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Nuisance Law and Human Rights: Bridging the Gap Between Article 8 and Article 1 of Protocol No. 1 to the European Convention on Human Rights[1]

Prawo immisji a prawa człowieka: niwelowanie rozbieżności między artykułem 8 a artykułem 1 Protokołu nr 1 do Europejskiej Konwencji Praw Człowieka

Abstract: The European Court of Human Rights typically addresses nuisance claims, such as those concerning noise or pollution, under Article 8 of the European Convention on Human Rights, which protects the right to one's home, among other interests. Conversely, such claims are generally excluded from the scope of property protection under Article 1 of Protocol No. 1. This article challenges this approach, arguing that it results from a narrow interpretation of ownership and leaves gaps in protection. The two provisions can complement each other and provide more comprehensive protection for interests that warrant protection. The article concludes by proposing a dual-framework approach where nuisance is analysed under both provisions.

Keywords: nuisance, property rights, home, article 8 ECHR, article 1 of Protocol No. 1 ECHR

[1] The Generative AI tools Grammarly and Microsoft Copilot were used to improve the textual quality of the article. All the ideas and arguments in this article are the author's original work.

Abstrakt: Europejski Trybunał Praw Człowieka zazwyczaj rozpatruje roszczenia dotyczące uciążliwości, takie jak te dotyczące hałasu lub zanieczyszczenia, na podstawie artykułu 8 Europejskiej Konwencji Praw Człowieka, który chroni między innymi prawo do posiadania własnego domu. Z drugiej strony, roszczenia takie są generalnie wyłączone z zakresu ochrony własności na mocy artykułu 1 Protokołu nr 1. Niniejszy artykuł kwestionuje to podejście, argumentując, że wynika ono z wąskiej interpretacji własności i pozostawia luki w ochronie. Te dwa przepisy mogą się wzajemnie uzupełniać i zapewniać bardziej kompleksową ochronę interesów, które na nią zasługują. Artykuł kończy się propozycją dwuwymiarowego podejścia, w którym uciążliwości są analizowane w kontekście obu przepisów.

Słowa kluczowe: uciążliwości, prawa własności, dom, artykuł 8 EKPC, artykuł 1 Protokołu nr 1 EKPC

1. Introduction

The European Convention on Human Rights (the Convention) does not explicitly provide a right "to a clean and quiet environment."[2] The European Court of Human Rights (ECtHR) has also clarified that Article 1 of Protocol No. 1 (A1P1) to the Convention does not include the right to enjoy one's possessions in a "pleasant environment".[3] Consequently, nuisance cases have generally been excluded from scrutiny under A1P1. However, there are instances in the ECtHR's case law where typical nuisance cases have been considered under Article 8 of the Convention, which protects the right to respect for private and family life.[4] The general argument in such cases is that annoyances, such as noise or other pollution, prevent the applicants from properly enjoying the amenities of their home. Therefore, these cases revolve around the concept of "home" under Article 8 and the scope of its protection.

[2] Judgment of the European Court of Human Rights of 8 July 2003, 36022/97, *Hatton and Others v. the United Kingdom*, LEX 80309, para. 96.

[3] Judgment of the European Court of Human Rights of 15 November 2011, 31339/04, *Darkowska and Darkowski v. Poland*, LEX 1060259, para. 71; judgment of the European Court of Human Rights of 13 December 2012, 3675/04 and 23264/04, *Flamenbaum and others v. France*, LEX 1230217, para. 184.

[4] See e.g. judgment of the European Court of Human Rights of 8 July 2003, 36022/97, *Hatton and Others v. the United Kingdom*, para. 96; judgment of the European Court of Human Rights of 24 April 2014, 27310/09, *Udovičić v. Croatia*, LEX 1451482, paras 139–149; judgment of the European Court of Human Rights of 16 November 2004, 4143/02, *Moreno Gómez v. Spain*, LEX 142240, para. 53.

The inspiration for this paper is drawn from my current and previous doctrinal and normative work on A1P1.[5] I have generally agreed with scholars who have argued that the normative underpinnings of A1P1 are unclear and overly focussed on the financial aspects of property, where the term "possessions" in A1P1 is too commodified. However, I have also argued that there is a social dimension to the Court's case law that remains largely unexplored, offering a "human flourishing reading" of A1P1.[6]

Nuisance law serves as a valuable case study to highlight two further aspects of my ongoing research. Firstly, failing to acknowledge protection against nuisance under A1P1 demonstrates a mistaken and narrow view of the term "ownership". Secondly, the "home" approach to nuisance cases has certain advantages that are often overlooked in the property literature. It emphasises the social aspects of property and may contribute to the ECtHR's exploration of the "social function" of property. However, the "home" approach has its limitations. It falls short when dealing with possessions that do not qualify as a home and overlooks some unique "property" qualities of nuisance.

This article suggests that protection against nuisance should find its place under both Article 8 and A1P1. The latter would provide protection for property owners who do not own a home, while the former would protect those who do, as well as those without property. Approaching nuisance as both a property and a home issue does not imply that the substantive protection under the two provisions would be identical. The two provisions represent different values, where a disturbance of the home will elicit different doctrinal and analytical responses compared to an interference with the use and enjoyment of one's property.

The structure of the rest of the paper is as follows: section 2 sets the stage by providing a general definition of nuisance law. Section 3 then examines how nuisance cases are handled within the framework of the ECtHR's jurisprudence. Section 4 investigates whether claims arising from nuisance law are categorically excluded from A1P1 and highlights the need for clarity around what constitutes "ownership" under A1P1. Section 5 analyses the fundamental conceptual dif-

[5] See e.g. V. Petersen, *Climate Change and the Social Function of Property: A Human Flourishing Reading of Article 1 of Protocol No 1 to the European Convention on Human Rights*, in: M. Habdas, L. Verstappen, H. Mostert, E. Marais (eds), *Rethinking Expropriation Law IV: Takings for Climate Justice and Resilience*, Eleven Publishing, Hague 2024, p. 213–246; V. Petersen, F. Vavourakis, *Review of Permits: The Interplay between Article 11(5) of the Water Framework Directive and Article 1 of Protocol 1 to the European Convention on Human Rights*, in: M. van Rijswick, C. Suykens (eds), *EU Research Handbook on Water Law*, Edward Elgar Publishing (forthcoming 2025); V. Petersen, K. Ragnarsson, *Obligations for Owners to Climate-Proof Buildings in Iceland*, "European Property Law Journal" 2024, vol. 13, no. 1, p. 104–126.

[6] See e.g. V. Petersen, *Climate Change and the Social Function of Property*…, op. cit.

ferences between "homes" and "possessions" in the ECtHR's case law. It notes that while the protection of the home extends to individuals who might fall outside the scope of A1P1, it is limited to buildings and dwellings to which the applicant has demonstrated sufficient ties. Section 6 delves into the substantive and methodological differences in the protection provided by the two provisions. Finally, section 7 presents preliminary normative reflections on the relationship between Article 8 and A1P1, offering insights into how these provisions interact and the potential for a more integrated approach to nuisance protection.

2. Nuisance in a nutshell

The aim of this article is not to provide an exhaustive explanation of the doctrinal intricacies of nuisance law. Therefore, this section merely outlines the general characteristics of nuisance law and presents the essential elements needed to understand the following discussion.[7]

Nuisance law is a fundamental aspect of private law, and it is both "universal and ancient".[8] While people must tolerate everyday annoyances from their surroundings, especially in bustling urban areas, disturbances that reach a certain level of severity can become nuisances. Examples include air pollution, loud noises, excessive light and unpleasant odours. Thomas Merrill and Henry Smith define nuisance as "an unreasonable interference with a private right: the use and enjoyment of land."[9] The determining question, therefore, is whether the action amounts to an "unreasonable interference"[10] for the victims. Another similar formulation is that an activity amounts to a nuisance when it is "abnormal and grave".[11]

Nuisance types can be categorised in several ways, but for the purposes of this paper I suggest the following three categories. The first category encompasses physical breaches. These can be breaches that amount to trespass, such as when someone enters your property without consent, whether it be a public official or a private individual. Such disturbances are rarely governed by nuisance

[7] For a more detailed discussion of nuisance law, I refer e.g. to M. Habdas, *Compensating Landowners in the Vicinity of Airports*, Routledge, New York 2024, p. 7–56.

[8] J. Gordley, *Disturbances among Neighbours: An Introduction*, in: J. Gordley (ed.), *The Development of Liability Between Neighbours*, Cambridge University Press, Cambridge 2010, p. 25.

[9] T.W. Merrill, H.E. Smith, *Introduction to Property*, Oxford University Press, New York 2010, p. 193.

[10] For a critical view of the "reasonableness" threshold and an alternative understanding of nuisance law, see A. Beever, *The Law of Private Nuisance*, Hart Publishing, Oxford 2013.

[11] J. Gordley, *Foundations of Private Law*, Oxford University Press, New York 2006, p. 75.

law and are more commonly addressed under criminal law, tort law or human rights law. In the case law of the ECtHR, physical breaches frequently fall under Article 8 of the Convention, which examines whether the breach constitutes an unlawful invasion of the sanctity of the applicant's home. It must be noted, though, that certain physical breaches can constitute a private-law nuisance, such as flooding and noxious fumes that "enter" the land without the owner's consent.[12] Another example is when tree branches overhang onto a neighbouring property. Such overhanging branches can constitute an unauthorised intrusion (encroachment), interfering with the neighbouring property owner's ability to fully use and enjoy their land. This can also extend to issues such as tree roots spreading underground and causing damage to structures or the land itself.[13]

The second category involves non-physical nuisances, such as excessive noise and intrusive lighting. These types of nuisances emanate from a nearby activity, but the nuisance does not "enter" the victim's home in a similar way as physical breaches or intrusions. However, they can still cause substantial disturbance and annoyance and can negatively affect the victim's health, well-being or senses.

A third category is what James Gordley has referred to as uses or activities that are "indecent or aesthetically objectionable",[14] such as brothels, sex shops and "unsightly piles of junk."[15] Magdalena Habdas similarly mentions "unprofessional storage of large amounts of flammable materials, breeding aggressive dogs without proper measures preventing their escape, placing obscene figures, posters or pictures on property, and running a morally offensive business (e.g. selling drugs, running a brothel)".[16] While it may be more challenging for plaintiffs to succeed in cases within this category compared to the more conventional nuisances, many legal systems acknowledge the possibility of such activities being classified as nuisances.[17] In these cases, property-related factors, such as whether the activities have diminished the value of the plaintiff's property, might play a role in the legal assessment.[18]

When an activity crosses the nuisance threshold, the victims may have several remedies available. These can range from ordering compensation for enduring the nuisance, prohibiting the offending operations, to requiring the

[12] M. Habdas, *Compensating Landowners…*, p. 16.
[13] Ibidem.
[14] J. Gordley, *Foundations of Private Law…*, p. 79.
[15] Ibidem.
[16] M. Habdas, *Compensating Landowners…*, p 23.
[17] J. Gordley, *Foundations of Private Law…*, p. 79.
[18] Ibidem, p. 79–80.

owner to abate or mitigate the nuisance.[19] The available remedies arise from private law and are generally recognised as originating from the victim's property rights.[20] However, the victim does not have to hold ownership rights to be entitled to a remedy – nuisance law also covers those that have lesser or subordinate proprietary rights, such as rights stemming from leases. Recognising nuisances as part of the property arsenal is crucial because it underscores that owners have a right to enjoy their property. This enjoyment is significantly diminished if owners must tolerate all disturbances in their surroundings, both minor and major.

Still, there are two significant limitations to viewing nuisance exclusively through the lens of property. Firstly, although nuisance law provides protection to tenants and others who enjoy proprietary use rights, it fails to account for those who do not hold formal property rights. Should squatters be expected to tolerate excessive noise from a nearby factory merely because they lack a legal claim to the property? Similarly, what about children, siblings, partners or parents living in an owner's or tenant's home without formal property ownership? Their experiences and well-being are equally important to the owner's or tenant's, yet they are overlooked by a strictly property-focussed framework. Secondly, placing too much emphasis on property can skew nuisance analysis towards financial and monetary considerations. Certain cases may become narrowly centred on one question: Does the annoyance in question substantially reduce the property's market value?[21] While financial aspects are undeniably relevant to nuisance analysis, they are far from the whole picture. Property often holds deeper value beyond its monetary worth – a point that will become evident in the discussion to follow.

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[19] T.W. Merrill, H.E. Smith, *Introduction to Property…*, p. 196–200. See also a detailed discussion of nuisance remedies in M. Habdas, *Compensating Landowners…*, p. 41–56.

[20] Some jurisdictions view nuisance as a tort, but it does not seem to change the fact that the analysis has a property focus. Magdalena Habdas states that an "important characteristic of nuisance is that it concerns land by negatively affecting its amenity for a person" and is "regarded in the context of violating a person's property right" because it "protects a proprietary right." Even in legal systems where nuisance is considered a tort, it is "a tort directed against land, or more precisely against ownership or an interest in land." See M. Habdas, *Compensating Landowners…*, p. 41, 43.

[21] In the author's local jurisdiction of Iceland, property owners may be entitled to compensation following the implementation of a zoning or land use decision. The sole criterion for eligibility is whether the decision resulted in a substantial decrease in the property's value relative to other similarly situated properties. Financial value is the only relevant factor, and considerations of broader social interests are deemed irrelevant in these cases. See Article 51 of the Icelandic Planning Act No. 123/2010 of 1 January 2010.

3. How is nuisance treated in the ECtHR's case law?

Nuisance cases typically arise between two or more private parties: the victim(s) and the individual or entity causing the nuisance. How, then, does this relate to constitutional property protection and the role of the Convention's Contracting Parties? In such cases, the applicant often argues that the State has failed to fulfil its positive obligations under Article 8 to safeguard the applicant's right to be free from nuisance. For instance, this might occur when authorities grant a permit for a noisy operation in a residential neighbourhood without adequately considering the interests of nearby residents. A notable example can be found in the applicant's (although unsuccessful) arguments in *Darkowska and Darkowski v. Poland*.

> With regard to the alleged breach of Article 8 of the Convention, the Court notes that the applicants were involved in a long-standing dispute with their neighbour concerning the nuisance caused by the emissions from his heating system in the form of carbon monoxide pollution and the discharge of soot and tarry substances into their apartment. In this connection they instituted a number of administrative, civil and criminal proceedings against their neighbour. The applicants generally complained that the State failed to comply with its positive obligations to protect their right to respect for their private and family life and home."[22]

An example of a successful complaint under Article 8 is *Udovičić v. Croatia*. In that case, the applicant complained about excessive noise from a bar beneath her apartment. The applicant provided evidence demonstrating "that the disturbance affecting the applicant's home and her private life reached the minimum level of severity, which required the authorities to implement measures to protect the applicant from that disturbance".[23] Therefore, the situation reached a level of severity which activated the authority's positive obligations under Article 8, but the authority failed to take the appropriate steps. Indeed,

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[22] Judgment of the European Court of Human Rights of 15 November 2011, 31339/04, *Darkowska and Darkowski v. Poland*, para. 64. It must be noted, though, that the ECtHR did not take a clear stance on whether this was only a private dispute between the two neighbours or whether there was any ECHR dimension to the case, because the case was deemed inadmissible on procedural grounds – see para. 63 of the judgment.

[23] Judgment of the European Court of Human Rights of 24 April 2014, 27310/09, *Udovičić v. Croatia*, para. 149.

> by allowing the impugned situation to persist for more than ten years without finally settling the issue before the competent domestic authorities, the Court finds that the respondent State has failed to approach the matter with due diligence and to give proper consideration to all competing interests, and thus to discharge its positive obligation to ensure the applicant's right to respect for her home and her private life.[24]

4. Have nuisances been categorically excluded from A1P1 protection?

As mentioned in the Introduction, nuisance cases are *generally* not argued under A1P1, because the provision does not include the owner's right to enjoy their property in a "pleasant environment".[25] The following subsections explore whether these statements should be interpreted as categorically excluding nuisance from A1P1 protection. Subsection 4.1 argues that the intention of nuisance law is generally not to ensure a "pleasant environment" for everyone. Subsection 4.2 provides examples from the ECtHR's case law where the Court does not seem to rule out the possibility of protecting nuisance interests under A1P1. Subsection 4.3 contains a summary of the key arguments.

4.1. Ownership and a right to "tranquillity"?

The issue of nuisance highlights a significant gap in the Court's case law: the lack of a clear definition of what constitutes "ownership" under A1P1. According to established jurisprudence, the concept of "possessions" has an "autonomous meaning" which is "independent from the formal classification in domestic law".[26] While it is evident from the ECtHR's case law that "ownership of physical goods"[27] is protected under A1P1, much of the legal scholarship and case law focuses on exploring the outer boundaries of the concept of possessions.[28]

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[24] Ibidem, para. 159.

[25] D. Maxwell, *The Human Right to Property: A Practical Approach to Article 1 of Protocol No. 1 to the ECHR*, Hart Publishing, Oxford 2022, p. 126–127.

[26] Judgment of the European Court of Human Rights of 30 November 2004, 48939/99, *Öneryıldız v. Turkey*, LEX 142252, para. 124.

[27] Ibidem.

[28] Indeed, several unconventional interests, such as social security benefits, business licences and professional clientele, have been recognised as enjoying property protection under A1P1.

However, the question remains: What precisely defines ownership as a property interest within the autonomous concept of possessions?[29]

Ownership is a *private-law* concept with no obvious or universal meaning.[30] Generally, ownership comes with certain powers and rights, such as the power to use the property, derive profits from its "fruits" and bequeath it.[31] Land ownership may also come with horizontal and vertical rights, such as ownership of the surface materials (including grass, trees and their roots and branches), the right to extract resources from the ground and "air rights".[32] While this core idea of ownership is generally recognised, its specific meaning and content can vary across different legal systems. Some legal systems may, for instance, acknowledge the landowner's right to extract resources, while in another system such resources are owned by the State.

It is also very different between jurisdictions whether every aspect of ownership enjoys constitutional protection. In the author's domestic legal system of Iceland, there is a marriage between the concept of property in private law and constitutional law. An interest that falls under the heading of "ownership" will also be protected under the constitutional property clause.[33] The opposite is true in Germany, where the constitutional meaning of property is autonomous and does not necessarily harmonise with its private-law counterpart. In other words, an interest that belongs to owners under private law does not automatically enjoy constitutional protection.[34]

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[29] D.J. Harris, M. O'Boyle, E. Bates, C.M. Buckley, *Harris, O'Boyle and Warbrick: Law of the European Convention on Human Rights*, Oxford University Press, New York 2023, p. 890. The authors claim that if ownership "is seen as a bundle of rights, the fact that an owner has been deprived of one right will not usually be sufficient to say that he has been deprived of ownership."

[30] Indeed, ownership is a civil-law concept, while common-law jurisdictions use different terms, such as "fee simple". Although the concepts differ somewhat, they align in important aspects. See e.g. J. Gordley, *Foundations of Private Law…*, p. 50–65.

[31] An overview of what is generally included in the term "ownership" can be found in B. Akkermans, *Property Law*, in: J. Hage, A. Waltermann, B. Akkermans (eds), *Introduction to Law*, Springer, Cham 2018, p. 86–93.

[32] See a more thorough discussion of horizontal and vertical expressions of property in Y. Lifshitz, *The Geometry of Property*, "University of Toronto Law Journal" 2021, vol. 71, no. 4, p. 480–509; H.E. Smith, *Property beyond Flatland*, "Brigham-Kanner Property Rights Conference Journal" 2021, vol. 10, p. 9–56.

[33] See e.g. K. Axelsson, Á. Ragnarsdóttir, *Eignarnám*, Fons Juris, Reykjavík 2021, p. 14.

[34] In the seminal Groundwater case, the German Federal Constitutional Court stated that the "concept of property as guaranteed by the Constitution must be derived from the Constitution itself. This concept of property in the constitutional sense cannot be derived from legal norms [ordinary statutes] lower in rank than the Constitution, nor can the scope of the concrete property guarantee be determined on the basis of private law regulations" – judgment of Federal Constitutional Court of 15 July 1981, BVerfGE 58, 300 (translation from D. Kommers, R. Miller,

If the ECtHR were to flesh out its A1P1 definition of "ownership", it would be difficult to exclude nuisance from the concept, irrespective of whether the Court took a private-law or autonomous approach to it. The right to *enjoy* property is one of the crucial aspects of ownership. In fact, this is explicitly stated in the first sentence of A1P1, which affirms that every natural or legal person "is entitled to the peaceful enjoyment of his possessions." Although the ECtHR has stated that A1P1 does not encompass the right to enjoy one's property in a *pleasant* environment, nuisance law typically does not aim to guarantee a positively framed right to tranquillity. Instead, nuisance law generally adopts a negative framing of the right, protecting owners from "unreasonable interferences" with their property rights, and it usually takes a lot for an action or activity to cross that threshold.[35] This means, in other words, that the absence of a right to a "pleasant environment" under A1P1 should not automatically mean that nuisance should be excluded from A1P1 protection.

4.2. Nuisance-like arguments and A1P1

In the aforementioned *Udovičić* case, the ECtHR held that it was "not necessary to examine whether in this case there has been a violation of [A1P1]"[36] because the Court had already found a violation of Article 8. Does this mean that the case would have deserved an examination under A1P1 if Article 8 had not been violated or was inapplicable – for instance, if the applicant's real estate did not constitute a "home" under Article 8? The Court, at a minimum, did not hold that nuisance arguments were irrelevant under A1P1, or outside the scope of its protection.

Also, the ECtHR has in some cases concluded that certain nuisance-like situations triggered the Contracting Parties' positive obligations, especially when the nuisance has already caused serious harm.[37] In *Kurşun*, an oil refinery explosion resulted in three deaths and many injuries, and damaged many

The Constitutional Jurisprudence of the Federal Republic of Germany, Duke University Press, Durham 2012, p. 642).

[35] J. Gordley, *Takings*, "Tulane Law Review" 2008, vol. 82, no. 4, p. 1526. The author claims that when deciding whether an activity amounts to a nuisance, courts must determine whether "an interference is sufficiently grave and sufficiently abnormal to warrant relief" and that "relief is usually given in clear cases of smells, noise, or vibrations that are clearly out of proportion to the interferences other owners create."

[36] Judgment of the European Court of Human Rights of 24 April 2014, 27310/09, *Udovičić v. Croatia*, para. 164.

[37] For more on positive obligations under A1P1, see e.g. M. Beeler-Sigron, *Protection of Property*, in: P. van Dijk, F. van Hoof, A. van Rijn, L. Zwaak (eds), *Theory and Practice of the European Convention on Human Rights*, Intersentia, Louvain-la-Neuve 2018, p. 885–888.

properties in the vicinity (including that of the applicant).[38] The Court found that the State authorities had failed in their positive obligations to take measures that were necessary to "avert the risks" posed by the refinery.[39] Similarly, in *Öneryıldız v. Turkey*, a methane explosion occurred at a municipal rubbish tip which resulted in the deaths of 39 people. The applicant, in addition to losing nine of his close relatives, lost his house and all movable property.[40] The Court noted that the State should have taken "practical steps" to "avoid the destruction of the applicant's house", but no such steps had been taken.[41] The Court also established that there was a causal link "between the gross negligence attributable to the State and the loss of human lives also applies to the engulfment of the applicant's house."[42] Since the State had breached its positive obligation, the Court accordingly concluded that there had been a violation of both Article 2 (right to life) and A1P1.

It could be argued that the operations in these two cases amounted to a nuisance due to their potential to harm health, life and property. These activities could be classified under the second and/or third nuisance categories (see the discussion on the classification in section 2). The mere presence of the municipal rubbish site in *Öneryıldız* posed both a threat to public well-being and an aesthetic displeasure. By recognising a positive obligation under A1P1 in *Öneryıldız*, the Court effectively acknowledged that the State had a duty to remove or mitigate the nuisance.

4.3. Summary

There do not seem to be any clear arguments for excluding nuisance from A1P1. The right to enjoyment of property is a fundamental property interest, and it is logical to interpret it in accordance with the general private-law perspective that includes the right to be free from "unreasonable interferences". Additionally, the ECtHR does not seem to have categorically excluded nuisance-like arguments from A1P1 protection. However, the examples provided above are sporadic and incidental, appearing to be exceptions to the otherwise clear principle of addressing nuisance under Article 8 instead of A1P1.

[38] Judgment of the European Court of Human Rights of 30 October 2018, 22677/10, *Kurşun v. Turkey*, LEX 2594174, para. 8.
[39] Ibidem, para. 130.
[40] Judgment of the European Court of Human Rights of 30 November 2004, 48939/99, *Öneryıldız v. Turkey*, paras 18, 63 and 119.
[41] Ibidem, para. 136.
[42] Ibidem, para. 135.

Although it might currently be seen as an exception, this area still provides a space worth exploring further.

5. A house is not necessarily a home – the conceptual differences between a "home" and "possessions"

5.1. Introduction

The terms "home" in Article 8 and "possessions" in A1P1 share some overlap, but they are far from synonymous. Many possessions protected under A1P1 bear no resemblance to the concept of a home; examples include business permits,[43] intellectual property,[44] business goodwill[45] and contractual claims.[46] However, the most evident overlap occurs in the context of real estate, such as land or buildings. For instance, individuals living in their own home have a possession under A1P1, which also usually qualifies as their home within the meaning of Article 8.[47] Nonetheless, even in the realm of land and buildings, these two concepts can carry distinct meanings. Subsection 5.2 discusses how a "home" can be a broader concept than "possessions", while subsection 5.3 explains why some buildings or dwellings do not deserve the label of a "home". Subsection 5.4 summarises some of the key points.

5.2. A home, but not a property

As a starting point, your home is typically either your own property or someone else's. However, even if you do not have ownership of the property, you may still hold protected property interests. For instance, leasing and housing rights can fall under the protection of A1P1, as they constitute lawful use rights and are therefore proprietary in nature, regardless of whether they are officially

[43] Judgment of the European Court of Human Rights of 7 July 1989, 10873/84, *Tre Traktörer Aktiebolag v. Sweden*, LEX 81085, para. 53; judgment of the European Court of Human Rights of 18 February 1991, 12033/86, *Fredin v. Sweden*, LEX 81122, para. 40.

[44] Judgment of the European Court of Human Rights of 11 January 2007, 73049/01, *Anheuser-Busch Inc. v. Portugal*, LEX 211949, para. 72.

[45] Judgment of the European Court of Human Rights of 26 June 1986, 8543/79, 8674/79, 8675/79 and 8685/79, *Van Marle and Others v. the Netherlands*, LEX 81017, para. 41.

[46] Judgment of the European Court of Human Rights of 28 September 2004, 44912/98, *Kopecký v. Slovakia*, LEX 141516, para. 48.

[47] B. Rainey, P. McCormick, C. Ovey, *Jacobs, White, and Ovey: The European Convention on Human Rights*, Oxford University Press, New York 2021, p. 455.

classified as property rights within the relevant domestic legal system.[48] This raises an important question: What about individuals who lack legitimate or recognisable interests under A1P1? Consider again the example provided above about parents, partners, children or siblings residing in an owner's or tenant's apartment. If their interests are compromised, does this mean they are excluded from protection?

The interests of such individuals are generally not protected under A1P1, as their rights are not derived from a legal act or instrument, such as a lease.[49] However, they may still receive protection under Article 8, even in the absence of legal ties to the property. As articulated in *Khamidov v. Russia*, "a home may be found to exist even where the applicant has no right or interest in real property."[50] Furthermore, the Court has emphasised that the concept of a home is not "limited to premises that are lawfully occupied or which have been lawfully established".[51]

Put simply, Article 8 can often provide broader protection than A1P1. While A1P1 safeguards individuals who hold rights classified as possessions, Article 8 extends its protective scope to those without property – and even to individuals with ambiguous or questionable claims to possessory interests.[52]

5.3. A property, but not a home

The song "A House is Not a Home", composed by Burt Bacharach and popularised by Dionne Warwick, highlights some of the distinctions between buildings and homes. Hal David's lyrics capture this difference, with the singer noting that while a chair remains a chair even when there is no one sitting there, the same cannot be said for houses. A house, according to the lyrics, is not a home "when there's no one there to hold you tight and no one there you can kiss go-

[48] See e.g. judgment of the European Court of Human Rights of 16 November 2004, 41673/98, *Bruncrona v. Finland*, LEX 142265, para. 79.

[49] See e.g. D. Maxwell, *The Human Right to Property…*, p. 127; decision of the European Commission of Human Rights of 14 May 1986, Case No. 11716/85, *S. v. the United Kingdom*, CE:ECHR:1986: 0514DEC001171685; decision of the European Commission of Human Rights of 12 January 1994, 19217/91, *Durini v. Italy*.

[50] Judgment of the European Court of Human Rights of 15 November 2007, 72118/01, *Khamidov v. Russia*, LEX 318799, para. 128.

[51] Judgment of the European Court of Human Rights of 9 June 2022, 42858/11, *Hasanali Aliyev and Others v. Azerbaijan*, LEX 3351593, para. 31; see also judgment of the European Court of Human Rights of 18 November 2004, 58255/00, *Prokopovich v. Russia*, LEX 142246, para. 36.

[52] D.J. Harris, M. O'Boyle, E. Bates, C.M. Buckley, *Harris, O'Boyle and Warbrick…*, p. 514–515.

odnight."[53] While the ECtHR's doctrinal distinction between houses and homes is fortunately different, there is an underlying truth in this sentiment. Certain values and emotions are uniquely associated with our home, feelings that we do not extend easily to other buildings or premises, such as our workplace or a hotel room we might stay in briefly. There are even prominent property theories that are devoted to exactly this difference, where the theorists argue that certain important types of property (so-called constitutive property) should enjoy more protection than less important (fungible) property.[54]

The ECtHR has firmly established that the concept of "home" does not extend to all buildings or dwellings. For a building or dwelling to qualify as a home, the individual occupying it must demonstrate a sufficient connection or attachment to it. As the Court has stated, an owner "may have a property right in a particular building or land, within the meaning of [A1P1], without having sufficient ties with it for it to constitute a home under Article 8".[55] The determination of whether a building or dwelling constitutes a home depends "on the factual circumstances, namely, the existence of sufficient and continuous links with a specific place".[56]

However, the concept of a home is not limited to the domiciles of individuals; it has been interpreted far more broadly than the conventional meaning of the term. Examples include caravans,[57] holiday homes to which the applicant has strong ties[58] and secondary residences.[59] The designation of 'home' has also been extended to legal entities, such as a "company's registered office, branches, or other business premises."[60] That said, the application of this broader

[53] B. Bacharach, H. David, *A House Is Not a Home*, Scepter Records, New York 1964.

[54] M. Radin, *Property and Personhood*, "Stanford Law Review" 1982, vol. 34, no. 5, p. 992. The author claims that the home "is the scene of one's history and future, one's life and growth [… and] one embodies or constitutes oneself there". See also H. Dagan, *Reimagining Takings Law*, in: G. Alexander, E. Peñalver (eds), *Property and Community*, Oxford University Press, Oxford 2010, p. 49. The author claims that "takings law should treat constitutive property, which implicates its holder's personhood, differently from fungible property, which is wholly instrumental."

[55] Judgment of the European Court of Human Rights of 15 November 2007, 72118/01, *Khamidov v. Russia*, para. 128.

[56] Judgment of the European Court of Human Rights of 17 October 2013, 27013/07, *Winterstein and Others v. France*, LEX 1375709, para. 141.

[57] Judgment of the European Court of Human Rights of 18 January 2001, 27238/95, *Chapman v. the United Kingdom*, LEX 76533, paras 71–74.

[58] Judgment of the European Court of Human Rights of 31 July 2003, 16219/90, *Demades v. Turkey*, LEX 80335, paras 23–34.

[59] Judgment of the European Court of Human Rights of 14 December 2021, 49108/11, *Samoylova v. Russia*, LEX 3271895, paras 63–66.

[60] Judgment of the European Court of Human Rights of 16 April 2002, 37971/97, *Société Colas est and Others v. France*, LEX 82207, paras 41–42.

understanding is highly sensitive to context. On several occasions, the ECtHR has excluded business operations of legal entities from the protection granted to "homes" under Article 8. Examples include a pig farm[61] and a "mill, bakery and storage facility" that appeared to serve exclusively industrial purposes.[62] In *Leveau and Fillon*, the Court emphasised the need to impose limits on the concept of a "home" when applied to legal entities, warning against interpretations "to avoid flying in the face of common sense and completely subverting the intentions of the authors of the Convention".[63]

Interestingly, the type and extent of the alleged interference can also play a role in determining whether a business premise qualifies as a home. For instance, an alleged unlawful entry into a company's offices might breach the sanctuary of its "home", whereas an alleged external nuisance caused by neighbouring properties may not have the same effect.[64] In fact, the Court has strongly implied that legal persons cannot enjoy protection from nuisances under Article 8. In the ECtHR's decision of *Asselbourg and Others v. Luxembourg*, the Court held that the association in question

> cannot claim to be the victim of an infringement of the right to respect for its "home", within the meaning of Article 8 of the Convention, merely because it has its registered office close to the steelworks that it is criticising, where the infringement of the right to respect for the home results, as alleged in this case, *from nuisances or problems which can be encountered only by natural persons*.[65] [emphasis added]

5.4. Summary

In summary, the concept of a home is broad, encompassing both conventional and unconventional buildings and dwellings. It extends protection to

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[61] Decision of the European Court of Human Rights of 6 September 2005, 63512/00 and 63513/00, *Leveau and Fillon v. France*, LEX 281497

[62] Judgment of the European Court of Human Rights of 15 November 2007, 72118/01, *Khamidov v. Russia*, para. 131.

[63] Decision of the European Court of Human Rights of 6 September 2005, 63512/00 and 63513/00, *Leveau and Fillon v. France*. See also the same wording in judgment of the European Court of Human Rights of 15 November 2007, 72118/01, *Khamidov v. Russia*, para. 131. These types of business operations, however, may still receive protection under A1P1, as business permits, along with the facilities and machinery used in such operations, can themselves constitute possessions.

[64] This can be inferred by *Leveau and Fillon v. France*, where the Court held that the pig farm was not a home in the conventional sense "unless perhaps the company itself were to allege unlawful entry of its head office or branches (…), which did not occur in this case".

[65] Decision of the European Court of Human Rights of 29 June 1999, 29121/95, *Asselbourg and Others v. Luxembourg*, LEX 524783.

individuals who might otherwise fall outside the scope of A1P1 protection. However, a gap exists in the protection offered by Article 8, as it is limited to buildings and dwellings with which the applicant has demonstrated sufficient ties. Furthermore, the nuisance protection under Article 8 appears to be restricted to natural persons, thereby excluding the interests of legal persons. At the very least, the scope of protection for legal persons is much narrower than that afforded to natural persons.

The next section moves beyond the conceptual distinction between "home" and "possessions", delving into the fundamental substantive and methodological differences in the protections provided by the two provisions under discussion.

6. Substantive and methodological differences between Article 8 and A1P1

Facts concerning cases under Article 8 generally differ from those under A1P1. The typical example of interference with the sanctity of the applicant's home involves physical breaches,[66] such as illegal entries[67] or alleged unlawful evictions.[68] Protection against nuisance extends this concept, as the Court has stated that the protection of one's home includes breaches "that are not concrete or physical, such as noise, emissions, smells or other forms of interference."[69] Applying this framework to the nuisance categories outlined in section 2, Article 8 primarily addresses the first category (physical breaches) but also extends its protection to encompass numerous activities within the second category, which are non-physical but still traditional types of nuisances. However, there appears to be no evidence that activities from the third category fall within the ambit of Article 8.

Property cases under A1P1 typically involve acts of expropriation (referred to as "deprivations" in the Court's terminology) or regulations that limit the use and enjoyment of one's property. A common example of regulations is zoning

[66] D.J. Harris, M. O'Boyle, E. Bates, C.M. Buckley, *Harris, O'Boyle and Warbrick…*, p. 564: "The core idea of protection of the home is one of sanctuary against intrusion by public authorities."

[67] Judgment of the European Court of Human Rights of 24 April 2014, 27310/09, *Udovičić v. Croatia*, para. 136.

[68] Judgment of the European Court of Human Rights of 9 June 2022, 42858/11, *Hasanali Aliyev and Others v. Azerbaijan*, paras 27–37.

[69] Judgment of the European Court of Human Rights of 24 April 2014, 27310/09, *Udovičić v. Croatia*, para. 136; judgment of the European Court of Human Rights of 9 April 2024, 53600/20, *Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, LEX 3701706, para. 516.

or environmental regulations. For instance, a government might impose zoning laws that restrict the types of buildings that can be constructed in certain areas, or environmental regulations that limit industrial activities to protect natural landscapes or resources.

The difference between the provisions lies not only in the types of issues they typically address, but also in their underlying principles and standards for finding a violation. A1P1 is primarily focused on economic value and the financial consequences that follow from property interference. For instance, when determining whether an interest amounts to "possession", one of the determining factors is whether it is an "economic interest"[70] or of "financial value".[71] The interest is perceived as a commodity, where the effects of an act or regulation can be quantified and monetised.[72] In contrast, Article 8 offers a very different perspective, asking whether the interference or breach adversely affected "the quality of the applicant's private life and the scope for enjoying the amenities of his home".[73]

The case law also suggests that more protection is generally awarded to interests that fall under Article 8 than A1P1. When both provisions apply to the facts of a case (such as in cases of demolishing an unlawful building[74]), the Court's proportionality analysis is sometimes similar, meaning that the same factors are considered relevant under both Article 8 and A1P1. However, "this assessment is not inevitably identical in all circumstances."[75] The primary difference lies in the margin of appreciation awarded to Contracting Parties, where it is narrower in housing matters "when it comes to the rights guaranteed by

[70] Judgment of the European Court of Human Rights of 7 July 1989, 10873/94, *Tre Traktörer Aktiebolag v. Sweden*, para. 53.

[71] Judgment of the European Court of Human Rights of 11 January 2007, 73049/01, *Anheuser-Busch Inc. v. Portugal*, paras 73–78.

[72] F. McCarthy, *Protection of Property and the European Convention on Human Rights*, "Brigham-Kanner Property Rights Conference Journal" 2017, vol. 6, p. 299–328. However, the author provides examples of exceptions to the commodification of the ECtHR, e.g. in the field of social welfare benefits, saying that the Court largely makes "use of a commodity-type approach to property, with occasional diversions into propriety territory."

[73] Judgment of the European Court of Human Rights of 21 February 1990, 9310/81, *Powell and Rayner v. the United Kingdom*, LEX 81097, para. 40; judgment of the European Court of Human Rights of 9 April 2024, 53600/20, *Verein Klimaseniorinnen Schweiz and Others v. Switzerland*, para. 516. See also judgment of the European Court of Human Rights of 8 July 2003, 36022/97, *Hatton and Others v. the United Kingdom*, para. 96. See also judgment of the European Court of Human Rights of 9 December 1994, 16798/90, *López Ostra v. Spain*, LEX 80503, para. 51.

[74] See e.g. judgment of the European Court of Human Rights of 21 April 2016, 46577/15, *Ivanova and Cherkezov v. Bulgaria*, LEX 2021199.

[75] Ibidem, para. 74.

Article 8 compared to those in [A1P1]"[76] because regard has to be given "to the central importance of Article 8 to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community."[77]

In sum, there are considerable differences in the scope of analysis between Article 8 and A1P1. The protection under Article 8 centres around fundamental values such as social ties, security, mental and physical well-being and community. In contrast, A1P1's scope predominantly focusses on the financial and economic aspects of property ownership. This difference may also affect the remedies available: a violation of A1P1 may emphasise compensation for financial loss, while a violation of Article 8 can call for different responses, such as non-pecuniary damages for mental and personal suffering.[78]

7. Preliminary normative reflections

I have previously concluded that "there is no clear normative framework of how A1P1 is applied."[79] Another commentator has noted a "lack of normative coherence" in the ECtHR's case law. [80] Yet another commentator has claimed that in practice, "most of the ECtHR's decisions appear to be based on the principles of equity and vague concepts of justice flowing from the distinct facts that have shaped a given case."[81] Despite these forthright remarks, "it must be kept in mind that the ECtHR has recognized the social dimensions of property."[82] Importantly, the Court has stated that private property has a "social function" which, "given the appropriate circumstances, must be put into the equation to determine whether the "fair balance" has been struck between the demands of the general interest of the community and the individual's

[76] Judgment of the European Court of Human Rights of 6 December 2011, 7097/10, *Gladysheva v. Russia*, LEX1054644, para. 93.

[77] Ibidem. See also judgment of the European Court of Human Rights of 27 May 2004, 66746/01, *Connors v. the United Kingdom*, LEX 125977, para. 82.

[78] Additionally, when domestic courts find a violation of Article 8, they might invalidate the decisions or laws that authorised the illegal interference. This approach directly addresses the source of the violation and aims to restore the applicant's rights by removing the offending legislation or decision. In contrast, cases concerning A1P1 might provide more flexibility. Instead of invalidating the laws, courts might opt to keep the regulations intact but compensate the owner with monetary damages.

[79] V. Petersen, *Climate Change and the Social Function of Property…*, p. 214.

[80] F. McCarthy, *Protection of Property and the European Convention on Human Rights…*, p. 327.

[81] D. Maxwell, *The Human Right to Property…*, p. 40.

[82] V. Petersen, *Climate Change and the Social Function of Property…*, p. 214.

fundamental rights."[83] However, the Court "has not defined the scope of the social function"[84] and "we know little about the Court's view on the substance of [the social] function."[85]

The "home" approach to nuisance teaches valuable normative lessons to property lawyers, emphasising that ownership extends beyond mere instrumental or monetary value. The case law on the concept of "home" under Article 8 can inspire the inclusion of more diverse values beyond financial value in the property protection under A1P1, such as social ties, security, well-being and a sense of community. The inclusion of such interests would add layers of meaning and context to the "social function" of property. In addition to focussing on the social aspects of homeownership, the "home" approach has certain advantages because it provides important protection to those without property.

However, it is unwise to exclude nuisance from A1P1 protection for three reasons. Firstly, as discussed in section 2, protection against nuisance is a fundamental aspect of ownership. Secondly, property owners are excluded from Article 8 protection if their building or dwelling does not qualify as a home. Legal persons, in particular, seem to be largely excluded from nuisance protection. While it may be sensible to afford such owners less protection against nuisance, there is no logical reason to categorically exclude them from such protection. Thirdly, it is important to acknowledge that financial value is a relevant consideration in nuisance cases. Although property serves more diverse values than mere financial ones, as the previous discussion demonstrates, arguments about the loss of financial value due to nearby activities or operations should not be disregarded. Importantly, Article 8 does not extend its protection to activities that are deemed indecent, undesirable or unwelcome (the third category discussed in section 2). These types of nuisances fall outside the scope of Article 8, as they are not directly related to the sanctity of the home. In contrast, A1P1 may offer protection in such cases due to its focus on property rights and economic value. Under A1P1, activities that significantly diminish the value of a property could potentially be addressed, even if they do not impact the sanctity of the home in the manner envisioned under Article 8.

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[83] Judgment of the European Court of Human Rights of 29 March 2011, 33949/05, *Potomska and Potomski v. Poland*, LEX 784737, para. 67; decision of the European Court of Human Rights of 14 May 2013, 26367/10, *Fürst von Thurn und Taxis v. Germany*, LEX 1315916, para. 23; judgment of the European Court of Human Rights of 15 December 2015, 32794/07, *Matczynski v. Poland*, LEX 1936311, para. 106.

[84] V. Petersen, *Climate Change and the Social Function of Property…*, p. 235.

[85] Ibidem, 235.

A way forward could involve analysing nuisance cases under both Article 8 and A1P1. For owners who qualify for protection under both provisions, Article 8 would likely offer greater safeguards (see the discussion in section 6), rendering A1P1 protection largely superfluous in most instances, except in cases that fall outside the concept of a "home". A1P1 could then serve as the primary avenue of protection for those not covered by Article 8. This dual-framework approach would not only enhance protection against nuisances compared to the existing system, but would also foster greater normative interplay between the provisions.

This reflection is preliminary but should serve to encourage further research into the implications of this dual approach, with the aim of fostering an understanding of property that includes more diverse values than the current interpretation of A1P1.

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