicant, a Traveller, bought a plot of land with a view to settling there. However, her request for planning permission to park caravans on her land was refused due to the detrimental effect it may have on the rural character of the site. The Court established that there were alternatives available to the applicant besides remaining on that site without planning permission and found no violation of Article 8. For the same reasons, the Court ruled that the applicant's right to live peacefully on the plot of land she had bought (protected by P1-1), was not breached. As regards cases raising **tenancy** issue, the ECtHR did not find a violation under P1-1 in the case F.V.B v. PORTUGAL (2001), concerning the restriction on the owner's right to terminate his tenant's lease. This was due because of an existing legitimate social policy aim.

Under Article 8 of the Convention, effective protection of respect for private and family life does not require existence in national law of legal protection enabling each family to have a home for themselves alone, nor does it place the state under an obligation to give a landlord the right to recover possession of a rented house on request and in any circumstances. Legislation entitling owners to terminate a lease subject to certain conditions perceived the legitimate aim of promoting country's economic well-being and protecting rights of others, Portuguese courts did not act arbitrarily and stroke a fair balance between respective interests.

In case CVIJETIĆ v. CROATIA, the applicant, following her divorce, complained about her prolonged inability – through lack of police assistance – to recover possession of her apartment and about the duration of the eviction proceedings. She relied on Article 6.1 (right to a fair hearing within a reasonable time) of the ECHR and P1-1 (protection of property) to the Convention. She further relied on Article 8 (right to respect for private and family life), since her inability to live in her flat for more than eight years period. The European Court of Human Rights held unanimously that there had been a violation of Article 6 § 1 and Article 8 and that it was not necessary to rule on the complaints made under P1-1.

### **Environment**

The ECtHR does not directly protect the right to clean and quiet environment, but this obligation can arise when the person is directly affected, for example by pollution or noise. In APANASEWICZ v. POLAND, the applicant complained that the owner of a plot of land adjacent to that of the applicant built a concrete works on it without planning permission. She complained about pollution, various health problems, inedible harvest, etc.. The Court found Article 8 to have been violated, as the applicant did not raise Article 1 of Protocol 1. The Court took a similar decision in the case OLUIĆ V. CROATIA in which it found a violation of Article 8 and decided that there was no need to analyze the complaint under P1-1.

### **Article 1 of Protocol 1 and ECHR Article 10 – Freedom of Expression**

In HANDYSIDE v. THE UNITED KINGDOM (1976), authorities seized and later destroyed the matrix (master copy) and hundreds of copies of a schoolbook published by the applicant due to its lewd content. The Court, acknowledging that Contracting States had a margin of appreciation under Article 10, found no breach of this provision.

In a more recent case, ÖZTÜRK v. TURKEY (1999), the Court took a different approach. It held that the confiscation and destruction of copies of a book published by the applicant was an incidental effect of his conviction. Since the Court found a breach of Article 10, it held that it was not necessary to consider the applicant's complaints under Article 1 of Protocol 1.

## **Article 1 of Protocol 1 and ECHR Article 13 – Right to an Effective Remedy**

The contracting states' obligation under Article 13 is to provide a person with an effective remedy before a national authority and adequate redress of an eventual violation if the Convention right asserted by the applicant is the property right, or any other right established by the ECHR.

In ALIŠIĆ AND OTHERS v. BOSNIA AND HERZEGOVINA, CROATIA, SERBIA, SLOVENIA AND THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA (2014), the Court found a violation of Article 1 of Protocol 1 and Article 13 by Slovenia and Serbia. As almost 8,000 applicants were concerned, the Court chose to apply a pilot procedure and requested the national authorities to establish an efficient national remedy and to provide an adequate redress to compensate all the applicants.

## **Article 1 of Protocol 1 and ECHR Article 14 – Prohibition of Discrimination**

Applicants raising allegations of discrimination have to indicate which substantive rights they were denied due to discrimination. Article 14 does not have an independent existence but rather completes other articles of the Convention, also P1-1.

In INZE v. AUSTRIA (1987), the Court also found violation of both articles, as illegitimate children did not have the same inheritance rights as legitimate children born out of wedlock. CHASSAGNOU AND OTHERS v. FRANCE (1999), concerned the hunting rights of owners of small pieces of land, who were obligated to cease hunting rights, while those who owned larger plots were not. The Court reiterated that Article 14 had no independent existence, but plays an important role by complementing the other provisions of the Convention and the Protocols, since it protects individuals, placed in similar situations, from any discrimination in the enjoyment of the rights set forth in those other provisions. *"Where a substantive Article of the Convention has been invoked both on its own and together with Article 14 and a separate breach has been found of the substantive Article, it is not generally necessary for the Court to consider the case under Article 14 also, though the position is otherwise if a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case"* (§89).

However, in a more recent judgment concerning hunting rights, HERRMANN v. GERMANY (2012), the Court considered that there was violation of P1-1 and there was no need to give a separate ruling on the applicant's complaint under Article 14 of the Convention taken in conjunction with P1-1.

The entitlement to the pension itself cannot be made dependent on the applicant's place of residence, resulting in a situation in which the applicant, having worked for many years in his country and having contributed to the pension scheme, had been deprived of it altogether, on the sole ground that he no longer lived in his country PICHKUR v. UKRAINE (2013), CARSON AND OTHERS v. UK (2010).

## 5.2 PROPERTY RIGHTS IN RELATION TO OTHER RIGHTS AT THE NATIONAL LEVEL IN ALBANIA

### PROPERTY RIGHTS IN RELATION TO RIGHT TO PRIVATE LIFE – NATIONAL EXAMPLES

1. The Constitutional Court in its decision No. 2/2013, regarding the constitutionality of the Normative Act No.5 / 2010, stated that the measure of the military pension could be decreased when it dictated by the public interest of preserving of the state's financial system in the social security scheme. The Constitutional Court considered this legislative interference in compliance with the Constitution, which deteriorates/worsens the situation of the beneficiaries of military pension by providing a lower amount of it.

2. In the case M.L v. A.A., M.L has claimed an increase in the child's alimony amount, claiming that have changed the economic conditions for raising the boy who is of adolescent age, but also because of his deteriorating health conditions from chronic illness of diabetes. The First Instance Court of Tirana accepted M.L's request by ruling on the increase of the alimony to the amount of 15,000 Lek per month. While, the Court of Appeals rejected the claim with the argument that the salary of the plaintiff is bigger and the first instance court did not take into account the fact that the economic situation of the respondent was aggravated as a result of his rent for the dwelling accommodation and he does not have the economic capability to afford the increase of the alimony amount, while the monthly income of the plaintiff has increased. The applicant ML filed recourse with the High Court. The latter with the decision no. 444/2011 accepted the recourse by quashing the decision of the court of appeal upholding the decision of the first instance court decision, reasoning that:

“The Court of Appeal of Tirana, considering the plaintiff's salary and the economic situation of the respondent who lives in a rented dwelling, essentially disregarded the primary interest of the child by not respecting Article 2 of the Family Code, which provides that: Parents, competent organs and courts, in their decisions and activities, must have as their primary consideration the best interest of the child.”

In assessing the actual circumstances for determining (increasing or decreasing) of the alimony, the court takes into account elements such as the ratio between the minimum life expectancy and the growth in demand in terms of inflation growth and significant change of prices and living standards; the age of the child and the specific requirements of each child on a case-by-case basis in relation to his/her education and his/her health. Therefore, these primary considerations surpass any other assessment or grouping of other factors of another party, in the present case, the economic conditions of the respondent.”

## PROPERTY RIGHTS IN RELATION TO RIGHT TO FAIR TRIAL- NATIONAL EXAMPLES

1. In the case of E.K vs. the Agency for the Restitution and Compensation of the Property, before the Constitutional Court (the decision no.20/2013), the applicant has requested: "Finding the violation of the right to fair trial as a result of the failure to enforce within a reasonable time the decision no.532/2, dated 23.09.1996 of the Commission Restitution and Compensation of Property", claiming that in the implementation of the law, the ARCP had the legal obligation to deal with the decision of the former owners for compensation in value and not justify the lack of the DCM. This standing is in conflict with the constitutional jurisprudence and the decisions of the European Court of Human Rights. Refusal to compensate the former owners for the area of 330 m2 violates the principle of legal certainty. The Constitutional Court in the case has rejected the request of the applicant, stating that:

"Despite the fact that the applicant applied to ARCP before the date on which the sub-legal act establishing the rules and criteria for distributing the compensation fund, has entered into force, he was able to apply to the ARCP for compensation within the deadlines set out in the DCM no. 768, dated 7.11.2012 (points 6 and 8), which does not appear to have done. Consequently, the non-issuance of the administrative act by the ARCP does not prevent the applicant from realizing the material right to compensation of property by applying and supplementing the relevant documentation provided by the legal framework in force."

### QUESTIONS

**Q1** Article 1 of Protocol 1 and Article 3 of the Convention – Prohibition of torture, inhuman or degrading treatment apply to the following factual situation :

**Select your response(s) below.**

1. Eviction of a third person from illegally occupied flat
2. Income/Pension below subsistence level
3. Destruction of books intended to be published

**Q2** Article 1 of Protocol 1 and Article 8 of the Convention (Right to respect for private and family life) apply to the following situation :

**Select your response(s) below.**

1. Lack of efficient remedy to complain about the right to pension
2. Lengthy judicial compensation proceedings
3. Distinction in inheritance rights between legitimate and illegitimate children

**Q3** Under Article 3 ECHR, is a low amount of social pension normally considered to constitute inhuman or degrading treatment?

**Select your response(s) below.**

True

False

**Q4** Was the confiscation of books at stake in *Handyside v. the UK* a violation of Article 1 of Protocol 1?

**Select your response(s) below.**

True

False

**Q5** Article 1 of Protocol 1 is in principle applied in the litigation between two private persons:

**Select your response(s) below.**

True

False

It depends

**Q6** The length of domestic court proceedings can be examined in the light of Article 1 of Protocol 1:

**Select your response(s) below.**

True

False

**Q7** The Court can deliver a pilot judgment in a property right dispute and order the state to set up a compensation mechanism at the national level.

**Select your response(s) below.**

True

False

**Q8** What are the main issues which are raised by the applicants under Article 1 of Protocol 1 and Article 6 of the Convention ?

**Enter your answer in the box below.**

**Q9** Illegitimate children not having the same inheritance rights as legitimate children are victims of violation of the following articles of the Convention :

**Select your response(s) below.**

1. Article 1 of Protocol 1 of the Convention
2. Article 14 of the Convention
3. Article 1 of Protocol 1 and Article 14 of the Convention

**Q10**

There is no need to exhaust domestic remedy if you have a doubt about its effectiveness.

**Select your response(s) below.**

True

False

## ANSWER KEY

### Q1 Feedback

A1-P1 would apply if Income/Pension was below the subsistence level

### Q2 Feedback

Article 1 of Protocol 1 and Article 8 of the Convention would apply to the distinction in inheritance rights between legitimate and illegitimate children

### Q3 Feedback

The answer is false

### Q4 Feedback

The answer is false

### Q5 Feedback

It depends.

For more details see case: [ZAGREBAČKA BANKA D.D. v. CROATIA \(Application no. 39544/05\)](#)

### Q6 Feedback

It is true

### Q7 Feedback

It is true

### Q8 Feedback

1. Excessive length of proceedings concerning property rights
2. Access to court to complain about the breaches of property rights

### Q9 Feedback

Illegitimate children not having the same inheritance rights as legitimate children are victims of violation under Article 1 of Protocol 1 and Article 14 of the Convention

### Q10 Feedback for True

That's right

Mere doubts on the part of the applicant regarding the effectiveness of a particular remedy will not absolve him or her from the obligation to try it (Epözdemir v. Turkey (dec.); Milošević v. the Netherlands (dec.); Pellegriti v. Italy (dec.); MPP Golub v. Ukraine (dec.))



## CHAPTER 6

### 6.1 ENFORCEMENT MEASURES

#### What are enforcement measures?

Enforcement : the putting into effect of court decisions, and also other judicial or non-judicial enforceable titles in compliance with the law which compels the defendant to do, to refrain from doing or to pay what has been adjudged (source: Recommendation Rec(2003) 17 of the Committee of Ministers to member states on enforcement).

Non-enforcement of judicial decisions by national authorities can result in breach of human rights. Firstly, the right to fair trial is concerned and, more particularly, right to trial in reasonable time. Secondly, there are other rights concerned like property rights, or right to family life. Non – enforcement of judicial decisions is particularly visible in certain Council of Europe member states. We explore selected case studies in rest of this section

#### Non-enforcement of final domestic decisions in Russia

Russia's non-compliance with domestic court decisions is the largest recurrent issue in all Russian applications concerning about one third of them. BURDOV (NO. 2) v. RUSSIA (2009) is the first pilot judgment adopted in respect of Russia. It ordered the introduction of an effective domestic remedy in cases of non-enforcement of domestic judicial decisions and the settlement of similar cases pending before the Court. The Court found violations of Articles 6 § 1 (right to a fair trial) and 13 (right to an effective remedy). Violation P 1-1.

The post-Burdov cases concerned either the non-enforcement of domestic court judgments in the applicants' favour (NAGOVITSYN AND NALGIYEV v. RUSSIA (2010)) or the excessive length of court proceedings (FAKHRETDINOV AND OTHERS v. RUSSIA (2010)). The Court decided that the remedy adopted by Russia in response to the Burdov No. 2 pilot judgment had to be exhausted before applying to the European Court of Human Rights. These applications were considered as inadmissible.

The Court found a violation of right of access to court enshrined by Article 6 in the judgement RYABYKH v. RUSSIA (2003). Breach of the legal certainty requirement in civil proceedings before courts of general jurisdiction was a result of supervisory review (nadzor). No violation of P1-1.

#### Non-enforcement of final domestic decisions in Ukraine

Issue –retirement compensation In the first pilot judgment concerning non-execution of final domestic court decisions, YURIY NIKOLAYEVICH IVANOV v. UKRAINE (2009), the Court found the prolonged non-enforcement of final domestic decisions and the lack of an effective domestic remedy to deal with it. It concluded to breach of property rights (Article 1 of Protocol 1), right to fair trial (Article 6) and right to effective remedy (Article 13). In view of the approximately 1400 applications against Ukraine currently

pending before the Court and concerning the same questions, the Court concluded that an incompatible with the Convention practice existed in Ukraine and held unanimously that Ukraine had to introduce in its legal system, within one year from the date on which the judgment becomes final, an effective remedy which secured adequate and sufficient redress for non-enforcement of domestic judgments. Pending the adoption of the above measures, the Court adjourned, for one year from the date on which the judgment becomes final, the proceedings in all new Ukrainian cases concerning solely the non-enforcement or delayed enforcement of domestic judgments.

On 21 February 2012, the Court examined the state of the implementation of the above-mentioned pilot judgment, noted that Ukraine has not adopted the required general measures to tackle the issues of non-enforcement at the domestic level, and - in accordance with the pilot judgment (§ 100) - decided to resume the examination of applications raising similar issues.

### **Non-enforcement of final domestic decisions in Moldova**

Moldovan social housing legislation bestowed privileges on a very wide category of persons. However, because of chronic lack of funds available to local governments, final judgments awarding social housing were rarely enforced. The Court, deciding to adjourn all similar cases, held that, within six months from the date on which the judgment became final, the Moldovan state had to set up an effective domestic remedy for non-enforcement or delayed enforcement of final domestic judgments concerning social housing and, within one year from the date on which the judgment became final, grant redress to all victims of non-enforcement cases lodged with the Court before the delivery of the present judgment.

Following this pilot judgment OLARU AND OTHERS v. REPUBLIC OF MOLDOVA (2009) the Moldovan Government reformed its legislation by introducing a new domestic remedy in July 2011 against non-enforcement of final domestic judgments and unreasonable length of proceedings.

### **Non-enforcement of judicial decisions in Council of Europe member states**

The European Court of Human Rights found violation of Article 1 of Protocol 1 as regards non-enforcement of judicial decisions in cases lodged against many other member states.

DRIZA v. ALBANIA (2002) – authorities' failure to enforce judgements and administrative decisions for the restitution of property

AKIMOVA v. AZERBAIJAN (2007) – authorities' decision to postpone, for an indefinite period of time, the enforcement of an eviction order against internally displaced persons illegally occupying the applicants' apartment

R. KAČAPOR AND OTHERS v. SERBIA (2008) – authorities' failure to enforce final judgements (payment orders against a socially-owned company –former employer of the applicants) given in favour of the applicants

BIJELIĆ v. MONTENEGRO AND SERBIA (2009) – authorities' failure to enforce the eviction order

ČOLIĆ AND OTHERS v. BOSNIA AND HERZEGOVINA (2009) – authorities' failure to enforce final judgements awarding the applicants compensation for war damage

MUTISHEV v. AND OTHERS BULGARIA (2009) – authorities' failure to execute a final judgement in their favour restoring their ownership of more than 100 hectares of farmland which was collectivised during the communist era.

## **6.2 ENFORCEMENT MEASURES IN ALBANIAN LEGAL ORDER**

### **CONTENT AND OBJECTIVES**

This chapter contains information about the obligation and legislative framework of enforcement of national judgments related to property rights in Albania.

It also identifies some consequences of non-enforcement of these judgments under Article 1 of Protocol No. 1 of the European Convention on Human Rights.

Learning objectives of this chapter:

- Increased knowledge about the current situation and statistics in the area of (non) enforcement of judgment related to property rights in Albania from the perspective of fundamental human rights;
- Understanding of recent developments on Albanian legislation and case law concerning the property rights/compensation judgments enforcement in the frame of execution of ECtHR judgment *Manushaqe Puto and Others v. Albania* (2012).

### **NATIONAL REGULATIONS AND CASE LAW ON ENFORCEMENT OF FINAL JUDGMENTS RELATED TO PROPERTY RIGHTS IN ALBANIA**

#### **Execution of civil court decisions**

Article 142, paragraph 3, of the Constitution of the Republic of Albania states that: "State bodies shall be obliged to execute court decisions."

According to Albanian legislation the civil trial proceedings has two stages, the first of which consists in making statements and claims on the breach or violation of the law, recognition and/or restoration of the right through a final judgment.

Article 451 of Albanian Civil Procedure Code provides the cases when a decision becomes final (irrevocable): "when the judgment cannot be appealed; when no appeal has been made against it within the time-periods determined by law or when the appeal has been withdrawn; the appeal presented has not been accepted; the decision of the court is left in effect, is changed or trial in the second level has been ceased." After the court decision becomes final the proceedings enter the second stage, which is known as the compulsory/mandatory execution or execution phase. In fact, not all court decisions are subject to compulsory execution, only some of them are, such as judgments that rule on the obligation of one party in favour of another party.

The bailiff, based on article 517 of the Civil Procedural Code, begins the execution by notifying the debtor to execute the obligation of the execution order and assigns a deadline of either ten days or five days when the goal is a fee or alimony obligation. Upon receiving the notification for voluntary execution, the debtor is obliged to declare, in a written form, his or her property statement and other items or loans that

third parties may be obligated to him or her, if the bailiff requests it. Mandatory execution may not begin before the provided deadlines are over, based on the article 517 of Civil procedural Code, unless the time limits of the deadlines may cause a risk that the execution becomes impossible. In this case, the bailiff may begin immediately the mandatory execution.

According to article 522 of the Civil Procedural Code, when the debtor's residence is not known, the first instance court in the place of execution appoints a representative of the debtor who is initially reimbursed by the creditor, based on article 525 of the civil procedural code. This is done at the request of the bailiff after s/he has reviewed the situation and within 10 days of the submission of the request.

### **The execution of financial obligations towards legal entities and natural persons**

When the execution of a financial obligation is required, the bailiff, on the completion of the deadline of notification of execution (article 517 of civil procedural code), shall begin the mandatory execution, by seizing the immovable and movable property of the debtor in an amount that would cover the obligations of the debtor in accordance with the balance of the debtor's loan. To fulfil the obligation of the debtor, the bailiff shall seize the debtor salary and after decreasing the contribution to social assistance and income tax and without jeopardizing the needs of basic life of the debtor, s/he shall provide for the amount to be paid on behalf of the debtor. When the amount available is not sufficient to recompense all the creditors, the bailiff shall determine what shall be paid and shall pay the creditors in accordance with a pre-determined proportion of the amount owed. It is the responsibility of the bailiff to notify the debtor and the creditors of the method of dividing the amount to be paid to the creditors. If, within five days of providing this notification the division is considered to be final, the bailiff provides each creditor the amount s/he has been allocated.

### **Execution on immovable properties**

Based on article 560, of Civil Procedural Code, the execution of the decision of the court or of other executive titles on immovable property of the debtor is effected by placing such property under seizure. Seizures are registered in the office of the register of the immovable property by the action of the bailiff. The register shall note the kind, nature and at least three borders of the immovable property, its location as well as the mortgages and the real rights, which may have been placed on it. The Bailiff's act is registered by the real immovable property office within 10 days of its submission. A copy of the action of the bailiff is communicated to the debtor.

The seized immovable property is left in the custody of the debtor until it is sold, the debtor being obligated to take care of it as if it was his own. If the debtor does not take due care for the property left in custody, the bailiff appoints another person for the custody and determines a fee to be paid to him.

After the seizure, the bailiff notifies the debtor that the seized property will be on sale. The auction is held in accordance with the rules for movable property.

A review of cases finds that debtor budgetary institutions, in the execution process of a final court decision, do not carry out case by case the observance of Article 20 and 21 of Law No. 8510 on the liability of extra-contractual bodies of the state administration of 15 July 1999 and that, in those cases when these provisions have been observed, the state budget was not able to finance the provision of funds for the settlement of obligations to private individuals.

This attitude, transforms the right to access the court, for complainants, into an illusion, because of the impracticability of the executive title for a very long time, just as the Constitutional Court concludes, when it tried and accepted the requirements of eight different entities, with the same goal:

“Finding the violation of the principle of a fair trial as a result of failing to execute a final court decision by authorities in charge by law, within a reasonable time, in terms of Article 42 of the Constitution and Article 6/1 of the European Convention on Human Rights”.

Enforced execution towards determined credits of a foreign creditor is made only when there is no prohibition or limitation by separate law or by international state agreement.

### **Means of defence against execution of decisions**

Albanian Civil Procedure Code provides means to protect against the irregularities in the execution phase, as follows

#### **Invalidity of executive title**

The debtor may request to the competent court of the place of execution to be declared that the executive title is invalid, that the obligation does not exist, or that it exists to a smaller amount or has increased subsequently;

#### **Objection to the action of the bailiff**

Parties may file an appeal to the court responsible for the execution of the decision, against actions performed by the bailiff or its refusal to perform an action, within five days from the performance or refusal to perform the action, when the parties were present in the performance of the action or if they have called to attend in other cases since the day of notification or the day of becoming aware of the action or of the refusal.

#### **Objection to the action of the bailiff from third person**

Each third person who claims to be owner of the property on which execution is made, may bring a lawsuit to exercise his right and if it is the case to exempt the property from seizure and sale. A lawsuit is brought against the creditor and the debtor in the court of the place of the execution of the decision. In these cases the court may decide as a temporary measure the suspension of the execution with or without guarantee.

## **Execution of final administrative court decisions**

According to the Law No. 49/2012 on the organisation and functioning of administrative courts and the adjudication of administrative disputes, the execution of the final decision issued by the administrative court is different from that on the civil court.

A decision of the administrative court that has become final is put into execution directly by the bailiff at the request of the creditor. Every act issued or action performed by the defendant public body, after the decision of the administrative court has become capable of execution, and which is in violation of the ordering provisions of the decision of the court, is absolutely invalid and does not impede the execution.

At the end of the time period of mandatory execution set by the judge, the bailiff notifies the judge in writing of the actions performed by the debtor public body.

In case of the failure, with fault, to perform the obligations according to the decision or orders of the court, without justified reasons, even on his or her own initiative the judge imposes a fine against the director of the debtor public institution. The amount of the fine is equal to 20% of the minimum pay, on the national level, for every day of delay in execution; or the judge may ask for disciplinary measures to be taken and, as the case may be, also submits a criminal denunciation against the responsible persons.

## **ENFORCEMENT OF NATIONAL JUDGMENTS IN ALBANIA IN THE LIGHT OF THE EUROPEAN COURT OF HUMAN RIGHTS CASE LAW**

In pilot-judgment *Manushaqe Puto and Others v. Albania* (2012), the problem of failure to enforce final, domestic judicial and administrative decisions relating to the right of the applicants to restitution or compensation (pecuniary or in kind) for property nationalised under the Communist regime (violations of Article 6 § 1 and Article 1 of Protocol No. 1) and the lack of an effective remedy in this respect (violation of Article 13) was recognized by the European Court of Human Rights as a structural problem in Albania. Consequently, the Albanian authorities were requested to set up an effective compensation mechanism at the national level by 17 June 2014.

The European Court of Human Rights also found violations in other similar cases against Albania:

In case *Bushati and Others v. Albania* (2009), the ECtHR found the bailiffs' failure to secure enforcement of a Supreme Court decision in violation with Article 6 and Article 1 of Protocol No.1. In case *Driza v. Albania* (2007), the ECtHR found lack of legal certainty and lack of impartiality of the Supreme Court in breach with Article 6 § 1 of the Convention.

In 2015, the Albanian Parliament adopted a Law 133/2015 in the frame of general measures taken by national authorities to implement the judgment *Manushaqe Puto v. Albania* (2012). On 24 February 2016, this Law entered into force and first three by-laws were adopted on 23 March 2016.

In 2017, the Albanian Constitutional Court, having taken into consideration the Venice Commission Opinion issued its decision (no. 1) found Article 6 §§ 3 and 5 to be unconstitutional.

## QUESTIONS

**Q1** Authorities' failure to enforce judgements or administrative decisions for the restitution of property can't result in a breach of Article 1 of Protocol 1

**Select your response(s) below.**

True

False

**Q2** Excessive length of enforcement proceedings can result in a breach of '\_\_\_'? :

**Select your response(s) below.**

1. Right to Property
2. Right to Trial without undue delay
3. Both of the above

**Q3** A pilot judgment is applied to address the systemic violations of right to property:

**Select your response(s) below.**

True

False



## **ANSWER KEY**

**Q1** Feedback for False

**That's Right.**

Authorities' failure to enforce judgements or administrative decisions for the restitution of property can result in a breach of Article 1 of Protocol 1.

**Q2** Feedback

Answer 3 is Correct

**Q3** Feedback for True

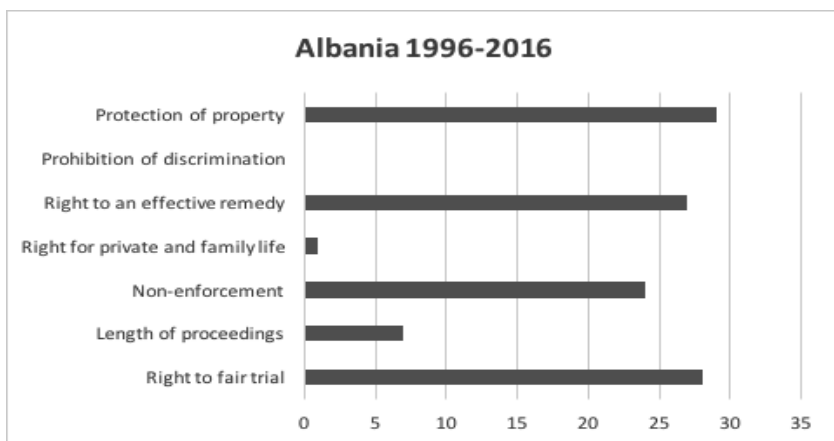
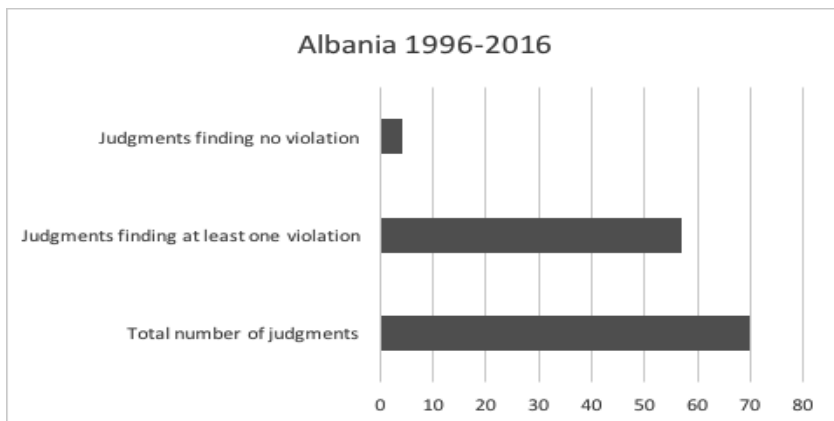
That's right

## CHAPTER 7

### 7.1 STATISTICS

#### Official Statistics of the European Court of Human Rights

#### Albania 1959-2016<sup>6</sup>



<sup>6</sup> [http://www.echr.coe.int/Documents/Stats\\_violation\\_1959\\_2016\\_ENG.pdf](http://www.echr.coe.int/Documents/Stats_violation_1959_2016_ENG.pdf) The comparative tables available at the website of the Court are made for all Member States, and show the statistics on the whole period of the activity of the Court, it means 1959-2016. However, Albania ratified the European Convention on Human Rights in 1996. Consequently, these statistics represent cases lodged and judgments delivered by the ECtHR in the period 1996-2016.



According to data provided by the Registry of the European Court of Human Rights and exploited in the Amicus Curiae of the Venice Commission<sup>7</sup>, there were 230 cases pending before the Court against Albania and 15 cases against Albania under supervision of the Committee of Ministers of the Council of Europe in October 2016. In this period, there were 40.000 cases pending before judicial and administrative court in Albania.

According to the General Advocate Office statistics, the European Court of Human Rights is actually examining 89 cases regarding the property issues (May 2017). In these cases, the Government has already submitted their observations and further comments on the applicant' allegations. These cases are pending before the Court for decision. These statistics indicate also that the ECtHR has delivered twenty-four decisions regarding the property issues in Albania; three out of the twenty-four decisions are not executed yet.

In 2017, there are around 11.000 cases pending before Agency for the Treatment of Property (ATP).

<sup>7</sup> [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)023-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)023-e)