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POLSKA AKADEMIA NAUK

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Protection of property rights in national and international law

Inside:

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Special issue

Protection of property rights in national and international law

Guest Editor:

dr hab. Magdalena Habdas, prof. UŚ (University of Silesia in Katowice)

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Niniejszy numer poświęcony jest zagadnieniom związanym z ochroną prawa własności. Tematyka przedstawiona jest nie tylko z perspektywy Europejskiej Konwencji Praw Człowieka, ale także w kontekście praw krajowych. Numer otwiera artykuł dotyczący tego, w jakim zakresie interes publiczny może stanowić uzasadnienie dla ograniczenia chronionych praw i wolności człowieka. W kolejnym artykule rozważono zagadnienie immisji w powiązaniu z ochroną własności oraz ochroną prawa do życia prywatnego i rodzinnego. W trzecim artykule, przestawiono analizę własności kolektywnej i jej znaczenie dla systemu społeczno-gospodarczego. W czwartym artykule podjęto temat reform własnościowych w Kosowie, z punktu widzenia tworzenia systemu prawa opartego na własności prywatnej, lecz nie wykluczającego występowania innych rodzajów własności. W ostatnim artykule omówiono wyzwania związane z ochroną własności prywatnej i prawem do mieszkania, w świetle rosnącego zjawiska dzikich lokatorów. Mamy nadzieję, że niniejszy numer „Studiów Prawniczych", którego tematem przewodnim są różne ujęcia prawa własności, stanowić będzie źródło inspiracji dla dalszych badań naukowych w tym ważnym, społecznie i ekonomicznie, obszarze.

Magdalena Habdas

The current issue is devoted to matters connected with the protection of property rights. The subject matter is presented not only from the perspective of the European Convention on Human Rights, but also in the context of national laws. The issue opens with an article on the extent to which the public interest may justify the restriction of protected human rights and freedoms. In the next article, the issue of nuisance in connection with the protection of property and the protection of the right to private and family life is discussed. In the third article, the significance of collective property is considered. In the fourth article ownership reforms in Kosovo are discussed, from the point of view of creating a legal system based on private property, but not excluding other property types. Last but not least, the challenges of protecting both private property and the right to housing are considered, as increasing problems of satisfying one's housing needs exacerbate the phenomenon of squatting. We hope that the presented issue of "Legal Studies", with the main theme encompassing various approaches to property law, will be a source of inspiration for further scientific research in this socially and economically important area.

Magdalena Habdas

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Public interest as a concept that determines the scope of property rights protection – case – law of the European Court of Human Rights on austerity measures

Interes publiczny jako koncepcja determinująca zakres ochrony praw własności – na przykładzie orzecznictwa Europejskiego Trybunału Praw Człowieka w sprawach dotyczących działań oszczędnościowych

Abstract: During times of systemic political and economic transformation, crises and pandemics, public authorities tend to prioritise the "public interest" over potential individual interests when implementing different types of policies. In the European legal area, the restriction of rights and freedoms is subject to limitations resulting from the European Convention on Human Rights. The extent to which States may invoke the public interest in order to implement specific social and economic policies has been repeatedly examined by the ECtHR, but special attention should be paid to austerity measures – government policies designed to reduce budget deficits during times of economic hardship. The article examines how the Court considered the individual applications resulting from austerity measures and concludes that in these cases, the Court defined "public interest" for the first time solely from the perspective of the economic interests of the respondent governments. Although this conclusion may seem pessimistic for human rights, the Court's approach undoubtedly reflects the need to introduce certain necessary government policies despite their deeply interfering character. It closely aligns with the original concept of property rights enshrined in the Convention, that of

a "social conception of property" which enables the pursuit of social policies in the general interest. The article concludes that the Court's rulings could be reasoned more persuasively in order to convince to their righteousness broad target audience – not only governments, but also other individuals and societies.

Keywords: European Convention on Human Rights, European Court of Human Rights, austerity measures, public interest, protection of property rights

Abstrakt: W czasach systemowych transformacji politycznych i gospodarczych, kryzysów i pandemii, władze publiczne, wdrażając różnego rodzaju polityki, mają tendencję do przedkładania „interesu publicznego" nad potencjalne interesy jednostki. W europejskim obszarze prawnym ograniczenie praw i wolności podlega ograniczeniom wynikającym z Europejskiej Konwencji Praw Człowieka. Zakres, w jakim państwa mogą powoływać się na interes publiczny w celu wdrażania określonych polityk społecznych i gospodarczych, był wielokrotnie badany przez ETPC, ale szczególną uwagę należy zwrócić na środki oszczędnościowe – politykę rządową mającą na celu redukcję deficytu budżetowego w okresach trudności gospodarczych. Artykuł analizuje, jak Trybunał rozpatrywał poszczególne skargi wynikające z działań oszczędnościowych i stwierdza, że w tych sprawach Trybunał po raz pierwszy zdefiniował „interes publiczny" wyłącznie z perspektywy interesów ekonomicznych pozwanych rządów. Chociaż wniosek ten może wydawać się pesymistyczny z punktu widzenia praw człowieka, niewątpliwie odzwierciedla on potrzebę wprowadzenia określonych polityk rządowych. Jest on ściśle powiązany z pierwotną koncepcją prawa własności zawartą w Konwencji, czyli "społeczną koncepcją własności", która umożliwia realizację polityk społecznych w interesie ogólnym. Artykuł podkreśla, że decyzje Trybunału wymagają bardziej przekonującego uzasadnienia poprzez odwołanie do koncepcji własności przyjętej w Konwencji.

Słowa kluczowe: Europejska Konwencja Praw Człowieka, Europejski Trybunał Praw Człowieka, środki oszczędnościowe, interes publiczny, ochrona prawa własności

1. Introduction: The term "public interest" and the European Convention on Human Rights

In the general social and legal debates, appeals to the public interest in law are commonplace, though they are typically made without clarifying how the public interest should be understood and how it can be identified.[1] The appeals have intensified in connection with the economic crisis in the 2000s, the COVID-19 pandemic and the aggression against Ukraine. These events necessitated the implementation of legislative instruments, which often interfered quite strongly with certain individual rights and freedoms, citing the need to pursue a generally defined public interest.

The concept of public interest has been introduced into the European Convention on Human Rights (ECHR or "the Convention") in several ways and has become one of the three elements of the classic triad by which the European Court of Human Rights (ECtHR or "the Court") assesses interference with the rights and freedoms of individuals: the condition of legality, public interest and proportionality. And although the concept has not been precisely defined in the text of the Convention, it has been broadly interpreted by the Court and as will be demonstrated below, has a direct impact on the rulings.[2]

First of all, Articles 8–11 of the Convention enumerate different "legitimate purposes" which may justify a State's interference in the rights and freedoms of entitled persons: public safety, protection of the rights and freedoms of others, protection of reputation of others, protection of health or morals, national security, prevention of disorder or crime, protection of public order, economic well-being of the country, territorial integrity, preventing the disclosure of information received in confidence and maintenance of the "authority and impartiality of the judiciary". The possible exceptions to rights and freedoms guaranteed in Articles 8–11 are difficult to categorise since they are capable of operating in a variety of ways depending on context. Due to the constant development of the Court's jurisprudence, it would currently be very difficult to draw sharp boundaries and divide the aims into two classic categories: those which concern "public interests", that is, the general interests of the state and

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1 E.R. Boot, *The Public Interest: Clarifying a Legal Concept*, "Ratio Juris" 2024, no. 37, p. 110.

2 A. McHarg, *Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights*, "The Modern Law Review" 1999, vol. 62 no. 5, p. 684.

society, and those which concern "private interests", in the sense that they are capable of benefiting distinct groups or individuals.[3]

A very good example for this lack of a clear division is the Court's attitude in cases concerning medically assisted procreation. There, the Court defined the public interest allowing States to restrict available artificial procreation techniques by referring to the legitimate aim of the "protection of the rights of others" – defined as the children that would be born as a result of medically assisted procreation and the women in potentially vulnerable situations (entering into surrogacy arrangements for financial reasons).[4] According to the classic division into public and private interests, the need to protect those groups would be classified as private interests because they embrace a distinct group of individuals. However, in cases on medically assisted procreation the Court embraces the interests of those groups with the notion of the public interest.[5] Therefore, although the notion of "public interest" is not explicitly mentioned in Articles 8–11 of the Convention, the various specific "legitimate aims" can be regarded as identical to the public interest, seen as a general statement of how to justify situations when the protection of individuals' interests or choices is overridden by considerations of collective utility.[6]

Secondly, the need to protect the public interest is reflected in Article 15 as a premise for suspending the rights guaranteed in the Convention in "time of war or other public emergency threatening the life of the nation", provided that it is "strictly required by the exigencies of the situation".[7] Here, again, although

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[3] This kind of division has been proposed e.g. by Steven Greer (S. Greer, *The Exceptions to Articles 8 to 11 of the European Convention on Human Rights*, Council of Europe Publishing, Strasbourg 1997, p. 18.

[4] Here, the Court argues to convince its audience of the decision by analysing the socially unfavourable phenomena which may occur. The interests of the two groups of individuals are treated as the designator of the legitimate public interest. See judgment of the European Court of Human Rights of 3 November 2011, 57813/00, *H.S. and Others v. Austria*, paras 66, 101, 104, 105 and 113, LEX 1001122; judgment of the European Court of Human Rights of 26 June 2014, 65192/11, *Mennesson v. France*, para. 72, LEX 1624604; judgment of the European Court of Human Rights of 24 January 2017, 25358/12, *Paradisso and Campanelli v. Italy*, para. 163, LEX 2192506.

[5] A. Mężykowska, A. Młynarska-Sobaczewska, *Persuasion and Legal Reasoning in ECtHR Rulings: Balancing Impossible Demands*, Routledge, London 2023, p. 89 ff.

[6] A. McHarg, *Reconciling Human Rights*…, p. 671–72 and 674–78.

[7] "Article 15 – Derogation in time of emergency:
1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary

the underlying justification is clearly the "public" or "national" interest, the text does not make this explicit.

Thirdly, the term "public interest"is used explicitly to justify interference with two rights: peaceful enjoyment of possessions (Article 1 of Protocol No. 1) and liberty of movement and freedom to choose residence (Article 2(1) and (4) of Protocol No. 4). According to Article 1 of Protocol No. 1,[8] the deprivation of property is conditional on a demonstration of a "public interest" and other conditions provided for by law and by the general principles of international law. Controlling the use of property is conditional upon proof of the existence of a "general interest". In turn, Article 2(3) of Protocol No. 4[9] introduces the possibility of limiting the freedom of movement in order to protect such interests as "national security", "maintenance of order public", "prevention of crime", "protection of health and morals" and "protection of the rights and freedoms of others". The notion of "public interest" is introduced in Article 2(4), and its test applies only to restrictions on the rights to freedom of movement and freedom to choose one's residence, set out in Article 2(1) of Protocol No. 4 and applying "in particular areas" within a State's territory[10]

General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed."

[8] "Article 1 of Protocol No. 1 – Right to 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."

[9] "Article 2 of Protocol No. 4 – Freedom of movement:
1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society."

[10] Explanatory Report to Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, Strasbourg, 16 November 1963, § 18; Guide on Article 2 of Protocol No. 4 to the European Convention on Human Rights, Freedom of Movement, p. 50, https://ks.echr.coe.int/web/echr-ks/article-2-protocol-4 [access: 22.09.2025].

As it is demonstrated above, the types of "general good" that permit a State to interfere with the rights and freedoms protected by the Convention are directly indicated, relative to the Convention as a whole – except for the provision which protects property rights and, to a very limited extent, freedom of movement – where the generic notions of "public" and "general" interests are used. The general nature of such terms and the fact that they do not exist in many legal systems or do not have fixed or clear meaning therein[11] has facilitated the Court's work in interpreting them in an autonomous manner, i.e. not directly in reference to similar concepts used in national legal systems.[12]

The fact that the provision on peaceful enjoyment of possessions (Article 1 of Protocol No. 1) refers to "public" and "general" interests without indicating any defendable reasoning how to differentiate between the clauses is assessed as one of the inconsistencies in the language of the Protocol.[13] And although in *James and Other v. UK*, the Court made it clear that there is no real distinction between the interests and that they should be interpreted broadly, the case law of the ECtHR demonstrates that these terms are used by the Court quite consistently, i.e. the term "public interest" is used in cases concerning deprivation of property,[14] while in cases concerning the control of the use of property, the term "general interest" is used.[15] At the same time, as already said, it would be difficult to identify any differences in the meaning of these terms and the Court when summarising its jurisprudence or making general observations, treats these terms interchangeably by writing about "public (or general) interest".[16]

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[11] T. Allen, *Property and the Human Rights Act 1998*, Hart Publishing, Oxford 2005, p. 29. In Polish law, one of the most important general clauses is the 'public interest' clause, which is constitutional in nature, but similar clauses such as 'social interest' and 'socially justified interest' are also applied. See, A. Żurawik, *„Interes publiczny", „Interes społeczny" i „Interes społecznie uzasadniony". Próba dookreślenia pojęcia* ["Public interest", "Social interest" and "Social justified interest". An attempt to define the concept more precisely], „Ruch Prawniczy, ekonomiczny i socjologiczny" 2013, vol. 75, no. 2, p. 57.

[12] Judgment of the European Court of Human Rights of 21 February 1986, 8793/79, *James and Others v. the United Kingdom*, para. 45, LEX 81009, par. 42.

[13] T. Allen., *Property…*, p. 29.

[14] Judgment of the European Court of Human Rights of 30 June 2005, 46720/99, 72203/01 and 72552/01, *Jahn and Others v. Germany*, paras 88 and 91–92, LEX 154350; judgment of the European Court of Human Rights of 27 November 2007, 74258/01, *Urbárska Obec Trenčianske Biskupice v. Slovakia*, paras 104, 112–15, 120, LEX 318977.

[15] Judgment of the European Court of Human Rights of 19 June 2006, 35014/97, *Hutten-Czapska v. Poland*, 164–65, 224–25, LEX 182154; judgment of the European Court of Human Rights of 2 November 2006, 68479/01, 71351/01 and 71352/01, *Radovici and Stanescu v. Rumania*, paras 73, 75 and 88, LEX 266611; judgment of the European Court of Human Rights of 24 June 2008, 303/04, *Borenstein v. Poland*, point 3, p. 10.

[16] Judgment of the European Court of Human Rights of 22 June 2004, 31443/96, *Broniowski v. Poland*, paras 147–48; judgment of the European Court of Human Rights of 19 June 2006, 35014/97, *Hutten-Czapska v. Poland*, paras 163–64.

The list of legitimate purposes for deprivation of property or any other interference with this right identified by the Court to date is not exhaustive, in the meaning that it may include various new purposes. The Court has already found that it will respect the legislature's decision as to what is "in the public interest", unless that judgment is manifestly without reasonable foundation.[17] The following purposes have been found by the Court to fall within the notion of public interest under the meaning of this provision:[18] eliminating social injustice in the housing sector[19] (although the Court emphasised that the financial burden of transforming and reforming a country's housing supply should not be placed on one particular social group, regardless of how important the interests of other groups or the community as a whole may be[20]); combating the effects of a foreign-currency loan crisis, particularly in the context of preventing mass homelessness;[21] nationalising specific industries;[22] adopting land and city development plans;[23] securing land in order to implement a local land development plan;[24] preventing tax evasion;[25] implementing measures to restrict the consumption of alcohol;[26]

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[17] Judgment of the European Court of Human Rights of 13 December 2016, 53080/13, *Béláné Nagy v. Hungary*, para. 113.

[18] Guide on Article 1 of Protocol No. 1 – Protection of Property, 27 ff, https://rm.coe.int/guide-art-1-protocol-1-eng/1680a20cdc [access: 22.09.2025].

[19] Judgment of the European Court of Human Rights of 21 February 1986, 8793/79, *James and Others v. the United Kingdom*, para. 45, LEX 81009; judgment of the European Court of Human Rights of 21 January 2021, 43326/13, *Grozdanić and Gršković-Grozdanić v. Croatia*, paras 102–03 and 113, LEX 3113324.

[20] Judgment of the European Court of Human Rights of 19 June 2006, 35014/97, *Hutten-Czapska v. Poland*, para. 225.

[21] Judgment of the European Court of Human Rights of 17 December 2020, 73303/14, *Béla Németh v. Hungary*, paras 42–45, LEX 3093842.

[22] Judgment of the European Court of Human Rights of 8 July 1986, 9006/80, 9262/81, 9263/81, 9265/81, 9266/81, 9313/81 and 9405/81, *Lithgow and Others v. the United Kingdom*, paras 9 and 109, LEX 81013.

[23] Judgment of the European Court of Human Rights of 23 September 1982, 7151/75 and 7152/75, *Sporrong and Lönnroth v. Sweden*, para. 69, LEX 80830; judgment of the European Court of Human Rights of 2 August 2001, 23529/94, *Cooperativa La Laurentina v. Italy*, para. 94, LEX 863179.

[24] Judgment of the European Court of Human Rights of 14 November 2006, 52589/99, *Skibińscy v. Poland*, para. 86, LEX 199003.

[25] Judgment of the European Court of Human Rights of 3 July 1997, 13616/88, *Hentrich v. France*, para. 39, LEX 79631.

[26] Judgment of the European Court of Human Rights of 7 July 1989, 10873/84, *Tre Traktörer AB v. Sweden*, para. 62, LEX 81085.

transitioning from a socialist to a free-market economy;[27] protecting the environment;[28] and enacting laws which expropriate property.[29]

In considering applications related to property rights, the Court has stated that the notion of "public interest" must necessarily be extensive.[30] The Court usually demonstrates deference to the Contracting States' arguments that the interference under examination was in the public interest, and its review in this regard is generally lenient. Therefore, an applicant's argument that a given measure actually served a different purpose to that relied upon by the defendant government in a given case, or that the measure did not serve any public purpose, is unlikely to be successful. In some cases, the Court also found that the interference served a purpose other than the public interest claimed by the government during the proceedings, or identified the real purpose itself.[31] Due to this deference to the appraisal of domestic authorities, instances where the Court found no public interest justifying the interference are rare and tend to concern individual cases rather than systemic situations.[32]

The Convention's status as a living instrument means that the concept of public interest evolves and changes.

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[27] Judgment of the European Court of Human Rights of 11 December 2018, 36480/07, *Lekić v. Slovenia*, paras 103 and 105.

[28] Judgment of the European Court of Human Rights of 12 December 2000, 50924/99, *Bahia Nova S.A. v. Spain*, LEX 524232; judgment of the European Court of Human Rights of 18 January 2001, 27238/95, *Chapman v. the United Kingdom*, para. 82, LEX 76533.

[29] Judgment of the European Court of Human Rights of 23 November 2000, 25701/94, *Former King of Greece and Others v. Greece*, para. 87, LEX 76700; judgment of the European Court of Human Rights of 25 March 2014, 71243/01, *Vistiņš and Perepjolkins v. Latvia*, para. 106, LEX 1438946.

[30] Judgment of the European Court of Human Rights of 25 March 2014, 71243/01,*Vistiņš and Perepjolkins v. Latvia*, para. 106; judgment of the European Court of Human Rights of 2 July 2013, 41838/11, *R.Sz. v. Hungary*, para. 44, LEX 1327053; judgment of the European Court of Human Rights of 17 April 2012, 31925/08, *Grudić v. Serbia*, para. 75, LEX 1147983.

[31] Judgment of the European Court of Human Rights of 19 October 2000, 31227/96, *Ambruosi v. Italy*, para. 28, LEX 76724; judgment of the European Court of Human Rights of 24 April 2014, 50636/09, *Marija Božić v. Croatia*, para. 58, LEX 1451493.

[32] Judgment of the European Court of Human Rights of 16 April 2002, 36677/97, *S.A. Dangeville v. France*, paras 47 and 53–58, LEX 75646; judgment of the European Court of Human Rights 28 July 2005, 51728/99, *Rosenzweig and Bonded Warehouses Ltd. v. Poland*, LEX 154907.

2. The meaning of the term "public interest" in ECtHR case law on the protection of property rights during times of crisis

Interference with property rights is not unique; it occurs as often as interference with other rights guaranteed under the ECHR. On the other hand, States undoubtedly often become more active in times of political and economic transformations and economic crises, as evidenced in the jurisprudence of the ECtHR. Economic crises happen cyclically and always have a number of negative consequences in many areas of the State's functioning. The main effects of the austerity measures and intervention policies implemented by the State, either on its own initiative or as a result of agreements with international institutions, have already been described and analysed in the context of both the disruption to market economy mechanisms and the negative impacts on society.[33] From a human rights perspective, the issue is primarily about rising unemployment and growing social inequalities, including the deterioration of the lives of vulnerable groups such as prisoners, migrants, asylum seekers and ethnic minorities,[34] or even the collapse of the welfare state.[35]

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[33] J.R. Cuadrado-Roura, R. Martin, A. Rodríguez-Pose, *The Economic Crisis in Europe: Urban and Regional Consequences*, "Cambridge Journal of Regions, Economy and Society" 2016, vol. 9, no. 1, p. 3–11, https://doi.org/10.1093/cjres/rsv036; R.C. Altman, *Globalization in Retreat: Further Geopolitical Consequences of the Financial Crisis*, "Foreign Affairs" 2009, vol. 88, no. 2, p. 2–7; D. Koufopoulos, *Austerity Measures at the European Court of Human Rights: Can the Court Establish a Minimum of Welfare Provisions?*, European Public Law 2019, vol. 25, no. 4, p. 535–558.

[34] The descriptor "vulnerable" was used in relation to those groups by Dien Spielman (D. Spielman, *Dialogue between Judges 2013: Implementing the European Convention on Human Rights in Times of Economic Crisis*, Council of Europe, Strasbourg 2013, p. 5, https://www.echr.coe.int/documents/d/echr/Dialogue_2013_ENG [access: 22.09.2025]); S. Charitakis, *Austerity Measures in Greece and the Rights of Persons with Disabilities*, "Cyprus Human Rights Law Review" 2013, vol. 2, no. 2, p. 258–271.

[35] *Protecting Fundamental Rights during the Economic Crisis*, European Union Agency for Fundamental Rights, December 2010, https://fra.europa.eu/sites/default/files/fra_uploads/1423-FRA-Working-paper-FR-during-crisis-Dec10_EN.pdf [access: 22.09.2025]; *The European Union as a Community of Values: Safeguarding Fundamental Rights in Times of Crisis*, European Union Agency for Fundamental Rights, 2013, https://fra.europa.eu/sites/default/files/fra-2013-safeguarding-fundamental-rights-in-crisis_en.pdf [access 22.09.2025]; *The Impact of the Economic Crisis and Austerity Measures on Human Rights in Europe*, Steering Committee for Human Rights, Strasbourg 2015, https://rm.coe.int/1680658602 [access: 22.09.2025]; N. Bruun, K. Lorcher, *The Economic Crisis and Its Effects on Fundamental Social and Collective Labour Rights*, "Cyprus Human Rights Law Review" 2013, vol. 2, no. 2, p. 167–194. For sources arguing in favour of expanding the ECHR protection for the most vulnerable and marginalised groups in face of extraordinary situations like economic crises or pandemics, see F. Tulkens, *The Contribution of the European Convention on Human Rights to the Poverty Issue in Times of Crisis*, "Cyprus Human Rights Review" 2013, no. 2, p. 122 ff.; S. Ganty, *Socioeconomic Precariousness in Times of COVID-19: A Human Rights Quandary under the ECHR*, "Polish Yearbook of International Law" 2020, vol. 40, p. 164 ff.

When it comes to respecting individual rights, states' actions tend to focus on two key areas. Firstly, the authorities provide support to specific groups of individuals, particularly those requiring special protection. In such cases, the issue is not interference with the right to property, but rather the granting of specific benefits to certain individuals. Secondly, when pursuing economic goals such as ensuring the sustainability of public finances, the authorities often interfere with the property rights of certain groups or entities by limiting their benefits or increasing their public burdens. Such activities have prompted complaints to the ECtHR, which alleged a violation of the right to property under Art. 1 of Protocol No. 1 to the ECHR. The Court assessed the compliance of states' countermeasures for the effects of the economic crisis in three main areas, although this list is not exhaustive.[36]

Firstly, the Court received complaints about reduced public-sector wages and benefits which reduced public spending. Complaints were also made about the introduction of additional tax burdens. Finally, there were complaints about state interference in applicants' real estate assets as part of interventions in the banking system and financial markets.

The first group of complaints, concerning reductions in wages and benefits of public-sector jobs, alleged infringement of property rights in circumstances such as the following:[37]

- *Koufaki and Adedy v. Greece*, concerning the reduction of public-sector wages in 2010 by 12% to 30%, with retroactive effect, further reductions by an additional 8% later that year and the reduction of holiday and Christmas allowances for higher-earning public-sector employees[38]
- *Da Conceição Mateus and Santos Januário v. Portugal*, concerning the reduction in 2012 of holiday and Christmas allowances payable to certain categories of public-sector pensioners with monthly pensions higher than EUR 600 and the complete suspension of these allowances for pensioners with monthly pensions higher than EUR 1,100,

[36] A. Dimopoulos, A. Sotiris, *A Comparative Examination of Human Rights in the Age of Austerity in the UK and Greece: The Need for an Integrated Approach in European Human Rights Law*, "Cyprus Human Rights Law Review" 2013, vol. 2, no. 2, p. 195–225.

[37] The adoption of measures, being the source of the complaint in one of the first cases concerning austerity measures – *Savickas v. Lithuania* – was related to the existence of the "particularly difficult economic and financial situation in Lithuania" in 1999. The measures consisted in the temporary reduction of judges' salaries (judgment of the European Court of Human Rights of 15 October 2013, 66365/09, *Savickas and Others v. Lithuania and 5 Other Applications*, LEX 1383387).

[38] Judgment of the European Court of Human Rights of 7 May 2013, 57665/12 and 57657/12, *Koufaki and Adedy v. Greece*, LEX 1314272.

leading to an almost 11% reduction in pension payments for the two applicants[39]

- *Valkov and Others v. Bulgaria*, concerning the introduction of maximum amount of pensions[40]
- *Mockienè v. Lithuania*, concerning the reduction of public servants' pensions[41]
- *Aielli and Others* and *Arboit and Others v. Italy*, concerning the recalculation of retirement benefits which reduced them for some beneficiaries entitled to them[42]
- *Frimu and Others v. Romania*, concerning the abolishment of a number of special pension regimes applicable to particular categories of retired public-sector employees in 2010, which resulted in a 70% reduction in the pensions of the five applicants[43]
- *Mihăieş and Senteş v. Romania*, concerning a 25% reduction in public-sector wages for six months in 2010, which was done to balance the state budget.[44]

The Court resolved all the cases by ruling that there had been no violation of the applicants' rights. Contrary to the applicants' submissions, it found that the States' actions constituted interference with the right to the peaceful enjoyment of possessions, rather than a deprivation of property, which was justified by public concerns.[45] The Court based its approval of state actions on two fundamental assumptions. Firstly, it recognised that the authorities of some countries operated in exceptional, extreme economic conditions and were acting in the public interest and in this context, it was essential to establish

[39] Judgment of the European Court of Human Rights of 8 October 2013, 62235/12 and 57725/12, *Da Conceiçă Mateus and Santos Januário v. Portugal*, LEX 1383186.

[40] Judgment of the European Court of Human Rights of 25 October 2011, 2033/04, 19125/04, 19475/04, 19490/04, 19495/04, 19497/04, 24729/04, 171/05 and 2041/05, *Valkov and Others v. Bulgaria*, LEX 1001014.

[41] Judgment of the European Court of Human Rights of 4 July 2017, 75916/13, *Mockienè v. Lithuania*, LEX 2327845.

[42] Judgment of the European Court of Human Rights of 10 July 2018, 27166/18 and 27167/18, *Aielli and Others v. Italy* and *Arboit and Others v. Italy*, LEX 2602720.

[43] Judgment of the European Court of Human Rights of 7 February 2012, 45312/11, *Frimu and Others v. Romania and 4 Others*, para. 5, LEX 1117626. The case was examined under Article 6 in regard to the fairness of the court proceedings and the alleged unequal treatment. Therefore, the applications are not discussed further.

[44] Judgment of the European Court of Human Rights of 6 December 2011, 44232/11 and 44605/11, *Mihăieş and Senteş v. Romania*, para. 8, LEX 1101154.

[45] E.g. judgment of the European Court of Human Rights of 7 May 2013, 57665/12 and 57657/12, *Koufaki and Adedy v. Greece*, para. 34.

which values are encompassed by the concept of the public interest and therefore require protection. As established by jurisprudence, the notion is very broad. The Court, particularly in decisions relating to restitution cases, has repeatedly found that states have considerable discretion in this area because the balance of expenditure and income is subject to political, economic and social considerations. Therefore, the Court accepts States' decisions as long as they are not clearly unreasonable.[46]

In the rulings issued in connection with State's austerity measures, this public interest was defined in a variety of ways. In *Valkov and Others*, the Court pointed out that the maximum amount of pensions was fixed as part of an overall reform of the social security system, which in turn was part of the process of transitioning from a centrally planned economy to private ownership and a market economy.[47] The general interest, thus defined as necessary, was the economic transformation.

Interestingly, in *Koufaki and Others*, the complainants argued that the notion of public interest cannot be equated with the interests of the State treasury, that is, eliminating the budget deficit and ensuring the sustainability of public finances.[48] The Court did not share this opinion. It considered that the contested measures were justified by an exceptional financial crisis that was unprecedented in the modern history of Greece. The crisis threatened the State's creditworthiness and solvency, and it posed a serious threat to the nation's economy.[49] The actions taken were part of structural reforms and had precisely defined goals and timetables. Moreover, not only were the efforts to save the domestic economy carried out in the national public interest, but they were also consistent with the objectives of other EU Member States to ensure budgetary discipline and to preserve the stability of the Euro area.[50] The need to save the Greek economy and protect the stability of the Euro area has thus become a public interest.

In *Conceição Mateus and Januário v. Portugal*, the objective of the measures was to "provide the State budget with the necessary short-term liquidity" with

[46] E.g. ibidem, para. 39. For a discussion of the Court's case law on reprivatisation, in which it used the conditionality for exceptional situations, see section 3 of the article.

[47] Judgment of the European Court of Human Rights of 25 October 2011, 2033/04, 19125/04, 19475/04, 19490/04, 19495/04, 19497/04, 24729/04, 171/05 and 2041/05, *Valkov and Others v. Bulgaria*, para. 96.

[48] Judgment of the European Court of Human Rights of 7 May 2013, 57665/12 and 57657/12, *Koufaki and Adedy v. Greece*, para. 23.

[49] Ibidem, para. 37.

[50] Ibidem, para. 38.

a view to "achieving medium-term economic recovery".[51] The Court noted that the cuts were intended to reduce public spending and were part of a broader programme designed by the national authorities and their EU and International Monetary Fund counterparts. The Court described the economic situation in Portugal as "extreme".[52]

In *Aielli and Others* and *Arboit and Others v. Italy*, an extremely difficult economic situation led Italy to take actions in order to guarantee a "balanced budget" and to "maintain control over public expenditure".[53] The Court accepted the objective of "protecting a minimum level of social benefits" and "guaranteeing the viability of the social security system for future generations".[54] Therefore, the possibility of paying social benefits to future generations was considered to prevail over the current interests of the complainants. Similarly, in *Mihăieş and Senteş v. Romania*, protecting the public interest was defined as the need to ensure a balanced budget during an economic crisis.[55]

All the aforementioned objectives, which the Court accepted as being in the public interest, were indicated by the governments or expressed in the decisions of domestic courts. In the majority of these cases, the domestic courts expressed their opinions during the domestic proceedings; in none of the rulings did the Court decide to question these objectives.

The second element on which the Court based its argument in these cases was the interpretation of the principle of proportionality of interference. The actions of the States were not assessed as interfering with the core of the applicants' rights or significantly affecting their livelihood – despite such drastic cuts to wages as those seen in Greece, for instance. Furthermore, the Court consistently sought arguments in favour of classifying the austerity measures as temporary and limited.[56] Another element supporting this argument was

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[51] Judgment of the European Court of Human Rights of 8 October 2013, 62235/12 and 57725/12, *Conceição Mateus and Januário v. Portugal*, para. 25, LEX 1383186.

[52] Ibidem, paras 25–26.

[53] Judgment of the European Court of Human Rights of 10 July 2018, 27166/18 and 27167/18, *Aielli and Others v. Italy* and *Arboit and Others v. Italy*, para. 28.

[54] Ibidem, paras 29 and 31.

[55] Judgment of the European Court of Human Rights of 6 December 2011, 44232/11 and 44605/11, *Mihăieş and Senteş v. Romania*, para. 18.

[56] Some of the measures accepted by the Court have resulted in a temporary reduction of income for certain segments of the population, e.g. in *Mihăieş and Senteş v. Romania* or *Da Conceição Mateus and Santos Januário v. Portugal*; others still have resulted in a permanent or semi-permanent reduction of income for certain segments of the population, e.g. in judgment of the European Court of Human Rights of 7 February 2012, 45312/11, *Frimu and Others v. Romania*, para. 5, and judgment of the European Court of Human Rights of 7 May 2013, 57665/12 and 57657/12, *Koufaki and Adedy v. Greece*.

that the measures were introduced for entire groups of beneficiaries and were not discriminatory.[57]

In terms of interpreting the term "public interest", another group of ECtHR rulings worth discussing is those which concern the introduction of various additional tax burdens. Although the cases concerned tax issues, the Court decided to examine some of them under the first paragraph of Article 1 of Protocol No. 1, subject to the specific rule concerning the payment of taxes contained in Article 1 *in fine*.[58] Consequently, the Court primarily referred to the "public interest" rather than the "general interest" in these cases.

The case *N.M.K. v. Hungary*[59] concerned the unexpectedly high rate of tax which the applicant was assessed on a severance payment for being dismissed after thirty years' service in the public sector. In the applicant's case the overall tax burden amounted to 52% on the entirety of the severance, approximately triple the general personal income tax. The Court, while determining what is in the public interest, stated that the "sense of social justice of the population", in combination with the interest to "protect the public purse and to distribute the public burden" satisfied the Convention requirement of a legitimate aim.[60] In the ruling, the Court additionally pointed to other elements defining the public objectives relevant to the case, such as protecting the public purse against excessive severances,[61] the interest of the State budget at a time of economic hardship[62] and the need to introduce sanctions against abuse by senior officials who were in a position to influence the rate of their severance.[63] Although the Court generally accepted the existence of societal goals that were realised

[57] E.g. judgment of the European Court of Human Rights of 8 October 2013, 62235/12 and 57725/12, *Conceição Mateus and Januário v. Portugal*, paras 26 and 29; judgment of the European Court of Human Rights of 7 May 2013, 57665/12 and 57657/12, *Koufaki and Adedy v. Greece*, para. 41.

[58] Judgment of the European Court of Human Rights of 14 May 2013, 66529/11, *N.K.M. v. Hungary*, para. 45, LEX 1314327.

[59] Ibidem.

[60] Ibidem, para. 59.

[61] Ibidem, para. 59.

[62] Ibidem, para. 72.

[63] Ibidem, para. 69. It is argued that the Court's inclusion of different public purposes and the lack of their convincing application allows the judgment to be interpreted in several ways. Cf. K. Zidar Al-Mutairi, *Some Thoughts on the ECtHR's Scrutiny of the Special Tax on Civil Servants' Severance Pay: The Case of N.K.M. v. Hungary*, "Cyprus Human Rights Review" 2013, vol. 2, no. 2, p. 235–236 and 239. See also the blog comments referred to therein: D. Hart, *Strasbourg Rules that Excessive Tax Rates Offend A1P1*, https://ukhumanrightsblog.com/2013/05/16/strasbourg-rules-that-excessive-tax-rates-offend-a1p1/ [access: 22.09.2025]; I. Leijten, *N.K.M. v. Hungary: Heavy Tax Burden Makes Strasbourg Step In*, https://strasbourgobservers.com/2013/06/10/n-k-m-v-hungary-heavy-tax-burden-makes-strasbourg-step-in/ [access: 22.09.2025].

through the fiscal policy, it expressed serious doubts about the relevance of the government's considerations and assessed the case from the point of view of the fulfilment of the requirements of non-discrimination and proportionality.[64] The Court concluded that the specific measure in question, as applied to the applicant – even if meant to serve social justice – could not be justified by the legitimate public interest specified by the government, as it was not reasonably proportionate to the intended aim.[65]

In *Maria Alfredina da Silva Carvalho Rico v. Portugal*, additional financial burdens took the form of a temporary additional income tax: a solidary contribution.[66] The Court underscored that the additional income tax applied in 2012, 2013 and 2014 was intended to reduce public spending (as in *Da Conceição Mateus and Santos Januário v. Portugal*) and was part of a broader programme designed by the national authorities and their EU and IMF counterparts to allow Portugal to secure the necessary short-term liquidity for the State budget with a view to achieving medium-term economic recovery. Thus, the Court accepted that securing the necessary short-term liquidity of the State budget constituted a public interest within the meaning of Article 1 of Protocol No. 1. Finally, the Court found that observing the overall public interests at stake in the respondent State at the material time – including the assessment of the Portuguese Constitutional Court, which considered that there were no other alternatives which could have pursued the same public aims while affecting the holders of social rights to a lesser degree – and given the limited extent and temporary effect of the tax on the applicant's pension, the impugned measure was proportional.[67]

The case *P. Plaisier B.V. v. Netherlands and 2 Other Applications*[68] concerned the retroactive increase of the applicants' tax burden following the introduction of a "crisis levy" on wages higher than EUR 150,000 per annum and on especially generous "golden handshakes". The applicant companies complained that they had been subjected to a tax with retroactive effect, that the tax surcharge placed on high wages had been imposed without regard for possible individual hardship and that the measures were discriminatory due to the fact that they

[64] Judgment of the European Court of Human Rights of 14 May 2013, 66529/11, *N.K.M. v. Hungary*, para. 59.

[65] Ibidem, para. 75.

[66] Judgment of the European Court of Human Rights of 1 September 2015, 13341/14, *Da Silva Carvalho Rico v. Portugal*, para. 12, LEX 1794013.

[67] Ibidem, paras 45–46.

[68] Judgment of the European Court of Human Rights of 9 March 2017, 46184/16, *P. Plaisier B.V. v. Netherlands and 2 Other Applications*, LEX 2405307.

had targeted an unaccountably small group of employers.[69] The Court decided to examine the complaints as concerning "securing the payment of taxes", which falls under the rule in the second paragraph of Article 1 of Protocol No. 1 and which allows States to control the use of property. 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 applicant companies did not contest that the measures served the "general interest". Their complaints focussed on the measures' proportionality.[70] Although the Court did not specify the purpose underlying the concept of "general interest" when determining whether the intervention pursued it, the meaning of this concept can be inferred from all the considerations set out in the ruling. Firstly, in assessing the issue of retroactive imposition of burdens, the Court pointed out that retrospective tax legislation is not prohibited as such by Article 1 of Protocol No. 1, and that the public interest may override the interest of the individual in knowing their tax liabilities in advance, provided that there are specific and compelling reasons for this.[71] The explanation of the retroactive introduction of the additional tax accepted by the Court was not, as it itself pointed out, "merely budgetary" interests. The Court stated that – as with Greece, Portugal and other EU Member States – the Netherlands was concerned with meeting its obligations under European Union law without delay, in circumstances aggravated by a financial and economic crisis of a magnitude seldom seen in peacetime.[72] As to measures taken by Contracting States to combat the financial crisis, the Court noted that retrospectivity was also a feature of the reduction of public-sector wages at issue in *Koufaki and Adedy* and the reduction of nominal value of bonds complained of in *Mamatas and Others* (see below).

The third main group of ECtHR rulings on austerity measures relates to complaints about States interfering with applicants' property values through interventions in the banking system and financial markets. The three most important cases should be analysed here. *Dennis Grainger v. the United Kingdom* concerned the terms of the State's takeover of Northern Rock Bank.[73] In neither

[69] For more on the circumstances of introducing domestic austerity measures in the Netherlands, see J.J. Sluysmans, W. Bosma, M. Timmer, N. van Triet, *The Rule of Law: Protection of Property*, in: M. Haentjens (ed.), *Research Handbook on Crisis Management in the Banking Sector*, Edward Elgar Publishing, Cheltenham 2015, p. 379–399.

[70] Judgment of the European Court of Human Rights of 9 March 2017, 46184/16, *P. Plaisier B.V. v. Netherlands and 2 Other Applications*, para. 66.

[71] Ibidem, para. 84.

[72] Ibidem, para. 88.

[73] Judgment of the European Court of Human Rights of 10 July 2012, 34940/10, *Grainger and Others v. the United Kingdom*, LEX 1213137.

the domestic nor ECtHR proceedings did the parties contest that the nationalisation of the bank was in the public interest.[74] The Court accepted this and considered the case only with regard to the applicants' sole challenge: that the Compensation Scheme failed to strike the fair balance required by Article 1 of Protocol No. 1. Therefore, the Court did not consider the meaning of the term "public interest" when deciding whether the intervention pursued a legitimate aim, but only when deliberating on the proportionality of the contested measure. There, the Court stated that the nationalisation served the aim of protecting the financial sector in the United Kingdom, which was seen as a key sector of the economy.[75] The Court developed the meaning of the notion and stated that as part of this policy, the UK authorities aimed to maintain depositor confidence in the safety of placing money with banks.[76] It was accepted that the authorities' aim in nationalising the bank was to protect the UK's financial sector from the consequences of its ultimate liquidation. It was primarily about protecting private deposits. There was also an additional aim, entirely accepted by the Court, which was to avoid encouraging the management boards of other financial institutions from taking bad business decisions on the assumption that the State would provide a safety net.[77] The applicants had challenged the legislation under the assumption that Northern Rock's former shareholders should not be entitled to take the value which had been created by the Bank of England's loan, which was initially granted to the bank. The Court accepted that that public goal was far from being "manifestly without reasonable foundation". It considered that it was clearly founded on the policy of avoiding "moral hazard", which is at the heart of the adopted legislation. In the Court's view, it was entirely legitimate for the State authorities to decide that, had the Northern Rock shareholders been permitted to benefit from the value which had been created and maintained only thanks to State support, it would have encouraged the managers and shareholders of other banks to seek and rely on similar support, to the detriment of the United Kingdom's economy.[78] Thus, the Court stated that there was no violation of Article 1 of Protocol No. 1. As is clearly visible, the Court's entire argumentation on the economic situation – the need to ensure the stability of the financial system – was additionally reinforced by referring to the argument that the policy aimed to avoid the morally ambiguous situation of managers

[74] Ibidem, para. 38.
[75] Ibidem, para. 40.
[76] Ibidem, para. 42.
[77] Ibidem.
[78] Ibidem, paras 42–43.

and shareholders of other banks seeking to benefit from State support in future, which would be to the detriment of the British economy.

The second application worth pointing out is that concerning the actions of the Dutch authorities in expropriating the shareholders and subordinate bondholders of SNS Reaal, in the case *Adorisio and Others v. the Netherlands*.[79] The Dutch capital group was taken over by the State in 2013. The government's decision was upheld by the Dutch courts. Since investors had to be compensated for the expropriation under the applicable regulations, the Minister of Finance offered compensation, specifying the value of individual property securities at EUR 0. The subject of the proceedings before the Court (there were several complaints) was both the questioned fairness of the domestic proceedings and the allegation of infringement of the right to property through expropriation without compensation.[80] The latter charge was dismissed, though proceedings are still pending in the Netherlands to determine the amount of any compensation. The first decision was not issued until February 2021, while the subsequent one was issued in 2023.[81]

The subject of the Court's decision was the allegation of unfairness of the proceedings under Article 6 of the Convention. The applicants complained under that provision that the 10-day time limit for appealing to the Administrative Jurisdiction Division had been too short; that they had had insufficient time to study the Minister of Finance's statement of defence; and that they had been given access to incomplete versions of the audit firms' reports.[82] The argumentation of the Court was based on the assumption that there was an extraordinary situation, although – and this should be emphasised – the public/general interest is not a condition for limiting the guarantees under Art. 6 of the Convention. The Court made clear that the government's action and the follow-up to legal proceedings had to be very swift in order to prevent serious harm to the national economy and to protect the stability of the Dutch financial system as a whole. The Court cited the decision of the domestic authorities, which declared that

[79] Judgment of the European Court of Human Rights of 17 March 2015, 47315/13, 48490/13 and 49016/13, *Adorisio and Others v. Netherlands*, LEX 1661894.

[80] Ibidem, paras 45 and 100.

[81] *Expropriated SNS Reaal Bondholders Secure Compensation from Dutch State*, https://www.jonesday.com/en/practices/experience/2021/02/expropriated-sns-reaal-bondholders-secure-compensation-from-dutch-state [access: 22.09.2025]. Further compensation was paid in subsequent years – see *Dutch Cabinet Pays Out €900 Million to Expropriated SNS Reaal Investors*, https://nltimes.nl/2024/04/11/dutch-cabinet-pays-eu900-million-expropriated-sns-reaal-investors [access: 22.09.2025].

[82] Judgment of the European Court of Human Rights of 17 March 2015, 47315/13, 48490/13 and 49016/13, *Adorisio and Others v. Netherlands*, para. 45.

"there is an exceptionally great public interest in obtaining judgment without delay in this case".[83] Further, the Court, in considering the applicants' allegation that they had been given redacted copies of the audit firms' reports, accepted that the government had done so in order to prevent the disclosure of information that, if made public, might have harmed the financial interests of SNS Reaal and hence the Netherlands.[84]

The ECtHR extensively cited in its decision the rulings of domestic courts and national administrative authorities. Thus, it can be assumed that the Court agreed with the conclusions of the Dutch organs that protecting the public interest in this case meant issuing a judgment confirming the legality of the expropriation as soon as possible, in order to reverse a serious and immediate threat to the stability of the entire domestic financial system. Therefore, the protection of domestic financial stability was a higher priority than the individual interests of the applicants, in terms of the fairness of the proceedings.[85]

The third important case was *Mamatas and Others v. Greece*.[86] The applications to the Court were filed by 6,320 Greeks holding Greek state bonds with values ranging from EUR 10,000 to 1.5 million. Between 2009 and 2011, when Greece was forced to seek assistance from the European Union and the IMF in connection with the economic crisis, the country decided, in line with the IMF's recommendations, to introduce exceptional budgetary discipline measures, which also affected individual investors (including the applicants). In 2012, old government bonds were exchanged for new financial instruments with a nominal value less than 50% of the original ones. Before the Court, the applicants – who did not agree to the exchange – alleged that such a state of affairs violated their right to peaceful enjoyment of property under Article 1 of Protocol No. 1 to the Convention.

The Court did not find a violation of that provision in this case. It found that the interference was justified in view of the exceptional situation of the economic crisis which Greece had been dealing with since 2009. Again, as in the cases discussed above, "maintenance of economic stability" and "restructuring of public debt" were indicated as protected public interests justifying the interference.[87] The Court further specified the values to be protected when

[83] Ibidem, paras 20 and 92.

[84] Ibidem, para. 105.

[85] Judgment of the Administrative Jurisdiction Division of 25 February 2013, 47315/13, *Adorisio and Others v. Netherlands*, , para. 20.

[86] Judgment of the European Court of Human Rights of 21 July 2016, 63066/14, 64297/14 and 66106/14, *Mamatas and Others v. Greece*, LEX 2071875.

[87] Ibidem, para. 103.

carrying out the proportionality test. It stressed that the actions undertaken by the Greek authorities constituted an appropriate, necessary measure to prevent the cessation of payments by the respondent State[88] and were taken within the framework of European regulations aimed at ensuring financial stability in the Euro zone.[89]

The Court concluded that the measures taken in the face of the extraordinary situation of an extremely severe economic crisis had struck a balance between the demands of the public interest (understood as saving the economy and restoring the State's fiscal stability) and the requirements of the applicants' individual interest. In view of the wide discretion enjoyed by the States in this regard, the contested exchange was not disproportionate.

3. Extending the meaning of the "public interest" – what are the limits?

For years the Court has not accepted solely economic or financial arguments from a government to avoid meeting their obligations under the Convention.[90] It can be concluded that the ECtHR has always held that insufficient resources of a State will normally not justify a failure to secure rights and freedoms provided by the Convention. This way of reasoning was firstly partially disrupted in the Court's case law on the so-called restitution cases. With the fall of communist rule in the early 1990, the countries of Central and Eastern Europe entered a period of transformation and of building new liberal democratic institutions. The transformation they carried out was much more multi-faceted and profound than other cases of transition from authoritarian to democratic systems[91] and had no precedent in the history of Western Europe.[92] Economic and social policy, as well as the legal system underlying the functioning of the states, were completely changed. Contrary to many other

[88] Ibidem, para. 113.

[89] Ibidem, para. 115.

[90] F.F. Tulkens, *The Contribution…*, p. 124. This position in supported by the Court's case law, e.g. judgment of the European Court of Human Rights of 7 May 2002, 59498/00, *Burdov v. Russia*, para. 35, LEX 75629; judgment of the European Court of Human Rights of 18 June 2013, 48609/06, *Nencheva and Others v. Bulgaria*, LEX 1322277.

[91] L. Garlicki, *L' application de l' article 1er du Protocol No 1 de la Convention Européenne des Droits de l'Homme dans l'Europe Central et Oriental: problems de transition*, in: H. Vandenberghe (ed.), *Propriété et droits de l'homme / Property and Human Rights*, Die Keure & Bruylant, Brugge 2006, p. 131.

[92] Ibidem, p. 159.

countries that underwent a period of transformation to a liberal democratic system (e.g. Latin American countries), those of Central and Eastern Europe introduced legal solutions aimed at returning or redistributing accumulated property that had been taken over by communist authorities primarily through nationalisation and mass expropriations. However, these processes of return and redistribution were underfinanced and carried out by ineffective and often still unreformed administrations and judiciaries. Therefore, they generated many legal problems, which became the source of complaints to the ECtHR.

In these cases the Court had to clarify the scope of protection of property in "extraordinary situations", taking into account the States' financial capabilities.[93] It took a general approach that in cases which involve difficult questions regarding the conditions of transition from a totalitarian regime to democracy and rule of law, States should enjoy a wide margin of appreciation for their decisions.[94] Because of their direct knowledge of their own society and its needs, the national authorities are in principle better placed than the international court to decide what is "in the public interest" on social or economic grounds,[95] and the Court will generally respect the legislature's policy choice unless it is "manifestly without reasonable foundation".[96] The Court also stated that a certain "threshold of hardship" must be crossed for the Court to find a breach of the applicants' rights under Article 1 Protocol No. 1.[97] It further decided that a State's modest financial capacity or other organisational and administrative obstacles cannot be the sole reason for its failure to fulfil its obligations or to implement

[93] W. Sadurski, *Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments*, "Human Rights Law Review 2009", vol. 9, no. 3, p. 401; L. Damsa, *The Transformation of Property Regimes and Transitional Justice in Central Eastern Europe*: *In Search of a Theory*, Springer, Berlin 2016, p. 85; M. Karadjova, *Property Restitution in Eastern Europe: Domestic and International Human Rights Law Responses*, "Review of Central and East European Law" 2004, vol. 29, no. 3, p. 326.

[94] Judgment of the European Court of Human Rights of 23 November 2000, 24701/94, *The Former King of Greece and Others v. Greece*, para. 87; judgment of the European Court of Human Rights of 12 November 2002, 46129/99, *Zvolsky i Zvolska v. The Czech Republic*, para. 67, LEX 423685; judgment of the European Court of Human Rights of 30 June 2005, 46720/99, 72203/01 and 72552/01, *Jahn and Others v. Germany*, para. 91; judgment of the European Court of Human Rights 20 July 2006, 30431/03, *Vajagić v. Croatia*, LEX 187314 ("wide margin of appreciation nationalisation implementing social policies").

[95] Judgment of the European Court of Human Rights of 12 November 2002, 46129/99, *Zvolsky i Zvolska v. The Czech Republic*.

[96] Judgment of the European Court of Human Rights of 23 November 2000, 24701/94, *The Former King of Greece and Others v. Greece*, para. 87; judgment of the European Court of Human Rights of 21 February 1986, 8793/79, *James and Others v. the United Kingdom*, para. 46.

[97] Judgment of the European Court of Human Rights of 15 March 2007, 43278/98, 4537/99 and 48380/99, *Velikovi and Others*, para. 192, LEX 248707.

final decisions of national authorities granting compensation or other forms of recompense to individuals.[98] The Court reached such conclusions on several occasions, despite the governments' arguments that enforcing the applicant's financial claims – and those of other persons in a similar situation – would be an excessive burden on the State and could even lead to the collapse of the economic system.[99]

At the same time, however, the Court accepted a wide margin of appreciation for States when taking necessary decisions by recognising that States cannot be held liable for the economic consequences of the transition. It did not consider the actions of States interfering with the property rights of the applicants and aiming to maintain a balanced budget and to correct the overly optimistic assumptions of the initial reforms to be in violation of the guarantees of the Convention.[100] The Court also accepted that States have the right to amend legislation adopted by previous authorities, including the right to modify benefits. Public authorities are entitled to make mistakes and correct them, particularly during the initial stages of a transformation.

The standard of compensation interpreted from Article 1 of Protocol No. 1, according to which States are obliged to compensate an applicant in an amount that is "reasonable" in relation to the damages suffered, allowed for the specific nature of reprivatisation to be taken into account when determining the compensation for interference with property rights. Consequently, the context of reprivatisation has so far been the only one in which the Court has ruled, in *Jahn and Others v. Germany*, that it is possible not to pay any compensation for seized property, due to the special nature of the transformation process.[101] The Court assessed the unification of the two German States as a special situation entitling Germany to a particularly wide margin of appreciation, despite the

[98] Judgment of the European Court of Human Rights of 7 January 2010, 69855/01, *Lyubomir Popov v. Bulgaria*, para. 130, LEX 534250; judgment of the European Court of Human Rights of 9 December 2008, 75951/01, *Viasu v. Romania*, para. 71, LEX 468558; judgment of the European Court of Human Rights of 13 November 2007, 38222/02, *Ramadhi and 5 Others v. Albania*, para. 82, LEX 318721; judgment of the European Court of Human Rights of 15 May 2011, 10810/05, *Driza v. Albania*, para. 108, LEX 736642.

[99] Judgment of the European Court of Human Rights of 31 October 2006, 41183/02, *Jeličić v. Bosnia and Herzegovina*, para. 42, LEX 195931.

[100] L. Garlicki, *L'application de l'article 1er…*, p. 155–56.

[101] Judgment of the European Court of Human Rights of 30 June 2005, 46720/99, 72203/01 and 72552/01, *Jahn and Others v. Germany*, para. 116. It is worth noting that the Court's ruling has been criticised in the literature for accepting actions that are contrary to the principle of legal certainty – see U. Deutsch, *Expropriation without Compensation – the European Court of Human Rights Sanctions German Legislation Expropriating the Heirs of "New Farmers"*, "German Law Journal" 2015, vol. 6, no. 10, p. 1380.

already wide margin of appreciation that States may enjoy when enacting legislation during the transition to a new political and economic system.[102] The Court also allowed for some reduction of the State's existing obligations, but only in situations of a State's systemic inability (due to the lack of resources) to implement the existing regulations.[103]

In cases concerning austerity measures, the Court expanded this way of reasoning. For the first time the Court based its argumentation on the need to protect the public/general interest, defined exclusively from the perspective of economic stability.[104] It seems that the Court decided to fully accept the values that States invoke as needing the protection of austerity measures. Among the values that make up this interest, it indicated carrying out an economic transformation (*Volkov and Others*); preserving the State's creditworthiness and solvency (*Koufaki and Others*); implementing objectives along with other EU Member States to ensure budgetary discipline and preserve the stability of the Euro area (*Koufaki and Others*); providing the necessary short-term liquidity for the State budget, with a view to achieving medium-term economic recovery (*Conceição Mateus and Januário*, *Maria Alfredina da Silva Carvalho Rico v. Portugal*); maintaining control over public expenditure, protecting a minimum level of social benefits and guaranteeing the viability of the social security system for future generations (*Aielli and Others* and *Arboit and Others*); protecting the public purse against excessive severances, performing general budgetary purposes during economic hardship and introducing sanctions to protect against senior officials' abuse in setting severance rates (*N.M.K v. Hungary*); meeting obligations under European Union law without delay (*P. Plaisier B.V. v. Netherlands and 2 Other Applications*); protecting the financial sector as a key industry and

[102] Judgment of the European Court of Human Rights of 2 March 2005, 71916/01, 71917/01 and 10260/02, *Von Maltzan and Others, Margarete von Zitzewitz and Others and Man Ferrostaal and Alfred Topfer Stiftung v. Germany*, paras 74, 77 and 110, LEX 147231; judgment of the European Court of Human Rights of 30 June 2005, 46720/99, 72203/01 and 72552/01, *Jahn and Others v. Germany*, para. 113.

[103] In *Broniowski v. Poland*, the Court accepted the introduction of a revised compensation model in place of the old one, which was assessed as ineffective, and the reduction of State liabilities incurred before the date of being bound by Protocol No. 1 to 20% of the value of lost property. See judgment of the European Court of Human Rights of 22 June 2004, 31443/96, *Broniowski v. Poland*, paras 39–42. In subsequent rulings in cases against Romania, the Court clearly suggested to the respondent government its acceptance for a similar move; however, the Romanian government did not follow the Court's suggestion, referring to the argument that a reduction in the amount of compensation due would lead to a wave of new complaints to the Court.

[104] Some authors conclude that the rulings discussed herein, especially those relating to the issue of lowering wages and benefits for employees in the public sector, prove that the protection of European human rights against austerity measures is currently lacking – see A. Dimopoulos, A. Sotiris, *A Comparative Examination*…, p. 222.

maintaining depositor confidence (*Dennis Grainger v. the United Kingdom*); and preventing serious harm to the national economy and protecting the stability of the financial system (*Adorisio and Others v. the Netherlands*).

The unprecedented crisis prompted the Court to confer an exceptionally wide margin of appreciation on national legislatures as regards their definition of the public interest that they aimed to protect. In these matters, the general or public interests have been defined solely in relation to the financial situation and the national economy. Only in *N.K.M. v. Hungary* did the Court express doubt as to the introduction of draconic taxes, stating that the applicant could not have been responsible for the fiscal problems which the State intended to remedy *de facto* at her costs.[105] That case raises a legitimate question: What prompted the Court to accept the governments' justifications in other cases? After all, it would be entirely impossible to attribute any responsibility to the remaining applicants for the financial situation in which their governments found themselves during and after the crisis. Furthermore, why was the situation more dramatic in some countries, such as Italy and Portugal, than in others? If not for the governments contributing to the poor state of the nation's finances, at least some of them, could the situation have been different? These questions remain untouched and unanswered in the rulings under discussion, though it must also be acknowledged that they are not questions that the Court could answer.

From the standpoint of legal reasoning, understood as a method in which the Court justifies its decisions and persuades its audience to its rulings, it may seem inadequate that the Court has so readily resorted to arguments presented by national authorities to explain the objectives encompassed by the concept of 'public interest'. It has to be pointed out that each court has its own concept of this audience, which depends on historical, cultural and social factors.[106] When it comes to the rulings of the ECtHR, the audience embraces not only the applicant and the respondent government, but also the governments of other countries and other attentive observers and addressees of its decisions, such as European societies at large and the particularly influential human rights NGOs (often appearing in cases before the ECtHR as third parties). Legal argumentation based substantially on the reasoning and justification provided for by the respondent government might not be convincing to the individuals who contest it and to societies deeply affected by the austerity measures. Due to the fact that the Court

[105] Judgment of the European Court of Human Rights of 14 May 2013, 66529/11, *N.K.M. v. Hungary*, para. 59.

[106] E. Feteris, H. Kloosterhuis, *Law and Argumentation Theory: Theoretical Approaches to Legal Justification*, "SSRN Electronic Journal" 2013, p. 8.

restrained its argumentation in austerity cases to that presented by respondent governments, its decisions may be perceived as not providing any protection against such measures. One of the reasons presented in the literature proving this understanding is the Court's acceptance of "asymmetrical priority of public interest to avoid state default, as advanced by national authorities".[107] From this angle, the Court's reasoning may be assessed as not meeting the expectations of European individuals, and thus proving to be a source of frustration for many.

However, the Court's decisions can be viewed in a different perspective brought to the light and clarified in the *Travaux Préparatoires* to the Convention. The provision on property rights, that was originally written by Henri Rolin, a Belgian socialist, received a great deal of attention during the preparatory works and it was the subject of heated debate. The form and content of the provision were discussed for over a year, during which time as many as seven drafts were proposed.[108] The concept of property introduced to the Convention at that time was intended not to hinder States in pursuing economic and political policies and to reflect the social conception of property, under which it may be used for the public good in accordance with the law.[109] Many doubts concerning the scope of the provision were dispelled during the debate on the drafts, which was held in the Parliamentary Assembly. Responding to Alice Brown's question as to whether he could guarantee that the article did not infringe on the right of states to nationalise or impose taxes necessary to ensure needed social policies, rapporteur Maxwell-Fyfe clearly indicated that states would continue to be free to pursue social policies in the general interest, while the protection afforded by the Convention would not cover any arbitrary confiscations or expropriations.[110] Thus, originally, the way in which Article 1 of Protocol No. 1 was formulated, was intended to discourage complaints alleging infringements with property rights, in particular those resulting from structural and systemic policies. It appears that the introduction of generic terms of "public" and "general" interest was meant to contribute to that aim. Although some of the commentators

[107] A. Dimopoulos, A. Sotiris, *A Comparative Examination…*, p. 222.

[108] Memorandum by the Secretariat-General, *Note on the amendments to the Convention on Human Rights proposed by the Consultative Assembly about which the Committee of Ministers was not able to reach unanimous agreement, 14 November 1950*, in: *Travaux Préparatoires*, vol. 7, p. 136. (Doc.CM (50) 90, A 3034).

[109] D. Maxwell-Fyfe, *Report of 24 August 1950 on the Draft Convention for the Protection of Human Rights and Fundamental Freedoms*, in: *Travaux Préparatoires*, vol. 6, p. 60–62 (Doc. Consultative Assembly, No. 93, 24 August 1950, p. 980–87).

[110] Second Session of the Consultative Assembly (7–28 August 1950), Sixteenth Sitting (25 August, morning), (b) *Report of the Sitting (Reports of the Consultative Assembly, second session. Part III, Sixteenth Sitting)*, in: *Travaux Préparatoires*, vol. 6, p. 138–40; p. 884–919.

argue, that with time "the case-law has given the P 1(1) a scope and structure that is largely independent of original intentions of the parties to the Protocol'[111], it can be stated that the Court reflected the elements of the original concept of the right precisely in its jurisprudence on austerity measures (and previously e.g. on restitution cases).

These roots of the understanding of the concept of "property rights" seem to have been overlooked by the applicants, who tend to forget that the protection offered by the Convention in regard to property rights is not absolute, and certain interferences by the State are permitted if they serve the public interest and are proportionate. According to the Court's jurisprudence an even wider margin of appreciation can be granted to States if they are pursuing a systemic political transition from an authoritarian to a democratic regime, involving economic as well as social and legal changes. And the same applies to other kinds of measures taken by States in extraordinary situations, not necessarily ones that involve any societal or political changes, but those that are aimed at preserving States' financial stability. It can be stated that it is the States' reasoned need to "implement social policies in general interest" that sets the limits of the property rights under the Convention in situations where States interfere with individuals' proprietary interests in pursuit of necessary policies. Only against this background can the Court's reasoning for its decisions on austerity measures be better understood and convince the general public.

If the Court were to refer to the limits set by the States' policies within which property rights are protected by the Convention, as well as to the reasons that legitimised the interference, it would be much more persuasive in convincing its target audience – not only governments, but also other individuals and societies – of the righteousness of its decisions. This would require a change in the way decisions are justified, but it would certainly increase the Court's legitimacy by making its decisions more understandable.

Conclusions

The case law of the ECtHR on the effects of economic crises shows that the Court accepts States introducing measures that deeply interfere with ownership rights in systemic situations necessitating introduction of extraordinary state's policies. These are situations that affect the whole of society, not just

[111] T. Allen, *Property…*, p. 37.

selected groups. The measures can be justified by a broadly understood public interest, even if this is defined solely in terms of ensuring the financial stability of the State. Some of those measures were introduced by States with the cooperation of the IMF or the EU, largely as a result of their earlier – often ineffective or even corruptive – economic policies. Without undermining the uniqueness of the crisis of the late 2000s, it is difficult not to perceive the fact that some countries were hit by it more than others. Thus, undoubtedly, their previous policy at least contributed to an "exceptional situation", during which they were ultimately allowed by the ECtHR to apply exceptional measures. It should be noted that the Court did not respond to this argument in any way. At the same time, it cannot be overlooked that the situation of accepting new, exceptional circumstances inevitably leads to a trap of "uniqueness", which could lead in future to the Court struggling to balance the public interest with private interests. From the point of view of the need to respect the rights of individuals, the concept of the "possible collapse of a country's financial sector" may at some point seem too broad when not combined with other arguments.

It cannot be excluded that in future the Court will be confronted with applications concerning other kinds of systemic restrictions. Recent years have shown that the economic and social situation in the world is far from stable. The COVID-19 pandemic, Russia's aggression against Ukraine and the energy crisis mean that the ECtHR will not be able to "ignore" arguments raised in disputes by States when individuals decide to question further "austerity", "remedy" or "supportive" measures. Perhaps, we have to accept the conclusion of Judge Tulkens, who stated – writing during the financial crisis that started in 2008 – that "the crisis today is perhaps no longer a crisis but rather the sign of a transition or shift".[112] The acceptance of this observation means that the concept of the public interest may be broad. And although it may sound like a pessimistic conclusion for the future protection of individual rights under the ECHR system, if we are to assume that the public interest refers to interests which all members of the public have in common, to the interests that are important for collective existence and to the broadly defined collective welfare,[113] this model requires strongly persuasive methods of argumentation, which must seek first to define collective goals and then to determine the means and scope of restriction. This task lies with the public authorities and the Court and can be associated with

[112] F.F. Tulkens, *The Contribution…*, p. 123.

[113] A. McHarg, *Reconciling Human Rights…*, p. 677. For more on the difficulty of defining the scope of public interest, see J. Bell, *Policy Arguments in Judicial Decisions*, Oxford University Press, Oxford 1983, p. 130.

the basic assumptions of the concept of property right, under which it may be used for the public good in accordance with the law.

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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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Collective Property in Italy: A Story of Resilience and Rebirth

Własność zbiorowa we Włoszech: historia odporności i odrodzenia

Abstract: The concept of collective property in Italian law has undergone significant changes, reflecting broader sociopolitical and legal developments. From its marginalisation under the individualistic paradigm of private property – embraced by post-unification codification – to its contemporary resurgence as a model for sustainable ownership, collective property represents a resilient institution that is the subject of renewed interest in the face of today's environmental challenges. This paper examines the historical trajectory of collective property, its legal recognition and its potential role in fostering a new paradigm of property ownership that aligns with ecological sustainability and solidarity. Recent legislative developments and scholarly debates indicate a growing interest in collective property as a means to reconcile property rights with ecological imperatives, positioning it as a viable alternative to the classic liberal conception of private property.

Keywords: collective property, rural commons, sustainable property, Italian property law

Abstrakt: Koncepcja własności zbiorowej w prawie włoskim uległa znaczącym zmianom, odzwierciedlając szersze przemiany społeczno-polityczne i prawne. Od marginalizacji w ramach indywidualistycznego paradygmatu własności

prywatnej – przyjętego przez kodyfikację po zjednoczeniu – po współczesny renesans jako model zrównoważonej własności, własność zbiorowa stanowi prężną instytucję, która budzi nowe zainteresowanie w obliczu współczesnych wyzwań środowiskowych. Niniejszy artykuł analizuje historyczną trajektorię własności zbiorowej, jej prawne uznanie oraz potencjalną rolę w promowaniu nowego paradygmatu własności, zgodnego ze zrównoważonym rozwojem i solidarnością. Ostatnie zmiany legislacyjne i debaty naukowe wskazują na rosnące zainteresowanie własnością zbiorową jako sposobem na pogodzenie praw własności z imperatywami ekologicznymi, pozycjonując ją jako realną alternatywę dla klasycznej, liberalnej koncepcji własności prywatnej.

Słowa kluczowe: własność zbiorowa; dobra wspólne na wsi; własność zrównoważona; włoskie prawo własności

1. Introduction

Property law in Italy has historically been shaped by the tension between possessive individualism and the public interest. Indeed, the Constitution of 1948 reflects an attempt to balance this concern through the notion of the social function of property. The dominant legal paradigm, however has remained rooted in the individualistic ownership structure embodied in the Civil Code of 1942. In this framework, collective property – an institution whose historical roots go back to the Middle Ages – has not disappeared, although for a long time the legislature largely neglected its importance.

The resurgence of collective property in contemporary legal discourse stems from its potential to address pressing ecological concerns. In fact, the importance of collective property in ensuring sustainable land use and environmental protection has been recognised in Italian constitutional case law and legislation, most notably from the 1980s onwards.

Collective property has recently attracted renewed interest from legal scholars as well. The quest for a "new" form of property is part of a wider debate about the relationship between private law and the environment – a debate that began to develop in the 1970s, when the environment entered the domain of law and collective morality,[1] one that first developed from the prospect of private-law

[1] It is now conventional to regard the 1972 Stockholm Conference as the moment when the international community became aware of the problem of biodiversity loss and environmental degradation

instruments contributing to environmental protection, and only then went on to examine how the main institutions of private law are changing – or need to change – to allow environmental objectives to be "incorporated into private law".[2]

In the following section, a brief exposition on the notion of property rights in the Italian legal system is presented. The article then goes on to offer the reader a reflection on collective property in a diachronic context. The proposed analysis indicates not only a crisis of property law within the framework of classical liberalism, but also a more fundamental crisis in the conception of the relationship between the individual and the world in which they live.

2. The Modern Concept of Property in the Italian Legal Order

The foundation for the modern concept of property in the Italian legal order was established by the Civil Code of 1942 and the Constitution of 1948. Despite their starkly divergent political underpinnings, both texts have been influenced by the debate on the social dimension of law that was reaching its conclusion during the historical period in which they were drafted.[3] The most compelling evidence of this can be found in Article 42 of the Constitution, which protects both public and private property, in addition to the right of succession. This Article stipulates that limitations on the right of property may be enforced in order to fulfil its social function, thereby establishing a point of intersection between the individual and general interests.

in general, and recognised the "special responsibility" of humankind to protect and conserve the natural heritage. See in particular Principle 4 of the Stockholm Declaration and Plan of Action on the Human Environment of 16 June 1972.

[2] M. Pennasilico, *Manuale di diritto civile dell'ambiente*, Edizioni Scientifiche Italiane, Napoli 2014; M. Pennasilico, *La "sostenibilità ambientale" nella dimensione civil-costituzionale: verso un diritto dello "sviluppo umano ed ecologico"*, "Rivista quadrimestrale di diritto dell'ambiente" 2020, no. 3, p. 4–61; M. Giorgianni, *Climate Change e analisi ecologica del diritto. L'apporto del comparatista all'emergenza climatica*', "Rivista di BioDiritto – BioLaw Journal" 2023, no. 2, p. 85–101; M. Meli, *La centralità della questione ambientale e le ricadute sul diritto privato*, "Diritto costituzionale: rivista quadrimestrale" 2023, no. 3, p. 99–122; N. Lipari, *Premesse per un diritto civile dell'ambiente*, "Rivista di diritto civile" 2024, no. 2, p. 209–228.

[3] As A. Iannarelli (A. Iannarelli, *Funzione sociale della proprietà e disciplina dei beni*, in: F. Macario, M.N. Miletti (eds), *La funzione sociale nel diritto privato tra XX e XXI secolo*, RomaTre-Press, Roma 2017, p. 34) points out, the debate on the so-called "socialisation of law" emerged in the late 19th and early 20th centuries. This debate developed from two perspectives: firstly, the pursuit of greater equity in the distribution of wealth, and thus in the spirit of social justice, and secondly, the limitation and regulation of property rights with a view to ensuring the satisfaction of collective interests alongside those of the owner.

With regard to the Civil Code of 1942, it was presented as the code of the producer, namely a person who takes an active part in promoting the strengthening and economic growth of the nation.[4] This represented a departure from the French tradition of regarding the Civil Code as the code of the citizen – that is to say, the holder of innate, intangible inalienable rights.

Therefore, as has been highlighted, private-law relationships, as delineated in the 1942 Civil Code, are regarded as inherently public. It can thus be posited that each right, duty, interest or individual power is inextricably linked to the overarching interests of the State.[5]

> According to this political perspective, the legal order is not designed to prioritise the self-interested concerns of the individual, but rather to ensure the safeguarding of the national interest, whether directly or indirectly. Property rights were therefore regulated in accordance with the corporative concept of solidarity, entailing the coordination and sacrifice of individual interests for the benefit of the nation as a whole.[6]

The ideological emphasis on the functional link between the individual and the community to which they belong can be explained by reference to the social nature of law and the subordination of individual interests to the greater social interest. It follows that the right of ownership is no longer "the untouchable myth" that it was in the Napoleonic Code.[7] Indeed, Article 832 characterises the owner as the rightsholder, thereby conferring upon them a full and exclusive right over property, provided that they respect the limits and observe the duties established by the legal order.[8] This means that this right is not absolute in nature,

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[4] See *Disposizioni per l'attuazione del libro del codice civile "Della proprietà" e disposizioni transitorie: illustrate con la relazione al Re Imperatore*, Giuffrè, Milano 1941, p. 42–43, point no. 13.

[5] G. Cazzetta, *Nel groviglio costituzionale del fascismo: lavoro, sindacati, Stato corporativo*, "Giornale di storia costituzionale" 2022, no. 43, p. 272.

[6] For a detailed analysis of the articles of the Civil Code that convey the notion that the right of property is imbued with a social function, namely the enhancement of national production, see A. Donati, *La concezione della giustizia nella vigente costituzione*, Edizioni Scientifiche Italiane, Napoli 1998, p. 334–341.

[7] R. Nicolò, *Codice civile*, in: *Enciclopedia del diritto*, vol. 7, Giuffrè, Milano 1960, p. 248–249. Nicolò places particular emphasis on the fact that the individualistic nature of the right of property has been the subject of substantial critique from a variety of perspectives, including those of sociologists, politicians, philosophers and jurists.

[8] The full text of Article 832 of the Italian Civil Code reads: "The owner has the right to enjoy and dispose of things fully and exclusively, within the limits and with observance of the obligations established by the legal order."

but is rather subject to both negative and positive limits. The latter derive from the concept of a duty, which – as opposed to the concept of a limit – implies a positive obligation on the part of the owner. And so, for instance, while Article 834 acknowledges the State's eminent domain power to further the public interest, Article 838 expands the grounds for expropriation to encompass the taking of private properties that are abandoned or unsatisfactorily used.[9] This suggests that owners have a duty to use their property efficiently to satisfy the general interest and to meet their correlative responsibility towards the State.

Notwithstanding this tendency towards what might be termed the "socialisation" of private property, the notion of ownership in Article 832 of the Italian Civil Code is still founded on the individualist paradigm, at least insofar as a property is regarded as having but one owner. Furthermore, the code contains no specific provisions on collective property.[10] Nonetheless, some scholars have posited the argument that State property (*beni demaniali*) could be regarded as a form of collective property,[11] on the grounds that it is intended for collective utilisation.[12] In fact, the failure to recognise collective property in the Civil Code did not result in that form of property ceasing to exist.

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[9] Article 838 of the Civil Code provides for the expropriation of properties that are affecting national production, in cases where owners have abandoned the maintenance, cultivation or operation of such properties. This provision is also applicable in instances where the deterioration of the property has a significant impact on the aesthetic appearance of cities or on considerations of art, history or public health. There is a prevailing consensus that the ideology embodied by this Article finds its genesis in a fascist conception of property, coupled with a corporative understanding of the State. In this ideological framework, the enhancement of property productivity and the promotion of economic solidarity are deemed to be of utmost significance in the pursuit of national interests.

[10] In this regard, a salient distinction emerges between the Italian and French civil codes. Chapter III of Title I of Book II of the French Civil Code, entitled "Des biens dans leurs rapports avec ceux qui les possèdent", contains a provision that is fundamentally at odds with the individualistic concept of property that the code advocates: Article 542, which states that "Les biens communaux sont ceux à la propriété ou au produit desquels les habitants d'une ou plusieurs communes ont un droit acquis".

[11] Chapter II of Title I of Book III of the Civil Code (Articles 822–830), which regulates publicly owned goods, distinguishes between State property (*beni demaniali*) and State assets (*beni patrimoniali*). The former comprises properties that are held by the State in direct connection with a general or public interest of the community, including, by way of illustration, beaches, rivers, works connected to national security and defence, roads, highways etc. The latter includes properties which are owned by public entities, but which are not subject to a general interest limitation or constraint. An example of this would be real estate hosting public offices.

[12] P. Maddalena, *L'ambiente e le sue componenti come beni comuni in proprietà collettiva della presente e delle future generazioni*, "Diritto e Società" 2012, no. 2, p. 357.

3. Collective Property in the Aftermath of the Unification of Italy

In order to better understand the modern history of collective property, it is essential to briefly look at how collective property was dealt with from the time of the unification of Italy in 1861 until the advent of the constitutional republic in 1946. Due to the dominant liberal political ideology of the time, the post-Unitarian era, the Italian Civil Code was significantly influenced by the *Code Napoléon* and its individualistic conception of the right of ownership.[13] Having said that, the legislature could not ignore the widespread presence and various form of collective property throughout the Italian peninsula.[14] Indeed, collective property played a significant role in local economies, particularly within the agricultural sector, which in that epoch was far from marginal.

Thus, in accordance with the prevailing liberal principles concerning private property, the post-Unitarian legislature initially implemented measures designed to abolish collective property;[15] however, by the late 19th century, a partial reversal of this trend occurred, as the significant economic role of collective property became increasingly recognised, prompting the adoption of protective measures.[16]

The course of collective property in Italy again appeared to be coming to an end during the two decades of Fascist rule, when the Fascist government enacted Law No. 1766 of 1927, in response to demands from World War I veterans, who had been promised significant benefits – including the subdivision of unexploited agricultural land.

The underlying framework of Law No. 1766/27 was the most general expression of the Fascist regime's agrarian policy, which aimed to establish an agricultural production system based on small-scale peasant ownership.[17] To

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[13] Article 436 of the Civil Code of 1865 defined ownership as the right to fully enjoy and dispose of things in an absolute manner, subject only to restrictions imposed by laws or regulations.

[14] Recalling the historical development of collective property, it is observed that this notion emerged during the Middle Ages as a result of the interplay between the Roman legal concepts of ownership and the customary laws of barbarian populations. See R. Pennazio, *Riflessioni sugli usi civici tra storia e rinnovata attualità*, "Rivista di diritto agrario" 2023, no. 2, p. 113–144.

[15] See G. Corona, *The Decline of the Commons and the Environmental Balance in Early Modern Italy*, in: M. Armiero, M. Hall (eds), *Nature and History in Modern Italy*, Ohio University Press, Athens 2010, p. 89–107.

[16] For an overview of the various laws enacted during that period, see F. Marinelli, *Gli usi civici*, Giuffrè, Milano 2022, p. 48 ff.

[17] For further details, see U. Petronio, *Gli usi civici. Dalla legge del 1927 al disegno di legge quadro: problemi storico giuridici*, "Giurisprudenza agraria italiana" 1989, p. 525–539.

achieve this goal, the law provided for the liquidation of all collective property and its transformation into private or public property. The legislature intended the law to remain in force only for the few years necessary to complete the transfer of collective property to private or public owners through the compulsory action of specially appointed commissioners.

However, the practical implementation of the legislation in question was hindered by a number of factors.[18] The primary factors were the selection of the commissioners, who were drawn from among high-ranking magistrates ill-suited and reluctant to undertake the necessary administrative tasks, and the evolution of Italian society during the post-war period. With regard to the latter, it is important to note that the accelerated process of economic development that began in the 1950s led to the diffusion of wealth in rural areas and an increase in the level of education, which eventually led to the depopulation of land that was considered less profitable for agriculture. Collective property thus came to symbolise an agrarian society grounded in values that were no longer aligned with contemporary realities, and it received scant attention, even from the commissioners entrusted with surveying and liquidating it – due to a combination of a lack of both commitment and resources.

4. From a Relic of the Past to a Sustainable Ownership Model for the Future: The New Old Collective Property

As has been keenly observed, collective properties in contemporary Italy constitute "a living archive of ways of life and of moral economies that are still little known by many jurists".[19] Although collective property has been the subject of legal research since the 19th century,[20] it is only in the last three decades that the debate has gained significant momentum, thanks also to the impetus of innovative research and the activity of the Centre for Studies and Documentation on Civic Property and Collective Properties set up by the University of Trento.

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[18] For in-depth insight into this issue, refer to F. Marinelli, *Gli usi civici…*, p. 94 ff.

[19] M. Graziadei, *Urban Commons in Italy*, "FIU Law Review" 2024, vol. 18, no. 4, p. 823.

[20] For more on the Italian and European debate on collective property that emerged in that century, see P. Grossi, *An Alternative to Private Property: Collective Property in the Juridical Consciousness of the Nineteenth Century*, University of Chicago Press, Chicago 1981. The first original Italian edition was published in 1977, and following a period of 40 years, an updated edition of the book was released in 2017, incorporating supplementary materials.

The concept of collective property is thus undergoing a process of reinterpretation, drawing on recent contributions from the social and economic sciences.[21] This evolution is further shaped by the rising prominence of environmental concerns in public discourse and jurisprudence, alongside the expanding debate on commons (*beni comuni*). Nevertheless, the term "collective property" – which includes both customary land rights (*usi civici*) and customary collective ownership (*domini collettivi*)[22] – remains an elusive notion. Collective properties are, in fact, alternative forms of community-administered land management that can vary significantly from one another.[23] Essentially, these forms of ownership have been shaped by history and the evolving needs of the communities that have succeeded one another over time in a given territory.

As mentioned above, the primary function of collective property was economic; however, this role has gradually diminished over time due to the economic and social transformation of communities and the economy. In particular, traditional subsistence practices (such as grazing, gathering fruit and wood etc.) have declined, resulting in a loss of cultural and ecological knowledge. It is noteworthy that the Constitutional Court has repeatedly remarked that the profound changes which took place after the Second World War led to the erosion of the economic dimension of collective property, while at the same time highlighting its relevance to other dimensions – especially the environmental one.[24]

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[21] For bibliographical references, see D. Cristoferi, *Da usi civici a beni comuni: gli studi sulla proprietà collettiva nella medievistica e nella modernistica italiana e le principali tendenze internazionali*, "Studi Storici" 2016, vol. 57, no. 3, p. 584 ff.

[22] Customary land rights are defined as rights belonging to a community (the so-called *cives*) over certain public or private lands. More specifically, they consist of particular rights of use granted to the community over private lands or, as some legal doctrine suggests, even over State-owned or inalienable public lands. Conversely, customary collective ownership constitutes a genuine right of ownership held by the community over specific lands. A fusion of private and public law elements characterises both customary land rights and customary collective ownership. The foremost public law aspect lies in the fact that these rights belong to a specific community, whose members exercise them not as individuals – *uti singuli* – but as members of the community: *uti cives*.

[23] G. Spoto, *Usi civici e domini collettivi: "un altro modo" di gestire il territorio*, "Rivista giuridica dell'edilizia" 2020, no. 1, p. 3–14. According to a recent ruling by the Court of Cassation, these alternative forms of land administration affect one fourth of the national territory. See Judgment of the Court of Cassation of 10 May 2023, Case No. 12570; F. Forte, P. Cupo, *The Collective Domains in the Ecological Transition: A Preliminary Analysis in an Inner Area in the Campania Region, Italy*, "Land" 2024, vol. 13, no. 5, p. 711, https://doi.org/10.3390/land13050711. These authors emphasise the lack of a comprehensive estimate of the current extent of collective property across the national territory and present data on their distribution. For a regional survey of present customary land rights, including legislative references, see D. Casprini, A. Oppio, F. Torrieri, *Usi Civici: Open Evaluation Issues in the Italian Legal Framework on Civic Use Properties*, "Land" 2023, vol. 12, no. 4, p. 871, https://doi.org/10.3390/land12040871.

[24] See Judgment of the Italian Constitutional Court of 10 April 2018, Case No. 113, IT:COST:2018:113.

The legislature finally acknowledged the potential of collective properties to serve as a tool for environmental protection by adopting Law No. 168 of 2017, thereby incorporating a jurisprudential orientation that had become established over the preceding 30 years.[25] Collective property, recognised under the law in question, is defined as a right *in rem* reserved for a community giving its members the prerogative of using and exploiting a piece of land or a body of water, either collectively or individually, in accordance with norms that predate the establishment of the Italian State.[26]

From a general point of view, the regulatory framework for collective property established by Law No. 168 of 2017 has been noted as constituting a "third civil property regime",[27] which is subject to the Constitution and founded on Articles 2 (which recognises social formations where individuals express their personality), 9 (which entrusts the Republic with the protection of the landscape and the nation's historical and artistic heritage), 42(2) (which recognises the social function of private property) and 43 of the Constitution (which provides that certain enterprises related to essential public services, energy sources or monopolies, and those of predominant general interest, may be originally reserved for or transferred to the State, public entities or communities of workers and users).[28]

As has been noted elsewhere, a "peculiarity of this «third type of property» is that its subject, the community, is considered to be a «natural entity» rather than a legal person (…). The owner of the common land, to whom the new Italian law also grants autonomous regulatory and managerial power, is the community of residents, or in some cases the group of families, that had been entitled by ancient law to use of the land".

If we consider the precise wording of the law, Article 1 defines collective property as a "primary legal order of the original communities" (ordinamento

[25] For a survey of this jurisprudential and legislative chronicle, see A. Jannarelli, *Passato e presente degli "usi civici" nel diritto vivente: dalla legge del 1927 a quella del 2017. Brevi cronache di un'evoluzione incompiuta*, "Rivista di diritto agrario" 2022, no. 3, p. 121–174.

[26] According to D. Casprini, A. Oppio and F. Torrieri (D. Casprini, A. Oppio, F. Torrieri, *Usi Civici: Open Evaluation…*, op. cit.), collective property exhibits characteristics akin to the commons as defined by Elinor Ostrom, in that it grants the right of use to the entire community rather than to specific individuals. This implies that a plurality member of the community may simultaneously exercise their rights over the shared resources. However, the use of a particular portion of land or its resources by one member inevitably restricts access for others, thereby limiting the total resources available to the community as a whole.

[27] R. Volante, *Un terzo ordinamento civile della proprietà. La l. 20 novembre 2017, n. 168 in materia di domini collettivi*, "Nuove leggi civili commentate" 2018, no. 5, p. 1067–1115.

[28] E. Conte, *The Many Legal Faces of the Commons. A Short Historical Survey*, "Quaderni storici" 2021, no. 3, p. 626.

giuridico primario delle comunità originarie), which means that the rules of substantive law which make up this legal order originated before the creation of the Italian State, which can only recognise them but not establish them, and are inseparable from the community that occupies the territory in question. Its defining characteristic is therefore its dependence on title: while private and public ownership derive their content from statutory law, collective domain is shaped by long-standing customs through which a community has historically asserted exclusive rights over specific land and immovable property. As a result, each instance of collective property entails a distinct set of rights that cannot extend beyond those authorised by the original title and must be concretely ascertained.[29]

The entitled community enjoys a kind of monopoly over the goods that are the subject of collective property. These assets, as stated in Article 3, are inalienable and not subject to acquisitive prescription; they are therefore taken out of free circulation for the achievement of purposes of general interest, including enhancing the national natural heritage, preserving stable components of the environmental system and safeguarding the cultural heritage – not only as artistic or archaeological testimony, but as an enduring manifestation of a specific cultural relationship with the territory. Finally, Article 1(2) of the law provides that "the exponential bodies of the communities owning collective property shall have legal personality under private law and statutory autonomy".

5. Property and Nature: Can the Twain Ever Meet?

At first glance, the regulation of property rights under the Italian Civil Code may appear to be incompatible with the (growing) ecological ethos. As a leading property law scholar has noted, it is essentially a "code of individual interests" and serves as a "basic source of private law, regulating the rights of

[29] An illustrative example is provided by the Regole of the Ampezzo Valley, an archaic institutional manifestation of collective property rights in natural resources, which is governed by detailed customary rules for common use. As typical of Alpine communities, the Regole emerged in the Middle Ages when village associations federated and formalized self-governance through common charters (laudi), especially in remote border areas. The Ampezzo Regole comprise 11 village-based associations that collectively manage shared forests and pastures. Families retain rights to timber, firewood, pasture, and foraged goods, allocated according to traditional rules. Despite state centralization from the Napoleonic era onward, this customary legal system endured and remains recognized by modern Italian law. See F. Minora, *The collective properties in the 21st century. Long–standing models, brand–new views*, https://euricse.eu/wp-content/uploads/2015/02/territoriality_of_the commons_minora.pdf [access: 4.03.2025].

a utilitarian or particularistic order".[30] Within this framework, nature – in its various components – is considered only to the extent that it constitutes a property.[31] Such an approach fails, however, to reflect the evolving social and legal consciousness surrounding environmental protection.

In fact, a constitutional amendment was passed in 2022 to include in the part of the Constitution devoted to Fundamental Principles, under Article 9, the duty of the State to protect the environment, biodiversity and ecosystems, also with regard to the interests of future generations.[32]

This process of "constitutionalising" nature has come about after a long jurisprudential evolution, during which landscape protection and environmental protection have often overlapped and the recognition of nature as an autonomous value worthy of protection in itself has faced significant challenges.[33] However, Article 9 of the Constitution now lays the foundation for an

[30] A. Gambaro, *Il tramonto della proprietà limitata e l'avvento delle proprietà conformate nelle letture del codice civile*, in: L. Vacca (ed.), *Il codice civile ha 70 anni ma non li dimostra*, Jovene, Napoli 2016, p. 76.

[31] It is important to note that the Italian Civil Code differentiates between property (*bene*) and things (*cosa*). According to Article 810, property consists of things that may be the object of rights.

[32] See Article 9, which further provides that "State law shall regulate the methods and means of safeguarding animals". Amendments were also introduced to Article 41 of the Constitution, which governs the exercise of private economic enterprise. Notably, the revised text now establishes that private economic activity may not be carried out to the detriment of health and the environment, adding these constraints to the pre-existing limitations of safety, freedom and human dignity. Moreover, the amendment expands the legislature's authority to direct and coordinate economic activity – both public and private – not only for social purposes, but also for environmental objectives.

[33] Without undertaking a full review of the relevant case law, the essential milestones may be summarised as follows. Since the 1970s, the Constitutional Court has repeatedly been called upon to assess the constitutional legitimacy of restrictions imposed on private property for environmental protection purposes. On multiple occasions, the Court has affirmed that the environment constitutes a fundamental (*primario*) and absolute (*assoluto*) constitutional value. In the absence of an express constitutional principle on environmental protection in the original text of the Constitution, the constitutional jurisprudence on the matter initially revolved around the principle of environmental protection. This principle was developed by the Court through a combined reading of Article 9 – which explicitly provides for the protection of the landscape – and Article 32, which safeguards human health. The distinction between the concepts of nature and environment began to emerge in the Court's jurisprudence concerning the interpretation of Article 117(2)(s) of the Constitution, which grants the State exclusive legislative competence over the "protection of the environment, the ecosystem, and cultural heritage." In particular, in judgment of the Italian Constitutional Court of 23 January 2009, Case No. 12, IT:COST:2009:12 the Court clarified that while the terms environment and ecosystem express closely related values, "the former primarily refers to matters concerning the human habitat, whereas the latter pertains to the conservation of nature as a value in itself." This conceptual distinction was ultimately formalised with the 2022 Constitutional reform. As the Constitutional Court explained in judgment of the Italian Constitutional Court of 13 June 2024, Case No. 104, IT:COST:2024:104 "[t]he 2022

eco-friendly interpretation of the Civil Code, including the provisions governing property rights.[34]

Furthermore, in 2022, a legislative proposal was advanced that sought to amend Article 810 of the Civil Code during the constitutional revision of that year.[35] This proposal would have redefined the notion of property (*bene giuridico*) by incorporating the concept of the "biotic community", understood as the complex network of ecosystems that constitute the "web of life". Consequently, property (*bene giuridico*) would no longer be confined to "things" that can be "objects of rights", but would encompass everything that is protected by the legal system. These may be either material or immaterial, and are essential to the realisation of fundamental rights as outlined in the Constitution, such as, for instance, clean air, biodiversity, energy sources, and so forth.

This proposal was a continuation of previous initiatives aimed at reforming the Civil Code's provisions on property. The best known and most debated of these initiatives is undoubtedly the one advanced by the Rodotà Commission. This Commission, named after its chairman, was specifically appointed by the Minister of Justice to revise the articles of the Civil Code governing the classification of property. In particular, the proposed legislation sought to introduce a novel fundamental category into the Civil Code: that of "common property" (*beni comuni*).[36] According to the bill, common property encompasses goods and services that are essential for the exercise of fundamental rights and the free development of the individual. The legal framework was then designed with the purpose of ensuring the protection and safeguarding of common property for the benefit of future generations. Ownership of this property could be vested in either public or private legal entities; however, it was to be guaranteed

reform directly enshrines in the text of the Constitution the mandate to protect the environment as a unified legal good, encompassing its specific components – namely, the protection of biodiversity and ecosystems – while recognising it as distinct and autonomous from both landscape and human health protection". A detailed study of the legal significance of the protection of the environment in constitutional jurisprudence is provided by G. D'Alfonso, *La tutela dell'ambiente quale «valore costituzionalmente primario» prima e dopo la riforma del Titolo V della Costituzione*, in: F. Lucarelli (ed.), *Ambiente, territorio e beni culturali nella giurisprudenza costituzionale*, Edizioni Scientifiche Italiane, Napoli 2006, p. 3–69.

[34] For more on this theme, see A. Pisani Tedesco, *Tutela ambientale e transizione ecologica: itinerari del diritto privato*, "Rivista giuridica dell'ambiente" 2023, no. 2, p. 473–527.

[35] Senate Act No. 2610 of 12 May 2022, https://www.senato.it/leg/18/BGT/Schede/Ddliter/testi/54988_testi.htm [access: 4.03.2025].

[36] Delegation to the Government for the amendment of the Civil Code regarding public property No. 2031 of 24 February 2010, https://www.senato.it/service/PDF/PDFServer/BGT/00462665.pdf [access: 4.03.2025].

that collective enjoyment of these assets was in accordance with the limits and modalities prescribed by law.

Notwithstanding the fact that the bill was never debated or enacted by the Parliament, the United Sections of the Court of Cassation issued a landmark ruling that attracted considerable attention from legal scholars, thereby affirming the opportunity to recognise the new category of common property. More specifically, the Court acknowledged the "interpretative necessity of considering public property beyond a purely patrimonial proprietary perspective and towards a personal-collectivist approach" and held that "where an immovable property, irrespective of its ownership, is, by virtue of its intrinsic characteristics – particularly environmental and landscape features – dedicated to the realisation of the welfare State, such property must be regarded, beyond both the now-outdated Roman legal concept of dominium and the traditional concept of ownership under the Civil Code, as 'common'; this is to say that irrespective of ownership, the asset is to be considered instrumentally linked to the fulfilment of the interests of all citizens".[37]

The proposal advanced by the Rodotà Commission was subsequently revisited in a legislative initiative introduced in 2020,[38] which sought to incorporate a new article into the Civil Code, aiming to grant legal recognition to a category of property characterised by the need to remain accessible for public use. The proponents of the bill emphasised that this new category would not be limited solely to natural resources, but would also include the so-called "urban commons", because – as the bill's drafters pointed out – urban commons are playing an increasingly significant socio-collective and generative role in fostering social cohesion, thereby counteracting the depersonalisation characteristic of the global era.

6. Some Concluding Thoughts

Although the aforementioned legislative proposals differ from one another, they share a common thread in that they all challenge the exclusive forms of the use of goods which underpin the current privatistic and contractualistic perspective on property. All of these proposals call for a reinterpretation of the relationship between things and individuals, shifting the focus away from

[37] Judgment of the Court of Cassation of 14 February 2011, Case No. 3665. The case in question was about determining the ownership of a fishing valley in the Venice lagoon.

[38] Senate Act No. 1999 of 9 March 2021, https://www.senato.it/leg/18/BGT/Schede/Ddliter/53445.htm [access: 4.03.2025].

an exclusive emphasis on exchange value and utilitarianism, and instead prioritising collective use value grounded in practices of care.[39]

The idea that it is now necessary to rethink the relationships between human beings, non-human beings and things is gaining ground and has led some legal scholars to affirm the need for a radical rethinking of property law in the light of the awareness that there is a "natural continuity" between people, things and ecosystems, i.e. a mutual dependence that the law must take into account.[40]

According to some authors, the current anthropocentric paradigm that underpins modern law should thus be abandoned in favour of an ecocentric approach. Under the ecocentric perspective, human beings are considered part of the biotic community and placed in a relationship of "natural correspondence" with the environment, whereby "on the one hand, humans must protect nature, and on the other, nature must be enabled to provide its benefits to humanity".[41]

Within legal systems rooted in Roman law, this would entail a reassessment of the principle of the "whole–part" relationship, a fundamental tenet of Roman law. This reassessment would involve repositioning individuals within the broader universe to which they belong.[42] In other cultural contexts, the shift towards the ecocentric paradigm is being driven by indigenous traditions, which embody "alternative cosmologies that offer an alternative conception of human dignity to the Western notion, whereby nature has inalienable rights and the false dichotomy of humans being separate and superior to the non-human world is rejected".[43]

There is a commonly accepted viewpoint that the indigenous world-view interprets the relationships between human beings and nature as horizontal, and founded on respect and solidarity. Such relationships are said to occur across species, within species and between generations.[44] Should this alternative approach to conceptualising the human–nature relationship be taken seriously, it has the potential to provide the foundation for a different understanding of property rights, as demonstrated by the case law of the Inter-American Court

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[39] For in-depth consideration, see N. Capone, *Lo spazio pubblico come luogo per riabitare mondi in comune*, "Diritto e questioni pubbliche" 2022, p. 157–178.

[40] R. Míguez Núñez, *La proprietà ecologica. Teoria e strumenti civilistici per una gestione responsabile del suolo*, Edizioni Scientifiche Italiane, Napoli 2025.

[41] P. Maddalena, *L'ambiente e le sue…*, 338.

[42] Ibidem, p. 347.

[43] M. Raftopoulos, *Contemporary Debates on Social-Environmental Conflicts, Extractivism and Human Rights in Latin America*, "International Journal of Human Rights" 2017, vol. 21, no. 4, p. 397.

[44] F. Cerulli, *Antropocentrismo vs ecocentrismo nella giurisprudenza della Corte interamericana dei diritti umani*, "Diritti umani e diritto internazionale" 2023, no. 2, p. 282.

of Human Rights. Indeed, this Court, in defining the scope of property rights, has moved beyond the approach centred on economic utility that underlies the corresponding jurisprudence of the European Court of Human Rights.[45] This shift is precisely rooted in the indigenous narrative of the relationship between humans and nature.[46]

With specific reference to the Italian Civil Code, this would require a shift from the current concept of solidarity, which is mainly orientated towards production and economic interests, to a broader concept of solidarity that includes ecological solidarity, reflecting the notion of the intrinsic interconnection of all living beings (both human and non-human) within the biosphere. This would be the first step in moving away from a notion of property centred on the extraction of economic value from all appropriable things and towards a model of "generative" property rights.[47] From this standpoint, collective property – which can be described as a "particular form of ownership whose rationale transcends the direct and immediate utility of the individuals who own it",[48] as well as "the expression of an original form of social solidarity within specific territorial communities"[49] – could provide a valuable basis for further reflection.

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[45] For more on this issue, see S. Praduroux, *(Un)defining the Right to Property in the Light of the Case Law of the European Court of Human Rights*, in: M. Durovic, C. Poncibò (eds), *The European Convention on Human Rights and Private Law: Comparative Perspectives from South-Eastern Europe*, Hart Publishing, Oxford 2024, p. 37–54.

[46] In the seminal case of *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (judgment of the Inter-American Court of Human Rights of 31 August 2001, Case No. 31/2001, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, IT:COST:2001:31) the Inter-American Court of Human Rights established a precedent by declaring that, in interpreting and applying Article 21 (right to property) of the American Convention on Human Rights, it shall be considered that "for indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations" (para. 148). Moreover in the judgment of the Inter-American Court of Human Rights of 17 June 2005, Case No. 125/2005, *Yakye Axa Indigenous Community v. Paraguay*, IT:COST:2005:125 it was explicitly stated that "the close ties of indigenous peoples with their traditional territories and the natural resources therein associated with their culture, as well as the components derived from them, must be safeguarded by Article 21 of the American Convention". For an in-depth analysis of the cases, see S. Di Benedetto, *La funzione ecologica della proprietà collettiva sulle terre ancestrali: un nuovo modello di rapporto tra diritti umani e tutela dell'ambiente?*, "Diritti umani e diritto internazionale" 2016, no. 3, p. 587–608.

[47] The reference is to the categorisation of ownership models elaborated by M. Kelly, *Owning Our Future: The Emerging Ownership Revolution*, Berrett-Koehler Publishers, San Francisco 2012.

[48] R. Louvain, *La funzione ambientale dei domini collettivi*, "Rivista quadrimestrale di diritto dell'ambiente" 2022, no. 3, p. 216.

[49] A. Jannarelli, *"Beni collettivi" e "beni comuni" nel pensiero di Grossi: brevi riflessioni*, "Rivista di diritto agrario" 2022, special issue, p. 58.

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Evolving Property Rights in Kosova

Ewolucja praw własności w Kosowie

Abstract: In July 2010, the European Parliament adopted a resolution on the European integration of Kosova.[1] This followed a major international post-Cold War liberal peacebuilding and state building project, with a central role being given to the creation of a post-communist, post-conflict property-law system. Private property ownership was seen as central to a multi-ethnic liberal democracy with guaranteed human rights and a market economy. While most "private" property in the form of housing, land and possessions already existed in Kosova, the international focus largely turned on the privatisation of large-scale, socially owned enterprises, the restitution of housing and property rights for displaced persons and, later, addressing (or not) several distinct Kosovan property rights issues. New institutional frameworks and mechanisms were established for addressing property issues, alongside and

[1] European Parliament Resolution of 8 July 2010 on the European integration process of Kosovo, OJ C 351E, 2.12.2011, https://www.europarl.europa.eu/doceo/document/TA-7-2010-0281_EN.html [access: 20.03.2025]. While the name Kosovo is how this country is internationally recognised, Kosovar people refer to their country as Kosova, and we use this name here.

instead of the courts. These measures and their outcomes have not been explored in detail. Therefore, this paper will shed light on aspects of the recent establishment of private property systems in Kosova, as well as the range of property types which have emerged, tracing the links between them and identifying some as yet unresolved issues.

Keywords: private property in Kosova, political context, liberal peacebuilding, privatisation, restitution, informally held ownership.

Abstrakt: W lipcu 2010 r. Parlament Europejski przyjął rezolucję w sprawie integracji europejskiej Kosowa. Stało się to po zakończeniu ważnego międzynarodowego projektu liberalnego budowania pokoju i państwowości po zimnej wojnie, w którym kluczowe znaczenie miało stworzenie postkomunistycznego, postkonfliktowego systemu prawa własności. Prywatna własność była postrzegana jako kluczowy element wieloetnicznej demokracji liberalnej z gwarantowanymi prawami człowieka i gospodarką rynkową. Podczas gdy większość „prywatnej" własności w postaci mieszkań, ziemi i dóbr materialnych istniała już w Kosowie, uwaga społeczności międzynarodowej skupiła się głównie na prywatyzacji dużych przedsiębiorstw społecznych, restytucji mieszkań i praw własności osób przesiedlonych, a następnie na rozwiązywaniu (lub nie) kilku odrębnych problemów związanych z prawami własności w Kosowie. Utworzono nowe ramy instytucjonalne i mechanizmy rozwiązywania problemów własnościowych, równolegle z sądami i zamiast nich. Środki te i ich rezultaty nie zostały szczegółowo omówione. W związku z tym niniejszy artykuł ma na celu naświetlić aspekty niedawnego ustanowienia prywatnych systemów własności w Kosowie, a także różnorodność rodzajów własności, jakie się wówczas pojawiły, prześledzenie powiązań między nimi i wskazanie niektórych nierozwiązanych jeszcze kwestii.

Słowa kluczowe: własność prywatna w Kosowie, kontekst polityczny, liberalne budowanie pokoju, prywatyzacja, restytucja, nieformalna własność.

1. The Political Evolution of Kosova

The evolution of property rights in Kosova is intertwined with its political evolution. The territory attained international attention in the early 1990s, as

a result of gross human rights violations against ethnic Albanians – prompting international intervention after the 1998–1999 conflict. Kosova was incorporated into Serbia following the defeat of the Ottoman Empire in the first Balkan Wars in 1912[2] and remained so after World War I, when Serbia became part of the Kingdom of Yugoslavia in 1918.[3] After World War II, Kosova remained part of Serbia, then a part of Yugoslavia[4], initially as the Autonomous Region of Kosova and Metohija.[5] The position of Albanians improved progressively between 1945 and 1980[6], and in 1963 the Region was recognised as an Autonomous Province.[7] In 1974, Kosova was recognised as an Autonomous Province within Serbia in the Yugoslav Constitution[8], conferring a status almost identical with that of Yugoslavia's other republics.[9] This autonomous status was revoked by the Serbian state in 1989, following years of unrest by ethnic Albanians, who were demanding republic status for Kosova.[10] The years after the revocation were marked by violations of human rights, when ethnic Albanians were entirely expelled from the public and economic system, a situation viewed by many as closely resembling apartheid.[11]

As noted earlier, the 1998–1999 conflict represented one of the significant events in the political development of Kosova. The conflict ended following NATO intervention, carried out through a military air campaign.[12] This was followed by the deployment of one of the most unprecedented and comprehensive United Nations peace missions, known as the United Nations Interim

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[2] See R.C. Hall, *The Balkan Wars 1912–1913: Prelude to the First World War*, Taylor & Francis Group, London 2000.

[3] The Yugoslav Kingdom or Kingdom of Serbs, Croats and Slovenes was established in 1918 and existed until 1941. See M.J. Calic, D. Geyer, *History of Yugoslavia*, Purdue University Press, West Lafayette 2019.

[4] R. Elsie, *Historical Dictionary of Kosovo*, Scarecrow Press, Lanham, Maryland 2010.

[5] Ibidem.

[6] See T. Judah, *Kosovo: What Everyone Needs to Know*, Oxford University Press, Oxford 2008.

[7] Ibidem.

[8] H.H. Perritt, Jr., *Final Status for Kosovo*, "Chicago-Kent Law Review" 2005, vol. 80, no. 3, p. 1–27, https://scholarship.kentlaw.iit.edu/cklawreview/vol80/iss1/2 [access: 20.03.2025].

[9] Ibidem.

[10] See R. Pichler, H. Grandits, R. Fotiadis, *Kosovo in the 1980s: Yugoslav Perspectives and Interpretations*, "Comparative Southeast European Studies" 2021, vol. 69, no. 2–3, p. 171–182, https://doi.org/10.1515/soeu-2021-0059.

[11] See D. Eyre, A. Wittkowsky, *The Political Economy of Consolidating Kosovo: Property Rights, Political Conflict and Stability*, Friedrich-Ebert-Stiftung, Bonn 2002, https://library.fes.de/fulltext/id/01351.htm [access: 20.03.2025].

[12] F. Bieber, Z. Daskalovski, *Understanding the War in Kosovo*, Taylor & Francis Group, London 2003.

Mission in Kosovo (UNMIK)[13], authorised by United Nations Security Council Resolution 1244.[14]

Following nearly a decade of UNMIK administration, Kosova declared its independence on 17 February 2008. After this declaration, one of the largest European Union missions, the European Union Rule of Law Mission in Kosovo (EULEX), was deployed with an executive mandate in the field of rule of law.[15]

2. Liberal Peacebuilding and State building

Kosova is known for having hosted one of the most complex and comprehensive liberal state building and peacebuilding interventions since the end of the Cold War. State building is defined as "an endogenous process to enhance capacity, institutions and legitimacy of the state driven by state–society relations".[16] Peacebuilding is defined as "a complex, long-term process aimed at creating the necessary conditions for positive and sustainable peace by addressing the deep-rooted structural causes of violent conflict in a comprehensive manner".[17] Both state building and peacebuilding "emerge as interrelated processes, addressing similar underlying problems and a common overall purpose".[18]

Liberal peacebuilding is a term used to describe external peacebuilding interventions that share several characteristics: firstly, they are conducted by liberal, Western (US-backed) states; secondly, they are motivated by liberal objectives such as responding to large-scale human rights violations or being conducted under international supervision; and thirdly, these interventions were intended to promote liberal democratic political institutions, human rights, effective and

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[13] A. Yannis, *The UN as Government in Kosovo*, "Global Governance" 2004, vol. 10, no. 1, p. 67–81, http://www.jstor.org/stable/27800510 [access: 20.03.2025].

[14] Security Council resolution 1244 of 10 June 1999, on the deployment of international civil and security presences in Kosovo, S/RES/1244(1999), https://digitallibrary.un.org/record/274488?ln=en&v=pdf [access: 20.03.2025].

[15] Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo EULEX Kosovo, OJ L 42, 16.02.2008, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32008E0124 [access: 20.03.2025].

[16] Report of the Organisation for Economic Co-operation and Development of 26 September 2008, *State Building in Situations of Fragility: Initial Findings*, DCD(2008)25. https://one.oecd.org/document/DCD(2008)25/en/pdf [access: 20.03.2025].

[17] *Supporting Statebuilding in Situations of Conflict and Fragility: Policy Guidance*, OECD Publishing, Paris 2011, https://doi.org/10.1787/9789264074989-en.

[18] Ibidem.

good governance and economic liberalisation as a means to bringing peace and prosperity to war-torn countries.[19]

For some, the resolution of property issues is pivotal for the success of a peacebuilding process in a post-conflict situation.[20] According to Wallis, the development of a market economy is what liberal peacebuilding seeks to achieve, allowing capitalist market economies to flourish.[21] Thus, the role of private property within the paradigm of liberal peacebuilding operates both at an ideological level and as a facilitator for capitalist production and exchange. Roberts suggests that this will lead to a shared prosperity conducive to a form of social justice that is antithetical to internal state–social strife.[22] In Kosova, all this provided a property-based legal and political justification for privatising public (socialist) property and imposing a market economy.[23] At a later stage, the national strategy on property rights were to guarantee by law the property rights of women and members of minority communities and to enforce them by government agencies and courts; to regulate the rights to use land in order to protect valuable land assets and to encourage its productive use; to remove legal concepts from Kosova's socialist past; to clearly define in the law the rights and responsibilities of citizens and government entities in order to provide the basis for a vibrant land market; to establish efficient, affordable administrative processes for obtaining legal recognition of rights exercised *de facto*; to strengthen, protect and enforce the property rights of displaced persons (DPs) and members of non-majority communities; and to support Kosova's integration into the European Union and promote its economic growth.[24]

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[19] D. Zaum, *Beyond the "Liberal Peace"*, "Global Governance" 2012, vol. 18, no. 1, p. 121–132, http://www.jstor.org/stable/23104304 [access: 20.03.2025]; R. Paris, *Peacebuilding and the Limits of Liberal Internationalism*, "International Security" 1997, vol. 22, no. 2, p. 54–89, https://doi.org/10.1162/isec.22.2.54.

[20] L. von Carlowitz, *Crossing the Boundary from the International to the Domestic Legal Realm: UNMIK Lawmaking and Property Rights in Kosovo*, "Global Governance" 2004, vol. 10 no. 3, p. 307–331, http://www.jstor.org/stable/27800531 [access: 20.03.2025].

[21] J. Wallis, *Is There Still a Place for Liberal Peacebuilding?*, in: J. Wallis, L. Kent, M. Forsysth, S. Dinnen, S. Bose (eds), *Hybridity on the Ground in Peacebuilding and Development: Critical Conversations*, ANU Press, Canberra 2018, p. 83–98, https://www.jstor.org/stable/j.ctvgd1g9.10 [access: 20.03.2025].

[22] D. Roberts, *Liberal Peacebuilding and Global Governance: Beyond the Metropolis*. Routledge, London 2011; R. MacGinty, *Hybrid Peace: The Interaction between Top-down and Bottom-up Peace*, "Security Dialogue" 2010, vol. 41, no. 4, p. 391–412, http://www.jstor.org/stable/26301105 [access: 20.03.2025].

[23] R.A. Knudsen, *Privatization in Kosovo: The International Project 1999–2008 (NUPI Report No. 288)*, Norwegian Institute of International Affairs, Oslo 2010, https://www.files.ethz.ch/isn/121346/Knudsen%20report-NUPI%20Report.pdf [access: 20.03.2025].

[24] *Kosovo National Strategy on Property Rights*, USAID, Government of Kosova, Pristina 2016, https://kryeministri.rks-gov.net/wp-content/uploads/2022/07/National_Strategy_and_Annexes_ENG.pdf [access: 20.03.2025].

3. Property Rights

Arguing that the law lies at the heart of property is an age-old trope.[25] As Bentham claimed, "[p]roperty and law are born together and die together. Before laws were made there was no property; take away laws, and property ceases".[26] Therefore, the existence of a property rights system presupposes adherence to the law in force, as without it property rights would lack legitimacy and enforceability. Liberal theories of property posit how it benefits the values of human autonomy and value pluralism.[27]

While the initial acquisition and justification of property in land have been well rehearsed, with the notable axioms of Locke's labour desert theory and Blackstone's "sole and despotic dominion", the subsequent trajectory of land ownership through various political and social developments around the world has been variable, often marked by historical phases.[28] The formalisation and registration of hitherto informal or socialised smallholdings and homes as individual property rights, in line with the Peruvian economist Hernando de Soto, has created a globalised model. In *The Mystery of Capital*[29] de Soto argues that secure and well-defined property rights transform assets from "dead capital" into resources that can be used to generate additional capital and obtain credit, making property fungible.[30] The World Bank adopted this approach and funded a land registration and cadastral development programme around the world.[31] In the context of the global financialisation of housing and land it is not clear whether this model has universally improved access to land and housing for all. Of course, this approach largely downplays the prevalence of state-owned, religious, regal, tribal and socially owned land and buildings around the world, upon which most societies depend.[32] Other writers have also highlighted the

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[25] G. Kantor, T. Lambert, H. Skoda, *Introduction. Property and Ownership: An Overview*, in: G. Kantor, T. Lambert, H. Skoda (eds), *Legalism: Property and Ownership*, Oxford Academic, Oxford 2018, p. 1–27, https://doi-org.nuigalway.idm.oclc.org/10.1093/oso/9780198813415.003.0001 [access: 20.03.2025].

[26] J. Bentham, *The Theory of Legislation*, Weeks, Jordan & Co., Boston 1840.

[27] H. Dagan, *A Liberal Theory of Property*, Cambridge University Press, Cambridge 2021.

[28] M. Albertus, *Land Power*, Basic Books, London 2025.

[29] H. De Soto, *The Mystery of Capital*, Transworld, London 2000.

[30] C.W. Kramer, *The Two Sides of De Soto: Property Rights, Land Titling, and Development*, in: E. Chamlee-Wright (ed.), *The Annual Proceedings of the Wealth and Well-Being of Nations*, Beloit College, Beloit 2010, p. 95, https://ssrn.com/abstract=1940201 [access: 20.03.2025].

[31] *Land*, https://www.worldbank.org/en/topic/land [access: 20.03.2025].

[32] In 2004 socially owned land constituted 43% of land ownership in Kosova – D. Stanfield, S. Thomas, K. Kelm, J.F. Dorsey, *An Assessment of Property Rights in Kosovo: Final Report (USAID Contract No. LAG-00-98-00031-00, Task Order No. 4)*, ARD Inc., Burlington 2004, https://www.terrainstitute.org/pdf/Kosovo/FINALReport.pdf [accessed: 26.05.2025].

disparities in society created by property ownership, and the need for a constitutionally recognised progressive tax on property.[33]

In former Yugoslavia, unlike in neighbouring socialist regimes, the principle of private ownership of property was never directly challenged, as there was widespread private ownership of homes, farms and commercial buildings.[34] While individual property ownership was not large-scale, and private enterprises could only employ a small numbers of workers, its legitimacy was continually questioned.[35] In agriculture, about 90 per cent of the land under systematic cultivation was owned by smallholder farmers.[36] Some two thirds of homes were privately owned. The definition of ownership in this system was influenced by Roman *dominium*, which included the right to use, the right to natural and civil fruits and the right or power to dispose of (*ius utendi*, *ius fruendi* and *ius abutendi*, respectively).[37] However, the antithesis of that part of private property viewed as capital or the means of production with the concept of "social property" had been created in the late 1950s.[38] Social(ist) ownership was not codified in a single legal instrument, and conceptually a social property was every citizen's indivisible property.[39] It was not characterised by the lack of an owner, but rather by a lack of an identifiable owner, for it belonged to the broader community.[40]

However, the property rights predicament in Kosova was compounded by the legacy of ethnic discrimination that took place during the early 1990s.[41] Many ethnic Albanians lost their public-sector jobs, and consequently their rights to socially owned apartments. These apartments were often then allocated to Serb employees and subsequently converted into private ownership through the privatisation process.[42] During the 1990s, the Serbian Parliament also adopted legislation on restricting sales of property from Serbs to Albanians.[43] Other

[33] T. Piketty, *Capital and Ideology*, Harvard University Press, Cambridge, Massachusetts 2020, p. 996.

[34] K. Medjad, *The Fate of the Yugoslav Model: A Case against Legal Conformity*, "The American Journal of Comparative Law" 2004, vol. 52, no. 1, p. 287–319, https://doi.org/10.2307/4144450.

[35] M. Lazic, L. Sekelj, *Privatisation in Yugoslavia (Serbia and Montenegro)*, "Europe-Asia Studies" 1997, vol. 49, no. 6, p. 1057–1070, http://www.jstor.org/stable/153347 [access: 26.05.2025].

[36] J.M. Fleming, V.R. Sertic, *The Yugoslav Economic System*, "International Monetary Found Staff Papers" 1962, vol. 9, no. 2, p. 202–225, https://doi.org/10.5089/9781451947120.024.A003 [access: 9.06.2025].

[37] Law of 1 September on Basic Property Relations, Official Gazette of the SFRY 1980, No. 6/80, art. 3.

[38] K. Medjad, *The Fate of the Yugoslav Model…*, op. cit.

[39] Ibidem.

[40] Ibidem.

[41] H. Das, *Restoring Property Rights in the Aftermath of War*, "The International and Comparative Law Quarterly" 2004, vol. 53, no. 2, p. 429–443, http://www.jstor.org/stable/3663092 [access: 20.03.2025].

[42] Ibidem.

[43] Law of 18 April 1991 on Changes and Supplements to the Law on the Limitation of Real Estate Transactions, Official Gazette of the Republic of Serbia No. 22/91.

property issues emerged from the lack of resources in the former Yugoslav property registration and enforcement systems.[44] The property/land registry often did not reflect the situation on the ground, and this further deteriorated due to damage and dislocation during the 1998–1999 conflict, making the determination of property titles extremely difficult. [45] As a result, the property registration system in Kosova has gradually become obsolete.[46]

4. Privatisation

The evolution of property since the 1990s in the territory of former Yugoslavia involved privatising socially owned farms, socially owned housing and socially owned enterprises (SOEs), creating new forms of "property" alongside existing ones and settling new disputes on identity and nation-building, which are outlined below.

The privatisation of socially owned property began when the 1988 Enterprise Law diversified existing legal types of property and forms of enterprise, and the 1989 Law on Social Capital (amended in mid-1990, the so-called Markovic Law) laid out the framework for the privatisation of enterprises in the social sector.[47] The socialist model in Yugoslavia involved workers' self-management of industries, neither private nor state-owned, alongside private enterprises.[48] Privatisation involved ownership of SOEs being distributed to the workers through shares,[49] but this only covered 30% of the SOE capital.[50] After the breakup of Yugoslavia, successor states followed different privatisation strategies in Croatia, North Macedonia, Montenegro, Serbia and Slovenia.[51]

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[44] *Private property issues following the regional conflict in Bosnia and Herzegovina*, Croatia, and Kosovo, European Parliament, Brussels 2010.

[45] See D. Todorovski, J. Zevenbergen, P. van der Molen, *Conflict and Post-conflict Land Administration: The Case of Kosovo*, "Survey Review" 2016, vol. 48, no. 350, p. 316–328, https://doi.org/10.1179/1752270615Y.0000000044.

[46] H. Das, *Restoring Property Rights…*, op. cit.

[47] S. Estrin, M. Uvalic, *From Illyria towards Capitalism: Did Labour-management Theory Teach Us Anything about Yugoslavia and Transition in its Successor States?*, "Comp Econ Stud" 2008, vol. 50, no. 4, p. 663–696, https://doi-org.nuigalway.idm.oclc.org/10.1057/ces.2008.41.

[48] K. Medjad, *The Fate of the Yugoslav Model…*, op. cit.

[49] I. Mulaj, *Redefining Property Rights with Specific Reference to Social Ownership in Successor States of Former Yugoslavia: Did It Matter for Economic Efficiency?*, University Library of Munich, Munich 2006.

[50] S. Estrin, M. Uvalic, *From Illyria towards capitalism…*, op. cit.

[51] Ibidem.

Liberal economists suggest that the foundation of capitalism lies in the private ownership of productive resources, which provides the basis for the autonomy of the economic enterprise.[52] From this theoretical standpoint, the process of privatisation of around 400 SOEs took place[53], framed by the liberal peacebuilding approach and implemented by the UNMIK.[54] In relation to the land attached to the SOEs – and given the silence of UN Security Council Resolution No. 1244 on SOE privatisation and the complex property rights issues involved – the UNMIK initially opted for a process of commercialisation that involved leases for a fixed period.[55] The UNMIK established distinct institutional structures that would carry out the privatisation process: the Kosova Trust Agency (KTA)[56] and the Special Chamber of the Supreme Court of Kosova on Kosova Trust Agency Related Matters.[57] This EU intervention acted as the exogenous administrative power that managed and implemented the privatisation of SOEs in Kosova.[58]

Following the declaration of independence of Kosova, privatisation was continued with the Kosova Privatisation Agency (KPA)[59] and the Special Chamber of the Supreme Court of Kosova on Kosova Trust Agency Related Matters.[60]

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[52] D. Lane, *Global Neoliberal Capitalism and the Alternatives: From Social Democracy to State Capitalisms*, Bristol University Press, Bristol 2023, https://doi.org/10.1332/policypress/9781529220902.001.0001.

[53] A. Aslund, *How Capitalism Was Built: The Transformation of Central and Eastern Europe, Russia, and Central Asia*, Cambridge University Press, Cambridge 2007.

[54] J.H. Peterson, *Privatisation: Liberal Reform and the Creation of New Conflict Economies*, in: J.H. Peterson (ed.), *Building a Peace Economy? Liberal Peacebuilding and the Development-security Industry*, Manchester University Press, Manchester 2014, p. 115–137, https://doi.org/10.7228/manchester/9780719087301.003.0006; see also *The Ottoman Dilemma: Power and Property Relations under the United Nations Mission in Kosovo*, European Stability Initiative, Pristina 2002, https://www.esiweb.org/publications/ottoman-dilemma [access: 20.03.2025].

[55] R. Moalla-Fetini, S. Hussein, H. Hatanpaa, N. Koliadina, *Kosovo*, International Monetary Fund, Washington 2005, https://doi.org/10.5089/9781589064225.071.

[56] Regulation No. 2002/12 of United Nations Interim Administration Mission in Kosovo of 13 June 2002 on the establishment of the Kosovo Trust Agency, UNMIK/REG/2002/12, https://unmik.unmissions.org/sites/default/files/regulations/02english/E2002regs/RE2002_12.pdf [access: 20.03.2025].

[57] Regulation No. 2002/13 of United Nations Interim Administration Mission in Kosovo of 13 June 2002 on the establishment of a special chamber of the Supreme Court of Kosovo on Kosovo Trust Agency related matters, UNMIK/REG/2002/13, https://unmik.unmissions.org/sites/default/files/regulations/02english/E2002regs/RE2002_13.pdf [access: 20.03.2025].

[58] Under the UNMIK pillar system, the European Union was responsible for the economic reconstruction and development of Kosovo; therefore, socially owned enterprises fell within the scope of the EU pillar – R. A. Knudsen, *Privatization in Kosovo…*, op. cit.

[59] Law No. 04/L-034 of 21 September 2011 on the Privatization Agency of Kosovo, Official Gazette of the Republic of Kosovo No. 19, https://gzk.rks-gov.net/ActDetail.aspx?ActID=2773&langid=2 [access: 20.03.2025].

[60] Law No. 06/L-086 of 8 June 2019 on the Special Chamber of the Supreme Court of Kosovo on Privatization Agency related matters, Official Gazette of the Republic of Kosovo No. 12/2019.

In recognition of the legal impediments to an outright sale of land held under the right of use of an SOE, a formula was developed by the UNMIK that allowed the sale of transferable 99-year leases.[61] In 2016, the National Strategy on Property Rights proposed *ipso iure* transferring the 99-year leasehold into full ownership.[62]

However, the privatisation of SOEs was also complicated by the Serbian government opposition, on the belief that SOEs were either the property of Serbian private investors or of the Serbian people.[63] This increased the nervousness among the international officials as to future problems, should they be found to have exceeded their mandate when privatising.[64] The period of internationally managed privatisation in Kosova was also influenced by its status at the time, being internationally controversial and undefined.[65]

5. Restitution

The post-conflict restitution of housing, land and property rights forms one of the preconditions for the return of refugees and displaced persons.[66] In the *Pinherio Principles* this is outlined as follows:

> All refugees and displaced persons have the right to have restored to them any housing, land and/or property of which they were arbitrarily or unlawfully deprived, or to be compensated for any housing, land and/or property that is factually impossible to restore as determined by an independent, impartial tribunal.[67]

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[61] Regulation No. 2003/13 of United Nations Interim Administration Mission in Kosovo of 9 May 2003 on the transformation of the right of use to socially-owned immovable property, UNMIK/REG/2003/13, section 2.

[62] *Kosovo national strategy…*, op. cit. Nonetheless, in the civil-law system, a 99-year lease arrangement, known as emphyteusis and originating from Roman law, is recognised as a valid form of property right – See A. di Robilant, *The Tensions of Absolute Property*, in: *The Making of Modern Property: Reinventing Roman Law in Europe and its Peripheries 1789–1950*, Cambridge University Press, Cambridge 2023, p. 204–234.

[63] J.P. Korovilas, *Is Privatisation in Post-conflict Kosovo Possible?*, "Comparative Economic Studies" 2006, vol. 48, no. 2, p. 326–350.

[64] R.A. Knudsen, *Privatization in Kosovo…*, op. cit.

[65] Ibidem.

[66] E.C. Martínez, A. Díaz Anabitarte, *Right to Land, Housing, and Property*, in: C. Stahn, J. Iverson (eds), *Just Peace after Conflict: Jus Post Bellum and the Justice of Peace*, Oxford University Press, Oxford 2020, p. 252–266, https://doi.org/10.1093/oso/9780198823285.003.0014.

[67] Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights of 28 June 2005, *Housing and property restitution in the context of the return of refugees and internally displaced persons: Final report of the Special Rapporteur, Paulo Sérgio Pinheiro;*

Apart from the returning of refugees and displaced persons, the restitution process plays important role for the property rights system.[68] In many conflict situations, housing and property cadastres and records are consciously destroyed or confiscated by one of the warring parties with the aim of extinguishing the rights of members of another group.[69] In this situation, restitutions programmes involve establishing property rights and improving ownership information on cadastral records. Longstanding, pre-conflict disputes over housing, land, property ownership and tenancy can re-emerge following the conflict, and they require resolution.[70] In some instances, no clear title may have ever existed to the land or dwelling in question, while in others several people may place competing claims on the same house or piece of land.[71]

The restitution programme in Kosova was built upon the Bosnian and South African precedents and effectively combines elements of both.[72] It was initially handled by the Housing and Property Directorate (HPD) [73], with a quasi-judicial independent branch, the Housing and Property Claim Commission (HPCC).[74] The HPD and the HPCC had exclusive jurisdiction on receiving and deciding three specific categories of residential property claims. The first category pertained to residential claims regarding property rights lost after 23 March 1989 as a result of discrimination.[75] A second category applied to property transactions between Serbs and Albanians that were restricted during the 1990s, as explained above.[76] The third category concerned housing and property claims

Principles on housing and property restitution for refugees and displaced persons, E/CN.4/Sub.2/2005/17, https://undocs.org/E/CN.4/Sub.2/2005/17 [access: 20.03.2025].

[68] J. Unruh, *Land Rights and Peacebuilding: Challenges and Responses for the International Community*, "International Journal of Peace Studies" 2010, vol. 15, no. 2, p. 89–125, http://www.jstor.org/stable/41853008 [access: 20.03.2025].

[69] S. Leckie, *Housing, Land, and Property Restitution Rights of Refugees and Displaced Persons: Laws, Cases, and Materials*, Cambridge University Press, Cambridge 2007.

[70] Ibidem.

[71] Ibidem.

[72] H. Das, *Restoring Property Rights*…, op. cit.

[73] Regulation No. 1999/23 of United Nations Interim Administration Mission in Kosovo of 15 November 1999 on the establishment of the Housing and Property Directorate and the Housing and Property Claims Commission, UNMIK/REG/1999/23.

[74] Regulation No. 2000/60 of United Nations Interim Administration Mission in Kosovo of 31 October 2000 on residential property claims and the rules of procedure and evidence of the Housing and Property Directorate and the Housing and Property Claims Commission, UNMIK/REG/2000/60.

[75] Ibidem.

[76] Ibidem.

of refugees and displaced persons who had lost possession of their homes in connection with the 1999 conflict.[77]

The general procedures and principles governing the claim adjudication process and the mass adjudication mechanism were laid out in UNMIK Regulation No. 2000/60.[78] The procedure was founded on a "mass claims" approach combined with relaxed procedural rules.[79] Leckie justified these relaxed rules of procedure on the following grounds:

> States may, in situations of mass displacement where little documentary evidence exists as to ownership or possessory rights, adopt the conclusive presumption that persons fleeing their homes during a given period marked by violence or disaster have done so for reasons related to violence or disaster and are therefore entitled to housing, land and property restitution. In such cases, administrative and judicial authorities may independently establish the facts related to undocumented restitution claims.[80]

The restitution of housing and property rights have been extended with the establishment of the Kosova Property Agency (KPA)[81] and the Kosova Property Claims Commission (KPCC).[82] In addition to the residential properties, the KPA and KPCC mandate also included property claims related to agricultural and commercial property rights.[83] The KPA and the KPCC applied the same procedural principles in the processing and adjudication of property claims as the HPD and the HPCC. However, there is a significant difference between these two institutions, based on the fact that decisions of the KPCC, as a quasi-judicial body, have been reviewed by the Appeal Panel of the Supreme Court. Currently, restitution of housing and property rights is being carried out by the Kosova Property

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[77] Ibidem.

[78] Ibidem.

[79] Regulation No. 2000/60 of United Nations Interim Administration Mission in Kosovo of 31 October 2000 on residential property claims and the rules of procedure and evidence of the Housing and Property Directorate and the Housing and Property Claims Commission, Section 21.1, UNMIK/REG/2000/60; A.R. Smit, *Property Restitution and Ending Displacement in Kosovo: Coordinated Effort or at Cross-purposes?*, "Northern Ireland Legal Quarterly" 2004, vol. 55, no. 2, p. 182–205, https://doi.org/10.53386/nilq.v55i2.768.

[80] S. Leckie, *Housing, Land, and Property Restitution Rights…*, op. cit.

[81] Regulation No. 2006/50 of United Nations Interim Administration Mission in Kosovo of 16 October 2006 on the resolution of claims relating to private immovable property, including agricultural and commercial property, UNMIK/REG/2006/50.

[82] Ibidem.

[83] Ibidem, Section 3.

Comparison and Verification Agency.[84] However, decisions on restitutions have become a challenge for Kosova's justice system. The complexity of transplanting these resolution and adjudication agencies into the judicial and legal institutional framework of Kosova is often reflected in parallel (and conflicting) decisions brought by regular courts.[85] Another issue is the length of time that specialised institutions are involved in resolving housing and property rights issues.[86]

6. Informally Held Property Rights

Ribeiro de Almeida outlines the informal property rights system as "land tenure systems that have no recognition from state laws".[87] Formalisation is a three-step process:

> Property formalisation involves, first, the provision of legal representation of property in the form of title deeds, licences, permits, contracts or the like. Second, these representations must receive official sanction and protection from legitimate national authorities. And third, the information contained in these representations should be integrated in an accessible national registry.[88]

The two most common causes of informality in Kosova are verbal contracts for the sale of land and immovable property, and "informal inheritance" – where the property of deceased persons is possessed by heirs who did not initiate or complete formal inheritance proceedings.[89] In the past, the execution of verbal

[84] Law No. 05/L-010 of 3 November 2016 on the Kosovo Property Comparison and Verification Agency, Official Gazette of the Republic of Kosovo No. 37, https://gzk.rks-gov.net/ActDetail.aspx?ActID=13023&langid=2 [access: 20.03.2025].

[85] See *Property Rights Mass-claim Mechanism: Kosovo Experience*, Organization for Security and Co-operation in Europe, Helsinki 2020, https://www.osce.org/files/f/documents/2/7/454179.pdf [access: 20.03.2025].

[86] A. Mora, *"Property Rights are Human Rights": Bureaucratization and the Logics of Rule of Law Interventionism in Postwar Kosovo*, "PoLAR: Political and Legal Anthropology Review" 2023, vol. 46, p. 82–96, https://doi.org/10.1111/plar.12517.

[87] B. Ribeiro de Almeida, *Building Land Tenure Systems: The Political, Legal, and Institutional Struggles of Timor-Leste*, Leiden University, Leiden 2020, https://hdl.handle.net/1887/136944 [access: 20.03.2025].

[88] T.A. Benjaminsen, S. Holden, C. Lund, E. Sjaastad, *Formalisation of Land Rights: Some Empirical Evidence from Mali, Niger and South Africa*, "Land Use Policy" 2009, vol. 26, no. 1, p. 28–35, https://doi.org/10.1016/j.landusepol.2008.07.003.

[89] L. Keefe, M. Limani, G. Salihu, *Role Constructive Notice Could Play to Formalize Property Rights in Kosovo*, Tetra Tech, Burlington 2017, https://www.oicrf.org/-/role-constructive-notice-could-play-to-formalize-property-rights-in-koso-1 [access: 20.03.2025].

contracts for the sale of land and immovable property was an accepted means for transacting property rights due to cultural and traditional norms practiced in rural areas of Kosova.[90] However, subsequent to 1991, even if a contract document for inter-ethnic sales of property existed, the transaction could not be recorded in the cadastre due to discriminatory legislation in effect at the time prohibiting such transactions.[91]

The National Strategy on Property Rights outlines informality on property rights in Kosova as follows:

> Informality occurs when formal rights in property (rights registered in the cadastre) are not transferred from the formal rights holder through operation of law. Rights informally transferred are exercised de facto by the informal rights holder and generally respected by the community at large but cannot be registered in the cadastre. As a result, rights remain registered in the cadastre in the name of the formal rights holder who already transferred the rights, rather than the person currently exercising rights over the property.[92]

The "culture of informality in Kosova's land sector can be traced back to the 500-year period it was under Ottoman Empire rule".[93]

> Due to the different Ottoman legal heritage and a general lack of emphasis on property rights in the socialist regime, the property rights register was never de facto introduced in Kosovo nor in many other southern parts of the former Yugoslavia. Ongoing reform efforts were interrupted by Kosovo's recent turbulent history. Instead, cadastre entries based on a court certification of relevant legal documents replaced the registration function to some extent. Yet the cadastre did not provide legal title to ownership, and the registration procedure was complicated and opaque. This coincided with a partial tendency in the region to rely on spoken transactions, partially due to financial considerations. For these reasons, the registration procedure was often not adhered to and the cadastral records became largely outdated.[94]

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[90] *Kosovo National Strategy…*, op. cit.
[91] Ibidem.
[92] Ibidem.
[93] J. Keefe, M. Limani, G. Salihu, *Role Constructive Notice Could Play…* op. cit.
[94] L. von Carlowitz, *Crossing the Boundary…*, op. cit.

7. Unpermitted Structures

The existence of 350,000 unpermitted structures makes this one of the most significant property issues in Kosova. It originates primarily from traditional and cultural norms, since much of it stemmed from the rural-to-urban migration in post-conflict Kosova. However, unpermitted structures were also the mark of urban development of Yugoslavia.[95] Illegal building is defined as an activity of land transformation and construction/use of buildings that infringes the territorial planning rules in force.[96] According to the law that addresses this issue in Kosova, an unpermitted structure is defined as one that was built without a construction permit from the relevant public authority, or in a violation of construction permit,[97] including cases where more floors were built than were permitted, the building footprint was expanded beyond the permit or the use/designation was changed from what was permitted.

The National Strategy of Property Rights pointed out the following complications on the issue:

> Additionally, anecdotal information indicates that up to 50% or more of applicants seeking to formalize rights over the more than 350,000 unpermitted buildings through the government of Kosovo's (GoK's) legalization program cannot demonstrate rights in the land upon which the buildings are constructed because the land is currently registered in the name of a deceased rights holder.[98]

This segment of informally held property-related issues has remained outside the liberal peacebuilding framework in Kosova. During the UNMIK administration, a cadastral registry was re-established and cadastral data were reconstructed.[99] Informally held property rights, based on verbal contracts, were addressed through general courts, based on the doctrine of substantial perfor-

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[95] R. Archer, *The Moral Economy of Home Construction in Late Socialist Yugoslavia*, "History and Anthropology" 2017, vol. 29, no. 2, p. 141–162, https://doi.org/10.1080/02757206.2017.1340279.

[96] B. Romano, F. Zullo, L. Fiorini, A. Marucci, *Illegal Building in Italy: Too Complex a Problem for National Land Policy?*, "Cities" 2021, vol. 112, https://doi.org/10.1016/j.cities.2021.103159.

[97] Law No. 06/L-024 of 20 August 2018 on treatment of constructions without permit (Official Gazette of the Republic of Kosovo, https://gzk.rks-gov.net/ActDetail.aspx?ActID=17767 [access: 20.03.2025].

[98] *Kosovo National Strategy…*, op. cit.

[99] See D. Todorovski, J. Zevenbergen, P. van der Molen, *Conflict and Post-conflict Land Administration…*, op. cit.

mance and the doctrines of positive prescription or adverse possession.[100] Only a fraction of informally held property rights were addressed under the HPD.[101] Currently, verbal contracts are being addressed under a convoluted institutional framework, involving the Kosova Property Comparison and Verification Agency,[102] the Kosova Cadastral Agency[103] and general courts, all of which have competence for handling such issues. The process of comparing and verifying cadastral records that were dislocated in Serbia with the set of post-conflict cadastral records of Kosova[104] represents another significant challenge for addressing informally held property rights. The process of addressing unpermitted structures in property-law terms is proving to be a major challenge.

8. Conclusion

The central role of property in the peacebuilding and state building project in Kosova has created a unique legal landscape, largely based on neoliberal principles and orthodox market-based theory. Hehir argues that "it is highly unlikely that anything like the project launched in Kosovo in 1999 will be attempted in the foreseeable future".[105] Similarly, Richmond and Franks asserted that "[u]nderwritten by the principal tenets of the liberal peace, the Kosova 'trusteeship' was to be the most ambitious UN state building project".[106] Its nature and institutions have been fundamentally changed since the late 1990s, first

[100] *Litigating Ownership of Immovable Property in Kosovo*, Organization for Security and Co-operation in Europe, Helsinki 2009, https://www.osce.org/files/f/documents/9/9/36815.pdf [access: 20.03.2025].

[101] See Regulation No. 2000/60 of United Nations Interim Administration Mission in Kosovo of 31 October 2000 on residential property claims and the rules of procedure and evidence of the Housing and Property Directorate and the Housing and Property Claims Commission, UNMIK/REG/2000/60.

[102] Law No. 08/L-052 of 11 January 2023 on amending and supplementing Law No. 05/L-010 on the Kosovo Property Comparison and Verification Agency, Official Gazette of the Republic of Kosovo No. 3, https://gzk.rks-gov.net/ActDetail.aspx?ActID=13023&langid=2 [access: 20.03.2025].

[103] Law No. 08/L-237 of 9 January 2024 on Cadastre of Immovable Property, Official Gazette of the Republic of Kosovo No. 2, https://gzk.rks-gov.net/ActDetail.aspx?ActID=2757&langid=2 [access: 20.03.2025].

[104] Law No. 05/l-010 of 3 November 2016 on the Kosovo Property Comparison and Verification Agency, Official Gazette of the Republic of Kosovo No. 37, https://gzk.rks-gov.net/ActDetail.aspx?ActID=13023&langid=2 [access: 20.03.2025].

[105] A. Hehir, *Continuity or Change? Intervention and Statebuilding after Kosovo*, "Journal of Intervention and Statebuilding" 2019, vol. 13, no. 5, p. 581–593, https://doi.org/10.1080/17502977.2019.1658563.

[106] O.P. Richmond, J. Franks, *Liberal Peace Transitions: Between Statebuilding and Peacebuilding*, Edinburgh University Press, Edinburgh 2009.

by the UNMIK, then by EULEX, including major privatisation programmes and the introduction of the 99-year lease. The impact of this unconventional institutional interaction and the potential incoherence of many decisions by the various agencies on property disputes remains to be assessed. However, as the most comprehensive, distinct, unprecedented and *sui generis* legal and political landscape, the liberal peace project of Kosova might be considered experimental – especially in the field of property rights. Yet, neither the objective of ownership transformation nor the objective of restitution has been fundamentally addressed. The restitution of housing and property rights was advanced with weak land, housing and property rights documentation and records. Informality in land ownership and the issue of unpermitted structures are being addressed in isolation from other unresolved land rights issues, and eventually will be reviewed by the process of comparison and verification with previous cadastre registers. All this takes place in the context of major foreign investment (by the diaspora) in Kosova on new housing, rather than manufacturing industries, which explains the fact that in 2024 some 33% of all 560,000 houses and flats in Kosova were uninhabited.[107] Some contemporary issues, such as affordability and the low level of ownership by women, despite gender equality in the Kosovan Constitution,[108] have yet to be addressed.

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Squatting in Spain: The tension between the right to private property and the right to housing

Squatting w Hiszpanii: napięcie między prawem do własności prywatnej a prawem do mieszkania

Abstract: This paper analyses the practice of squatting in residential properties in Spain, which stems from the failure of public policies and which leads to different types of problems, for both homeowners and condominiums. The approach to this issue at the legislative, judicial and social levels is diverse and, quite often, contradictory depending on whether the measures are intended to protect the interests of the homeowners or of the squatters. For this reason, the right to private property and the remedies available to homeowners, on the one hand, and the implications of the right to housing, on the other hand, are briefly analysed based on the relevant case law, legislation and legal scholarship on this topic. The paper concludes that public authorities have delegated their duty to provide affordable housing to homeowners.

Keywords: squatting, crime of usurpation, right to housing, right of private property, domicile, housing policies

Abstrakt: Niniejszy artykuł analizuje praktykę squattingu w nieruchomościach mieszkalnych w Hiszpanii, która wynika z braku polityki publicznej i prowadzi do różnego rodzaju problemów, zarówno dla właścicieli domów, jak i wspólnot mieszkaniowych. Podejście do tego problemu na poziomie

legislacyjnym, sądowym i społecznym jest zróżnicowane i często rozbieżne w zależności od tego, czy środki mają na celu ochronę interesów właścicieli domów, czy też squattersów. Z tego powodu prawo do własności prywatnej i środki zaradcze dostępne dla właścicieli domów z jednej strony, a implikacje prawa do mieszkania z drugiej strony, są krótko analizowane w oparciu o stosowne orzecznictwo, przepisy i literaturę prawniczą w tym zakresie. W artykule stwierdzono, że władze publiczne delegowały swój obowiązek zapewnienia mieszkań w przystępnej cenie właścicielom domów.

Słowa kluczowe: przywłaszczenie, bezprawne przywłaszczenie nieruchomości, prawo do mieszkania, prawo własności prywatnej, miejsce zamieszkania, polityka mieszkaniowa

1. Introduction

According to the Spanish Sociological Research Center,[1] as of January 2025 housing was the top concern for most Spaniards, while squatting was ranked 39th out of a total of 57 issues. Squatting constitutes a criminal offence (crime of usurpation) which is regulated in Article 245 of the Spanish Criminal Code 1995 (CP).[2] It penalises anyone who occupies or stays in another person's property, dwelling or building without due authorisation or against the owner's consent, punishable with a fine of three to six months (in case of violence or intimidation, it shall be punished by imprisonment for one to two years). This criminal offence has increased progressively since 2011: a total of 14,621 properties were occupied by squatters in 2023 in Spain, according to the Statistical System of Criminality,[3] whereas this number was 12,214 in 2018, 7,739 in 2013 and 2,702 in 2010. There are no official data on the number of such properties in Spain, but it is estimated that the practice occurs primarily in the autonomous regions of Catalonia, Comunitat Valenciana, Andalusia (in the coastal regions) and Madrid, affecting around 78,800 dwellings, the vast

[1] *Barómetro de enero 2025*, https://www.cis.es/es/detalle-ficha-estudio?idEstudio=14870 [access: 4.03.2025].

[2] Ley Orgánica 10/1995 de 23 de noviembre 1995 del Código Penal, BOE-A-1995-25444, https://www.boe.es/eli/es/lo/1995/11/23/10/con [access: 4.03.2025].

[3] In these cases, a complaint was filed with the police, or an action was taken by the police on their own initiative – *Series anuales sobre Criminalidad*, https://estadisticasdecriminalidad.ses.mir.es/publico/portalestadistico/datos.html?type=pcaxis&path=/Datos11/&file=pcaxis [access: 4.03.2025].

majority of which (more than 80%) belong to legal entities (e.g. banks or real estate companies) – and most of which were previously vacant.[4] This is understandable given the fact that squatting in a household's primary residence or second home (the essential factor is the use of the dwelling as a space where the household fosters aspects of its private life, according to the Spanish Supreme Court ruling [STS] of 6 November 2020[5]) constitutes the crime of housebreaking (*allanamiento de morada*), punishable by imprisonment ranging from six months to two years (Article 202 CP). Accordingly, statistics show that 218 people were convicted for the crime of housebreaking in 2023 (255 in 2022), whereas that figure was 2,874 for the crime of usurpation (4,067 in 2022).[6]

This data may come as a surprise considering that Article 33.1 of the Spanish Constitution (CE)[7] recognises the right to private property and inheritance as a fundamental right (Constitutional Court ruling [STC] 204/2004 of 18 November[8]), and that both Article 348 of the Spanish Civil Code (1889[9] CCE) and Article 541-1 of the 5th Book of the Catalan Civil Code (2006[10] CCC) enshrine the right of ownership as an absolute right, entitling the homeowner to civil-law remedies (e.g. possessory actions or *rei vindicatio*) to recover possession of the property. For its part, Article 47.1 CE enshrines the right to decent and adequate housing as a programmatic principle, not as a fundamental right (STC 79/2024 of 21 May[11]), meaning that public authorities shall promote the necessary conditions and establish appropriate standards in order to make this right effective. There has also been debate about the significance of this phenomenon, given the total number of properties in Spain (26,623,708 million[12]) and the reported cases of usurpation: only 0.06% of the housing stock was affected in 2022, while

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4 *L'ocupació il·legal d'habitatges es xifra en 78.000 a Espanya*, https://www.icerda.org/ca/locupacio-il·legal-dhabitatges-es-xifra-en-78-800-avui-a-espanya/ [access: 4.03.2025].

5 Judgment of the Spanish Supreme Court of 11 December 2014, Case No. 852/2014, ES:TS:2014:5484.

6 *Conviction Statistics: Adults/Minors*, https://www.ine.es/dyngs/INEbase/es/operacion.htm?c=Estadistica_C&cid=1254736176793&menu=ultiDatos&idp=1254735573206 [access: 4.03.2025].

7 An English translation is available at: The Constitution of Spain, https://www.senado.es/web/conocersenado/normas/constitucion/detalleconstitucioncompleta/index.html?lang=en [access: 4.03.2025].

8 Judgment of the Constitutional Court of Spain of 18 November 2004, Case No. 204/2004, ES:TC:2004:204.

9 Real Decreto de 24 de julio de 1889 por el que se publica el Código Civil, BOE-A-1889-4763, https://www.boe.es/eli/es/rd/1889/07/24/(1)/con [access: 4.03.2025].

10 Ley 5/2006 de 10 de mayo 2006 del libro quinto del Código Civil de Cataluña, relativo a los derechos reales, BOE-A-2006-11130, https://www.boe.es/eli/es-ct/l/2006/05/10/5/con [access: 4.03.2025].

11 Judgment of the Constitutional Court of Spain of 21 May 2024, Case No. 79/2024, ES:TC:2024:79.

12 *Censos de Población y Viviendas 2021*, National Statistics Office, Madrid 2023, https://www.ine.es/prensa/censo_2021_jun.pdf [access: 4.03.2025].

the possessory proceedings filed for this reason (2,785) accounted for just 0.01% of the total.[13] However, the symptomatic importance of squatting should not be underestimated:[14] it is a clear example of the erosion of private property and of civil law in Spain. This weakening is evident at both the legal and jurisprudential levels, leading to widespread legal uncertainty among those affected, including banks, landlords and ordinary citizens.

This phenomenon is the result of a combination of different factors. First and foremost it is the weakening of private property and of civil law in Spain. As a matter of fact, Spain was ranked 15th out of a total of 19 economies in Western Europe in the 2024 edition of the International Property Rights Index.[15] The erratic multilevel public housing policies enacted in recent years in Spain[16] have failed to provide real alternatives to homeownership and leases. This has led to tenure becoming increasingly precarious and to a rise in the type of situations that constitute hidden homelessness, such as squatting, which has even been encouraged or protected by certain social movements and judicial decisions, having become an alternative way of gaining access to housing through national and regional laws since 2019. Furthermore, attempts to increase the stock of social and affordable housing (e.g. through expropriations or penalties for owners of empty homes at the regional level) have had limited success. It is worth highlighting that the number of empty dwellings in Spain is estimated at a total of 3,837,328 million homes (14.4% of the total housing stock,[17] although the reality may differ substantially). Furthermore, the stock of social housing is

[13] J.R. Pérez, *Los datos sobre okupación: hay una denuncia por cada 1.553 viviendas*, https://www.newtral.es/okupacion-viviendas-espana/20230506/ [access: 4.03.2025].

[14] See also M. Cuena Casas, *La ocupación ilegal de inmuebles: un necesario enfoque global*, "Cuadernos de derecho transnacional" 2023, vol. 15, no. 2, p. 301. She argues that minimising the phenomenon of squatting means accepting a flagrant and unjustified violation of property rights, which is an insult to the rule of law itself that can have undesirable economic consequences. Due to the importance and significance of the violation, the key is not the number of cases, but the fact that cases occur (ibidem, p. 304).

[15] S. Levy-Carciente, *International Property Rights Index 2024*, Property Rights Alliance, Washington 2024, https://cedice.org.ve/wp-content/uploads/2024/10/IPRI_FullReport2024_v3_compressed.pdf [access: 4.03.2025].

[16] The responsibility for regional planning and housing has been assumed by the Spanish Autonomous Communities based on Article 148.3 of the Spanish Constitution (CE), meaning they have their own housing laws and policies. However, the State might choose to legislate housing matters based on the exclusive competences attributed to the Spanish State by the CE, such as those outlined in Articles 149.1 CE (regulation of basic conditions ensuring the equality of all Spaniards in the exercise of their rights), 149.1.8 CE (the basis of contractual obligations [civil law]), 149.11 CE (the basis for regulations concerning credit, banking and insurance) and 149.13 CE (basic rules and coordination of general economic planning).

[17] *Censos de Población…* op. cit.

among the lowest in Europe: it is estimated to represent between 1% and 2.5% of the total stock.[18] In addition, the civil-law and criminal-law actions available to homeowners are not effective in practice, as shown below, as it can take months or even years to eventually evict squatters.

Not surprisingly, homeowners are increasingly relying on enterprises that specialise in negotiating with squatters to convince them to leave the property voluntarily in exchange for a payment from the homeowner.[19] It is worth noting that homeowners lose between 30% and 60% of the value of the property due to squatting.[20] Supported by the legal environment, a new phenomenon has emerged: so-called *inqui-okupación*,[21] where tenants pay the rent for one or two months and then stop paying while continuing to occupy the home, later applying for a suspension of the eviction due to their status as vulnerable persons. Properties with squatters are even sold, at a discount.[22] The legal uncertainty has also favoured the squatting of properties by criminal organisations, who then illegally rent them out to vulnerable persons or use them for other illicit activities, such as growing marihuana.[23] Also, in some cases, people organise themselves (as a citizen patrol) to protect homes from squatters.[24] This is understandable, as 80% of squatting cases take place in dwellings that are part of a condominium,[25] which might affect not only the homeowner, but also other

[18] The study is incomplete because it does not include, for example, dwellings belonging to third-sector entities. It can be found at Ministerio de transportes, movilidad y agenda urbana, DG de vivienda ysuelo, *Boletín especial vivienda social 2020*, Ministry of Transport, Mobility and Urban Agenda, Madrid 2020, p. 4, https://apps.fomento.gob.es/CVP/handlers/pdfhandler.ashx?idpub=BAW072 [access:4.03.2025].

[19] The most well-known is Desokupa (https://desokupa.com), but other companies have also been created for this purpose.

[20] R. Salvador, *El propietario pierde del 30% al 60% del valor cuando le ocupan un piso*, https://www.lavanguardia.com/economia/20220703/8382427/ocupacion-pisos-okupas-perdida-valor-vivienda.html [access: 4.03.2025].

[21] *Okupaciones e inquiokupación en auge, ante el caos normativo*, https://www.inmonews.es/okupaciones-inquiokupacion-auge-caos-normativo/ [access: 4.03.2025].

[22] P. Castán, *La venta de pisos ocupados prolifera en Barcelona y alimenta un 'negocio' paralelo de desocupaciones pagadas*, https://www.elperiodico.com/es/barcelona/20250330/auge-venta-pisos-okupados-convierte-negocio-okupas-inversores-115685713 [access: 31.03.2025].

[23] M. Saint-Germain, *Mafias, okupación y marihuana: otra tormenta en el mercado inmobiliario catalán*, https://cronicaglobal.elespanol.com/vida/20250129/mafias-okupacion-marihuana-tormenta-mercado-inmobiliario-catalan/919908054_0.html [access: 4.03.2025].

[24] See e.g. V. Yusti, *La patrulla vecinal de Carabanchel: una respuesta desesperada a la macrokupación de 28 pisos*, https://www.eldebate.com/espana/madrid/capital/20250112/patrulla-vecinal-carabanchel-respuesta-desesperada-macrokupacion-28-pisos_260050.html [access: 4.03.2025].

[25] E. Esparza, *Mayor protección del propietario ante la ocupación ilegal de la vivienda*, https://www.pisos.com/aldia/mayor-proteccion-del-propietario-ante-la-ocupacion-ilegal-de-la-vivienda/1628528/ [access: 4.03.2025].

neighbours and common areas of the multi-unit building. This problem has even led to the establishment of the Spanish Association of People Affected by Squatting,[26] with its counterpart being an office in Barcelona to provide advice to those who want to become squatters.[27]

Against this background, this paper first outlines how squatting has become an alternative means of accessing housing in Spain due to the failure of multilevel public housing policies. It then discusses the civil-law remedies available to homeowners, how squatting is dealt with in criminal law and the potential role of the right to housing. The paper concludes that public authorities must fulfil their duty to provide affordable and adequate housing without delegating this responsibility to homeowners. To this end, the relevant case law, legislation and legal scholarship on this topic are examined.

2. Squatting as an outcome of the failure of multilevel public housing policies in Spain

2.1. The erratic housing policies adopted since the global financial crisis

The squatting movement began to have a significant presence in Spain during the 1980s. Unlike other EU countries, in Spain there was a greater emphasis on squatting in self-managed social centres rather than private dwellings (entrepreneurial squatting). Likewise, these groups were not usually led by poor families, but by young groups from different social classes.[28] The 2007 global financial crisis triggered the emergence of new types of squatting: deprivation-based squatting (which involves poor or working-class people suffering housing deprivation) and squatting as a criminal activity. This outcome has been spurred by a series of social and legal developments.

Indeed, the erratic housing policies enacted in Spain have led to a progressive precariousness of tenure, with the measures taken by public authorities ranging from promoting homeownership to promoting squatting as a way of accessing housing. In this vein, credit restrictions and the insecurity of the labour

[26] *Homepage*, https://aeko.es [access: 4.03.2025].

[27] *Homepage*, https://oficinaokupacio.com [access: 4.03.2025].

[28] R. Adell, M.Á. Martínez (eds), *¿Dónde están las llaves? El movimiento okupa: prácticas y contextos sociales*, Catarata, Madrid 2004, https://www.miguelangelmartinez.net/IMG/pdf/2004_Donde_estan_las_llaves_Catarata.pdf [access: 4.03.2025].

market[29] since the GFC have posed difficulties when accessing homeownership, which is not a real option for many Spanish households, including young people and the less affluent, especially over the last 17 years. This implies that now only well-off households are able to secure a mortgage, with low-income families being excluded. Current statistics show that the homeownership rate among young people has decreased from 69.3% in 2011 to 36.1% in 2020 (with the overall homeownership rate falling from 82% to 73%).[30]

This context has led, firstly, to the economically less-favoured households being forced to rent, which has caused a bubble in the private rental market in large cities since 2016 (between 2015 and 2022, the accumulated growth of rental income per square metre of the rental housing stock exceeded 28.5%), with the indicators that measure economic effort being much higher than for home ownership with or without a mortgage (40.9% of Spanish households devoted more than 40% of their disposable income to housing, particularly among low-income households, compared to the EU average of 21.2%).[31] Secondly, this has led to a progressive precariousness in access to housing, with the rise of euphemisms such as "collaborative housing" and an increase in hidden homelessness situations, such as renting rooms[32] or squatting.

The policies adopted by legislators, as noted above, have been inconsistent. At the regional level, public authorities have attempted to regulate private property through sanctions, tax surcharges and the expropriation of vacant homes, but these measures have achieved limited success. Such measures, which fall under the category of administrative (public-law) regulations, have been deemed to be in accordance with the CE based on the social function of property (Art. 33.2 CE; see also STC 16/2018 of 22 February[33] and 32/2018 of 12 April[34]). At the state

[29] For instance, the unemployment rate among young people reached 21.3% in 2023, which has been constantly higher than the rate for both the Spanish economy as a whole (12.1%) and the rate for young Europeans (11.2%) – see Á. Gavilán, *Informe Anual 2023. Capítulo 4. El mercado de la vivienda en España: evolución reciente, riesgos y problemas de accesibilidad*, Banco de España, Madrid 2024, p. 24, https://www.bde.es/f/webbe/GAP/Secciones/SalaPrensa/IntervencionesPublicas/DirectoresGenerales/economia/Arc/Fic/IIPP-2024-04-23-gavilan2-es-or.pdf [access: 4.03.2025].

[30] Á. Gavilán, *Principales resultados de la encuesta financiera de las familias (EFF) 2020*, Banco de España, Madrid 2020, p. 16, https://www.bde.es/f/webbde/GAP/Secciones/SalaPrensa/IntervencionesPublicas/DirectoresGenerales/economia/Arc/Fic/IIPP-2022-07-27-gavilan.pdf [access: 4.03.2025].

[31] Á. Gavilán, *Informe Anual 2023...*, p. 41.

[32] The price of a room in Spain costs on average EUR 488 per month, that is, 57.3% more than 5 years ago (2019) and 89.4% more than 9 years ago (2015) – see A. López, *Viviendas compartidas en España en 2024*, https://blogprofesional.fotocasa.es/una-habitacion-en-espana-cuesta-un-90-mas-que-en-2015/ [access: 4.03.2025].

[33] Judgment of the Constitutional Court of Spain of 22 February 2018, Case No. 16/2018, ES:TC:2018:16.

[34] Judgment of the Constitutional Court of Spain of 12 April 2018, Case No. 32/2018, ES:TC:2018:32.

level, the first State Housing Act, enacted in 2023,[35] granted Autonomous Communities the authority to implement rent controls on residential leases (so far, only Catalonia has done so; it has been in force there since March 2024[36] and it is not having the desired results[37]). The Act has converted the ownership of primary residences into a land tenure controlled and supervised by the State.[38]

2.2. The gradual increase in squatting

Within this context, squatting has been encouraged by a series of social and legal developments since the GFC of 2007. For instance, 2011 marked the beginning of so-called "Robinprudence" in Spain, i.e. a "tolerant stage" with the non-payment of mortgages and rents being overlooked and permitted by some judges without any legal basis.[39] Examples of "Robinhoodian" court decisions in Spain are those that force creditors to accept a *datio in solutum* in

[35] Act 12/2023 of 24 May 2023 on the right to housing, BOE-A-2023-12203, https://www.boe.es/eli/es/l/2023/05/24/12/con [access: 4.03.2025]; enacted basically under the umbrella of art. 149.1.1 CE, offers common definitions for the whole housing system (e.g. social and affordable housing, art. 3), establishes the rights and duties of citizens in relation to housing (arts. 8 and 9), outlines broad principles on non-discriminatory urban rehabilitation, regeneration and renewal (arts. 12 and 13), implements new types of social housing (art. 17), regulates the so-called "stressed residential market areas" (e.g. when the average burden of the cost of a mortgage or rent on a household's budget, plus basic expenses and supplies, exceeds 30% of the average household income, art. 18) and promotes collaboration between public administrations and consumer protection institutions in relation to housing matters (art. 20), e.g. by implementing transparency measures in the purchase and rental of homes (art. 31).

[36] See Report for the declaration of 131 municipalities in Catalonia as areas of stressed residential market in accordance with Law 12/2023 of 24 May 2023, on the right to housing, https://habitatge.gencat.cat/ca/ambits/preus-ingressos-i-zones/limit-preu-lloguer/normativa/index.html [access: 4.03.2025].

[37] M. Gutiérrez, *Barcelona ha perdido el 75% de la oferta de alquiler permanente en cinco años*, https://www.lavanguardia.com/economia/20241009/10007925/barcelona-perdido-75-oferta-alquiler-permanente-cinco-anos.html [access: 4.03.2025].

[38] Article 10.1.a Act 12/2013 stipulates that the ownership of a dwelling comprises the power to use, enjoy and dispose of the property in accordance with its classification, state and objective characteristics, in accordance with the legislation on housing and other legislation that may be applicable, e.g. the acts implemented by Autonomous Communities. Unlike the previously discussed intrusive interventions of Autonomous Communities that interfered with the right to private property (e.g. expropriations of empty dwellings), which were of an administrative (public-law) nature, this article was enacted under the competence the State has to legislate on civil-law matters (Art. 149.1.8 CE), thereby affecting the right of ownership regulated in the Spanish Civil Code (Art. 348). See H.S. Moreno, *La evolución constitucional de la función social de la propiedad y el nuevo régimen del derecho de propiedad sobre una vivienda en la Ley por el derecho a la vivienda*, "Derecho privado y Constitución" 2023, vol. 42, p. 139 et seq.

[39] S. Nasarre Aznar, *Los años de la crisis de la vivienda. De las hipotecas subprime a la vivienda colaborativa*, Editorial Tirant Lo Blanch, Valencia 2020, p. 339 et seq.

the course of mortgage enforcement proceedings (which ordinarily requires the creditor's consent, according to Art. 1166 CCE) or those that do not allow them to continue seizing the debtor's assets once the mortgage enforcement proceedings have come to an end and the creditor acquires the encumbered property (in breach of Art. 1911 CCE). This open tolerance even led to the publication of the first "squatting manual" by the Platform of Mortgage Victims in 2013.[40]

A turning point was the legal protection of "vulnerable" squatters, who have never held a legal housing title. The first such measure was Catalan Decree-Law 17/2019[41], which amended Catalan Act 4/2016[42] by providing for the possibility of offering temporary accommodation to squatters occupying public housing if a series of conditions are met (e.g. if the squatters were at risk of residential exclusion). For its part, the First Additional Disposition of Catalan Act 24/2015[43] provides for (as amended by Decree-Law 17/2019) the duty of large landlords (e.g. legal entities owning more than 10 properties or natural persons owning more than 15 properties [Art. 5.9 of Act 24/2015]) to offer a social lease contract to squatters before initiating an eviction procedure, if the requirements established in the law are met. This measure was rendered unconstitutional by STC 16/2021 of 28 January[44] due to the legal instrument that was used (Decree-Law), but it was later reimplemented by Article 12 of Catalan Act 1/2022 of 3 March[45]. The measure was again rendered unconstitutional by STC 120/2024 of 28 October,[46] as it infringed on the state's exclusive competence on procedural legislation (Art. 149.1.6 CE).

At the central/state level, Royal Decree Law 11/2020 of 31 March[47] was enacted during the lockdown caused by COVID-19 to protect vulnerable tenants

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[40] *Manual 'obra social la PAH'*, P.A.H. Obra Social, 2013, https://afectadosporlahipoteca.com/wp-content/uploads/2013/07/MANUAL-OBRA-SOCIAL-WEB-ALTA.pdf [access: 4.03.2025].

[41] Decree-Law 17/2019 of 23 December 2019 on urgent measures to improve access to housing, BOE-A-2020-2509, https://www.boe.es/eli/es-ct/dl/2019/12/23/17/con [access: 4.03.2025].

[42] Catalan Act 4/2016 of 23 December 2016 on measures to protect the right to housing for people at risk of residential exclusion, BOE-A-2017-522, https://www.boe.es/eli/es-ct/l/2016/12/23/4/con [access: 4.03.2025].

[43] Catalan Act 24/2015 of 29 July 2015 on urgent measures to address the emergency in the field of housing and energy poverty, BOE-A-2015-9725 https://www.boe.es/eli/es-ct/l/2015/07/29/24 [access: 4.03.2025].

[44] Judgment of the Constitutional Court of Spain of 28 January 2021, Case No. 16/2021, ES:TC:2021:16.

[45] Act 1/2022 of 3 March 2022 amending Act 18/2007, Act 24/2015, and Act 4/2016, to address the housing emergency, BOE-A-2022-4208, https://www.boe.es/eli/es-ct/l/2022/03/03/1 [access: 4.03.2025].

[46] Judgment of the Constitutional Court of Spain of 8 October 2024, Case No. 120/2024, ES:TC:2024:120.

[47] Royal Decree-Law 11/2020 of 31 March 2020 adopting additional urgent social and economic measures to deal with COVID-19, BOE-A-2020-4208, https://www.boe.es/eli/es/rdl/2020/03/31/11/con [access: 4.03.2025].

from being evicted; it postponed evictions for a maximum of six months after its entry into force. Tenants were entitled to apply for an extraordinary suspension of an eviction. Royal Decree-Law 1/2021 of 19 January[48] extended this possibility to other court proceedings (e.g. possessory actions), including squatters involved in criminal proceedings until the end of the state of alarm (which was initially expected to conclude on 9 May 2021), provided that the requirements established in the law were met (e.g. the tenants were in a vulnerable situation).[49] STC 15/2023 of 7 March[50] deemed this measure to be constitutional, as the proprietary faculties of homeowners are only affected temporarily and only applies in cases where the legally established cumulative requirements are met. This is consistent with the previous doctrine of the Spanish Constitutional Court.[51] Homeowners are entitled to demand compensation according to Articles 4–6 of the Second Additional Disposition of Royal Decree-Law 37/2020 of 22 December[52] (which will consist of the average cost of renting a home in the area where the property is located), but only if certain requirements are met. For instance, homeowners must apply for compensation within three months of the date of the social services report, provided that the report identifies the appropriate measures required to address the proven situation of vulnerability and that those measures have not been adopted. In addition, the homeowner must also prove that the suspension of the eviction has caused them economic harm because the property was offered for sale or rent prior to being occupied. It has been argued that these requirements violate Art. 33.3 CE.[53]

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[48] Royal Decree-Law 1/2021 of 19 January 2021 on the protection of consumers and users against situations of social and economic vulnerability, BOE-A-2021-793, https://www.boe.es/eli/es/rdl/2021/01/19/1 [access: 4.03.2025].

[49] This does not mean that criminal proceedings will not be pursued against the squatters, as the judge can only intervene to suspend the eviction once a final judgment is made. SAP Madrid 17 March 2022 (Judgment of the Provincial Court of Madrid of 17 March 2022, ES:APM:2022:3512) precisely denied a request from a squatter to suspend the criminal procedure on the basis of RDL 12/2021.

[50] Judgment of the Constitutional Court of Spain of 7 March 2023, Case No. 15.2023, ES:TC:2023:15.

[51] I.G. Fernández-Díez, *La suspensión temporal del procedimiento de desahucio o de los lanzamientos derivados de una condena penal en el caso de la llamada «ocupación pacífica» de viviendas: aspectos legales y constitucionales*, "Cuadernos de Derecho Privado" 2021, vol. 1, p. 104 et seq.

[52] Royal Decree-Law 37/2020 of 22 December 2020 on urgent measures taken to combat social or economic vulnerability related to housing and transportation, BOE-A-2020-16824, https://www.boe.es/eli/es/rdl/2020/12/22/37/con [access: 4.03.2025].

[53] "No one may be deprived of his or her property and rights, except when justified on the grounds of public utility or social interest and only when accompanied by the payment of the corresponding compensation in accordance with the law". See I.G. Fernández-Díez, *La suspensión temporal del procedimiento…*, p. 119.

Thus far, the deadline for this measure has been extended several times, and it is now scheduled to be in force until December 2025,[54] so it seems that the right to property is no longer affected temporarily, but permanently, which violates Art. 33.1 CE.[55] Indeed, there is a real risk that this measure will become *de facto* permanent, as has occurred with the moratorium that protects vulnerable mortgage debtors from eviction, implemented by Act 1/2013 of 14 May.[56] It was only supposed to be in force for a period of two years, but it has been extended several times, with the current expiration set for May 2028.[57]

There are no official statistics on the number of people who benefited from such measures, but it is estimated that 25% of the evictions carried out from 2021 to 2023 would have been suspended had these measures been applied.[58]

Lastly, the State Housing Act of 2023 also takes squatters into consideration in the application of procedural law. "Big landowners" (i.e. natural or legal persons owning more than 10 properties [Article 3.1.k]), prior to initiating a possessory procedure to recover the possession of a dwelling, were required to prove whether the occupant was in a vulnerable position and to start an intermediation procedure with the occupier (5th Additional Disposition Act 12/2023). These measures were rendered unconstitutional by STC 26/2025 of 29 January,[59]

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[54] Article 72.1 of Royal Decree-Law 1/2025 of 28 January 2025 approving urgent measures in the areas of the economy, transportation, and social security, and to address situations of vulnerability, BOE-A-2025-1560, https://www.boe.es/eli/es/rdl/2025/01/28/1/con [access: 4.03.2025].

[55] In this vein, it has been argued that suspending an eviction for such a long period would constitute an unjustified postponement of the right of the landowner to the execution of a final judgment, which cannot be shielded by reasons of public order or of giving due social attention to people in vulnerable situations, as it is the responsibility of the public authorities to satisfy these needs, not landowners – J.L. Rodríguez Lainz, *Mitos, leyendas y otros sesgos doctrinales sobre el delito de ocupación ilegal de inmuebles. Parte II*, https://diariolaley.laleynext.es/Content/Documento.aspx?params=H4sIAAAAAAAAEAFWNsQ7CIBiEn0ZmQCRx-KfiG3Q3tByGSPgNpca-vbCYeMMNd-7n7UgjkZtllrLX6LN6oW-JCWmojr0qJwgGzm2gvATEVBJH9gjyNGJ9GDxTUtN5q5TrWKR6O1_l4gaLPGwQW5ucf5P47R0it05xvIHU5aaNkt1F_AVFDmm-ZAAAAWKE [access: 4.03.2025].

[56] Act 1/2013, of 14 May 2013 on measures to strengthen protection for mortgage debtors, debt restructuring, and social rentals, BOE-A-2013-5073, https://www.boe.es/eli/es/l/2013/05/14/1/con [access: 4.03.2025].

[57] The last extension was made by article 1.1 of Royal Decree-Law 1/2024 of 14 May 2024 extending the measures suspending evictions from primary residences for the protection of vulnerable groups, BOE-A-2024-9699, https://www.boe.es/eli/es/rdl/2024/05/14/1 [access: 4.03.2025].

[58] G. Domingo Utset, M.R. Díaz-Reixa, L. Delgado Ramisa, I. Escorihuela Blasco, *Informe impacto de la moratoria de desahucios 2021-2023. Primera evaluación de las medidas para evitar los lanzamientos del "escudo social": RDL 11/2020 y sus prórrogas*, Observatori DESCA, Barcelona 2024, https://afectadosporlahipoteca.com/wp-content/uploads/2024/12/informe-moratoria-desahucios-vf.pdf [access: 4.03.2025].

[59] Judgment of the Constitutional Court of Spain of 29 January 2025, Case No. 26/2025, ES:TC:2025:26.

as they placed a disproportionate burden on landowners seeking to exercise the right to effective judicial protection (Art. 24 CE).

All in all, the adoption of such measures at the central/state and regional levels does not contribute to making the right to decent and adequate housing under Article 47 CE an effective right. On the contrary, it has the effect of making housing increasingly unaffordable in any form of tenure.[60] In addition, squatting has become another form of temporary housing tenure when the occupants are in a vulnerable situation.[61]

3. Civil-law remedies available to homeowners

3.1. Overview

The protection offered by the legal system against squatting is mainly based on the procedural actions derived from the civil-law protection of possession (Articles 446 CCE and 522-7.1 CCC). Indeed, Article 250.1.2 of the Spanish Civil Procedural Law of 2000 (LEC)[62] provides for the possibility of filing a summary action to seek the recovery of a rural or urban property that has been precariously transferred, either by the owner, an usufructuary or any other person entitled to possess the property. The case law has further expanded the concept of "precariousness", which was originally limited to being in possession of a property with the tolerance of the owner, to include other cases such as the possession of an alien thing without holding any legal title to it and against the will of the owner: "squatting" (see STS 21 December 2020[63]). Article 250.1.4 LEC also provides for a summary action to seek the recovery of an asset or right by those who have been deprived of it or whose enjoyment of it has been disturbed. In this case, no definitive decision is taken on issues of ownership or superior right to possession, which are reserved for a subsequent declaratory judgment (STS 28 February 2022[64]). Of course, homeowners may

[60] See S. Nasarre Aznar, *Los retos de la vivienda en Europa. Especial atención a la evolución y situación en España*, Diputada al Parlamento Europeo, Brussels 2025, p. 35 et seq., https://sergionasarre.eu/wp-content/uploads/2025/03/snasarre-retos-de-la-vivienda-en-europa-2025.pdf [access: 4.03.2025].

[61] F.P. Méndez González, *La crisis de asequibilidad de la vivienda. Análisis y propuestas*, Tirant lo Blanch, Valencia 2025, p. 172, 188.

[62] Act 1/2000 of 7 January 2000 on Civil Procedure, BOE-A-2000-323, https://www.boe.es/eli/es/l/2000/01/07/1/con [access: 4.03.2025].

[63] Judgment of the Spanish Supreme Court of 21 December 2020, Case No. 4385/2020, ES:TS:2020:4385.

[64] Judgment of the Spanish Supreme Court of 28 February 2022, Case No. 149/2022, ES:TS:2022:792.

exercise claims to recover possession of the property based on the right of ownership. The most common type of claims is *rei vindicatio* (Articles 348 CC and 544-1 CCC). Also, Article 250.1.7 LEC establishes that holders of property rights which are duly registered in the Land Register may file a claim to enforce those rights in the event that they are disturbed.

In practice, there are no official statistics on the most commonly used procedures, as each one has its own pros and cons.[65] For instance, a summary action under Article 250.1.4 LEC results in a judgment with *res judicata* effects (concerning the possession) and there is no one-year limitation period, as occurs with actions regulated under Article 250.1.2 LEC (following Article 439 LEC), while the defendant's grounds for opposition are legally limited (Article 444.2 LEC) in the procedure outlined in Article 250.1.7 LEC. On the other hand, *rei vindicatio* is not a summary proceeding, making it a slower route to recover possession of a property. However, these procedures were not specifically intended to address squatting, which led the Spanish legislature to implement a new procedure through Act 5/2018 (see below).

Indeed, as there are no precautionary measures in the framework of the possessory procedures that allow for the occupier to be evicted in advance,[66] Act 5/2018 of 11 June[67] implemented a new summary possessory procedure with the aim of speeding up the recovery of properties occupied by squatters. Under this act, squatters (after the decree admitting the claim) shall be given five days to provide a legal title justifying their possession. If they fail to do so, the court shall immediately order that the property be delivered to the possession of the claimant, without the need to wait for the 20-day period referred to in Art. 548 LEC to elapse. Social services shall be notified if the squatters consent to a search for alternative remedies to their situation. STC 32/2019 of 28 February[68] upheld the constitutionality of Act 5/2018, as it does not infringe on the right to effective judicial protection (Article 24 CE).

However, the Act has proven to be ineffective in practice. It is worth noting that only individuals, non-profit entities and public entities are entitled to use this legal action, as it excludes legal entities – who are the ones most affected by the phenomenon. Condominiums are also excluded, and must instead file

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[65] According to A. Miranda Anguita, *Acción de indemnización de daños y perjuicios frente al poseedor en precario de un inmueble*, "Revista Crítica de Derecho Inmobiliario" 2023, no. 800, p. 3544 et seq.

[66] As highlighted in M. Cuena Casas, *La ocupación ilegal…*, p. 316.

[67] Act 5/2018 of 11 June 2018 amending Act 1/2000 of 7 January, on Civil Procedure, regarding the illegal occupation of homes, BOE-A-2018-7833, https://www.boe.es/eli/es/l/2018/06/11/5 [access: 4.03.2025].

[68] Judgment of the Constitutional Court of Spain of 28 February 2019, Case No. 32/2019, ES:TC:2019:32.

for an injunction (under Articles 553-40.1 CCC and 7.2 Spanish Condominium Act 49/1960 of 21 July[69]) if the activities of homeowners (or squatters) disrupt social harmony or might cause damage to the property. Furthermore, the introduction of the new possessory action initially helped to effectively reduce the average length of the procedure, bringing it down to 4.8 months in 2018. However, it has increased progressively since then, reaching an average of 12 months (one year) in 2023,[70] which is almost identical to the duration of the summary possessory procedures mentioned above (12.7 months in 2023). In addition, squatters –when required to do so by the court – often provide a title that appears valid, allowing the summary procedure to be easily delayed.[71] It has been suggested that an ad hoc court hearing should be implemented to analyse the validity of titles submitted by squatters.[72] In the end, the speed of the process depends on the court hearing the case.

3.2. Discussion

The recovery of possession of the property by its rightful owner should occur as quickly as possible. Any delay would undermine the right to property as guaranteed under Article 33 CE. In fact, the European Court of Human Rights has emphasised the need for procedures not to be unduly prolonged.[73] The Spanish legislature has tried to streamline the possession procedure through Act 5/2018, but the lack of human and material resources within the justice system has diminished the effectiveness of the procedure.[74] Furthermore, the exclusion of legal entities from the scope of the law warrants a negative

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[69] Act 49/1960 of 21 July 1960 on horizontal property, BOE-A-1960-10906, https://www.boe.es/eli/es/l/1960/07/21/49/con [access: 4.03.2025].

[70] *Estimación de los tiempos medios de duración de los procedimientos judiciales – Órganos Unipersonales*, https://www.poderjudicial.es/cgpj/es/Temas/Transparencia/ch.Estimacion-de-los-tiempos-medios-de-duracion-de-los-procedimientos-judiciales.formato1/?idOrg=20&anio=2023&territorio=España&proc=Verbales%20posesorios%20por%20ocupación%20ilegal%20de%20viviendas [access: 4.03.2025].

[71] M. Cuena Casas, *La ocupación ilegal…*, p. 317.

[72] M. Cuena Casas, *La deficiente tutela procesal civil de la posesión: una llamada a la "okupación" de inmuebles*, https://www.hayderecho.com/2020/12/14/la-deficiente-tutela-procesal-civil-de-la-posesion-una-llamada-a-la-okupacion-de-inmuebles/ [access: 4.03.2025].

[73] Judgment of the European Court of Human Rights of 13 December 2018, 67944/13, *Casa di Cura Valle Fiorita S.r.l. v. Italy*, LEX 2602643.

[74] As pointed out by V. Pérez Daudí, J. Sánchez García, *La okupación de bienes inmuebles y la protección efectiva del poseedor legítimo*, https://diariolaley.laleynext.es/Content/Documento.aspx?params=H4sIAAAAAAAAEAMtMSbF1CTEAAmNDE3NTY7Wy1KLizPw827DM9NS8klS13MSSktQiWz9HABfbwl4qAAAAWKE [access: 4.03.2025].

ruling on its constitutionality, as it contradicts Article 33.1 CE[75] (which recognises that legal entities are also entitled to the rights granted by the CE, as established in STC 23/1989 of 2 February,[76] such as the right of private property). Condominiums were also excluded from the scope of Act 5/2018. Considering that the available legal action may take up to several years,[77] it has been suggested that the condominium should have a legitimate right to file an action against squatters, either directly or subsidiarily, if the homeowner of the property fails to do so.[78]

As a matter of fact, a similar measure was implemented by the Catalan legislature through Act 1/2023 of 15 February.[79] The procedure is as follows: in the event of squatting, a "big landowner" (as defined above in Catalan law) must take the necessary actions to evict squatters if the situation disrupts community harmony or poses a threat to the safety or integrity of the property. If they do not act, the city council of the municipality where the property is located may compel the "big landowner" to do so (ex officio or at the request of the condominium board). If no action is taken within one month of the request, the city council is entitled to initiate the eviction procedure (Arts. 44 bis Catalan Housing Act 1/2007 of 28 December[80] and 553-40 CCC). As the standard conduct of a "big landowner" involves non-compliance with the social function of the property, this may be grounds for the city council of the municipality where the property is located to temporarily acquire use of the dwelling for a period of seven years (Article 118.7 Act 18/2007). The Act does not specify which procedure the admi-

[75] Á. Juárez Torrejón, *El derecho de propiepdad y vivienda: perfiles constitucionales y legales*, in: M.G. Rodríguez de Almeida (ed.), *"Nuevo" derecho de propiedad inmobiliaria en Iberoamérica*, Tirant lo Blanch, Valencia 2022, p. 44 et seq. It could also violate Art. 24 CE – see V. Gimeno Sendra, *Lección 17. Los juicios posesorios*, in: V. Gimeno Sendra, M. Díaz Martínez, S. Calaza López (eds), *Derecho Procesal Civil. Parte Especial*, Tirant lo Blanch, Valencia 2020, p. 378.

[76] Judgment of the Constitutional Court of Spain of 2 February 1989, Case No. 23/1989, https://www.boe.es/diario_boe/txt.php?id=BOE-T-1989-4730 [access: 4.03.2025].

[77] J. Bueno Del Amo, *Comunidades que "desokupan" viviendas*, https://elpais.com/economia/2020-09-04/comunidades-que-desokupan-viviendas.html [access: 4.03.2025].

[78] A. Fuentes-Lojo Rius, *Ocupación y desahucios. Problemática procesal y propuestas de lege ferenda*, in: M.G. Rodríguez de Almeida (ed.), *"Nuevo" derecho de propiedad inmobiliaria en Iberoamérica*, Tirant lo Blanch, Valencia 2022, p. 92 et seq.

[79] Act 1/2023 of 15 February 2023 amending Act 18/2007, on the right to housing, and Book Five of the Civil Code of Catalonia, relating to property rights, in relation to the adoption of urgent measures to address the inaction of property owners in cases of illegal occupation of homes that disrupt neighborly coexistence, BOE-A-2023-5752, https://www.boe.es/eli/es-ct/l/2023/02/15/1 [access: 4.03.2025].

[80] Act 18/2007 of 28 December 2007 on the right to housing, BOE-A-2008-3657, https://www.boe.es/eli/es-ct/l/2007/12/28/18/con [access: 4.03.2025].

nistration could employ for this purpose, but it seems that criminal proceedings are excluded.[81] However, in our view, Catalan Act 1/2023 contradicts Arts. 33.1 and 3 CE, as it allows the public administration to temporarily expropriate the use of private property without providing compensation.

Be that as it may, other measures have been suggested as alternative possessory remedies available to homeowners, such as a new procedure specifically designed to protect real estate owners seeking the immediate recovery of possession of a property seized by squatters, by postponing the procedural hearing where the occupant can present counterarguments during possessory proceedings until after the delivery of possession, or by prohibiting appeals against a court ruling ordering the delivery of possession, thus obliging the occupant, where appropriate, to engage in the corresponding declaratory proceedings to assert their rights.[82]

4. Effectiveness of the criminal procedure

4.1. Overview

In the criminal sphere, the crime of usurpation (Article 245 CP) requires the fulfilment of certain requirements (STS 18 May 2023[83]): (1) that the occupied property, dwelling or building is not the residence of another person at the time the occupation occurs (if it is, the crime is considered housebreaking, as per Article 202 CP); (2) that the occupation takes place without violence or intimidation and is intended to be permanent (i.e. not temporary, transitory or occasional, such as a stay of a single night or a few days; in this case an administrative penalty might be imposed, as discussed below); (3) that the oc-

[81] A. Fuentes-Lojo Rius, *La novedosa legitimación por substitución de la Administración para desahuciar a okupas*, https://diariolaley.laleynext.es/dll/2023/04/05/la-novedosa-legitimacion-por-substitucion-de-la-administracion-para-desahuciar-a-okupas [access: 4.03.2025].

[82] See A. Fuentes-Lojo Rius, *Ocupación y desahucios…*, p. 2 et seq. For a discussion in favour of a new civil-law procedure that includes a specific precautionary measure without allowing the squatter the possibility of presenting conclusive proof that they should not be evicted, see M.G. Rodríguez de Almeida, *La okupación de inmuebles: un supuesto de posesión ilegítima*, "Revista Crítica de Derecho Inmobiliario" 2021, no. 784, p. 1202.

[83] Judgment of the Spanish Supreme Court of 18 May 2023, Case No. 2136/2023, ES:TS:2023:2136. See also C. Vázquez González, *Lección 12. Delitos contra el patrimonio y el orden. Socioeconómico (I). Hurto, robo, extorsión y usurpación*, in: C. Vázquez Gónzalez, D. Fernández Bermejo, S. Cámara Arroyo, M. Teijón Alcalá, F.L. Meléndez Sánchez (eds), *Derecho Penal. Parte especial*, Tirant lo Blanch, Valencia 2023, p. 463 et seq.

cupation lacks a legal title which legitimises the possession of the property (e.g. a contract or the explicit tolerance of the homeowner); (4) that there is evidence of the owner's express opposition and intolerance of the occupation; and finally, (5) that there must be malice on the part of the perpetrator, which includes knowledge of the alien nature of the property and the lack of authorisation. The legal interests protected by this criminal offence are real estate assets (STS 12 November 2014[84]).

In addition to the need to comply with these requirements, there are other problems with the crime of usurpation that are worth noting. As it is now considered a minor or misdemeanour offence under the CP following the passage of Organic Act 1/2015,[85] in practice this means there are greater difficulties when seeking an immediate eviction based on a criminal precautionary measure (Article 13 of the Criminal Procedure Act 1882[86] [LECrim]). This is highly significant as the police (unlike in the case of housebreaking) cannot intervene unless squatters are caught in flagrante delicto (Article 553 LECrim), where the person who is committing or has just committed the crime is caught in the act (Article 795 LECrim). In fact, the judicial intervention introduced by Act 5/2018 was key to its constitutionality (STC 32/2019). Indeed, once individuals establish themselves in the property, it is deemed to be their "home", therefore triggering the protection offered by the concept of the inviolability of the home. As stated in Article 18.2 of the Constitution, "the home is inviolable. No entry or search may be made without the consent of the householder or a legal warrant, except in cases of flagrante delicto". For this requirement to be fulfilled, it is necessary to hold a court proceeding to ensure compliance with the right to effective judicial protection.[87] Moreover, the criminal procedure takes time due to the need to identify the occupants (this is not necessary in the possessory procedure introduced under Act 5/2018), who must appear at the proceedings with a lawyer and a legal representative. The same applies to enforcing the judgment (which takes place once the appeal has been resolved).[88]

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[84] Judgment of the Spanish Supreme Court of 12 November 2014, Case No. 800/2014, ES:TS:2014:5169.

[85] Organic Law 1/2015 of 30 March 2015 amending Organic Law 10/1995, of November 23, of the Criminal Code, BOE-A-2015-3439, https://www.boe.es/eli/es/lo/2015/03/30/1/con [access: 4.03.2025].

[86] Royal Decree-Law of 14 September 1882 approving the Criminal Procedure Act, BOE-A-1882-6036, https://www.boe.es/eli/es/rd/1882/09/14/(1)/con [access: 4.03.2025].

[87] L. Salamero Teixidó, *La autorización judicial de entrada en el marco de la actividad administrativa*, Marcial Pons, Madrid 2014, p. 390.

[88] S. Nogueras Capilla, *La usurpación de bienes inmuebles. Problemática del tratamiento penal como delito leve*, in: P. Izquierdo Blanco, J. Picó i Junoy (eds), *El juicio verbal y el desalojo de viviendas okupadas*, Wolters Kluwer, Madrid 2018, p. 321 et seq.

4.2. Discussion

The right to private property has been one of the pillars of the success of Western societies. While the prosperity gap between countries can be attributed to various factors, the presence of inclusive political and economic institutions that protect property rights has played an important role.[89] The significance of the right to property requires that the crime of usurpation must continue to be applied based on the principle of legality. Thus, if the objective and subjective elements of the offence are present (since Article 245 of the penal code makes no distinction between natural and legal persons – SAP Barcelona 4 November 2024[90]), criminal law must act independently of other legal channels,[91] such as the possessory remedies available under civil law (see e.g. SAP Madrid 28 November 2024[92] Barcelona 22 November 2024[93] or Murcia 12 November 2024[94]). Citizens cannot address the housing shortage on their own; it is the responsibility of public authorities to provide solutions to the housing problem (SAP Madrid 27 November 2024[95]).

However, case law shows that a minority of court rulings in squatting cases have set criminal law aside,[96] exemplifying what has been referred to as "Robinprudence". Thus, the principle of minimal intervention of criminal law has been applied in cases involving abandoned properties (or properties that

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[89] D. Acemoglu, J.A. Robinson, *Why Nations Fail: The Origins of Power, Prosperity, and Poverty*, Crown Publishers, New York 2012.

[90] Judgment of the Provincial Court of Barcelona of 4 November 2024, ES:APB:2024:14137.

[91] Following L. Roca de Agapito, *Consideraciones politico-criminales sobre el fenómeno delictivo de la usurpación de inmuebles ajenos*, in: F. Vázquez-Portomeñe Seijas (ed.), *Cuestiones actuales de política criminal*, Tirant lo Blanch, Valencia 2023, p. 192. The interest at stake (property rights) justifies the application of criminal law to prevent such crimes, but criminal law should be the last resort, i.e. it should only be employed in serious cases, not those involving temporary occupations or those where the squatter(s) do not intend to stay in the property permanently. Criminal law is also applicable when civil-law remedies are not enough to address the problem. See J.M. Jiménez París, *Desahucio exprés contra la ocupación de viviendas*, "Diario La Ley" 2018, no. 9262. For this author, not only should the criminal classification of this conduct be maintained, but the penalty for this criminal offence should be increased by at least one day's fine, to restore it to the category of a less serious crime. It is not appropriate to restrict the application of the criminal classification solely because possession is protected by civil law and based on the principle of minimum intervention of criminal law. See also M. Cuena Casas, *La ocupación illegal…*, p. 306.

[92] Judgment of the Provincial Court of Madrid of 28 November 2024, ES:APM:2024:13401.

[93] Judgment of the Provincial Court of Barcelona of 22 November 2024, ES:APB:2024:14078.

[94] Judgment of the Provincial Court of Murcia of 12 November 2024, ES:APMU:2024:2956.

[95] Judgment of the Provincial Court of Madrid of 27 November 2024, ES:APM:2024:16597.

[96] For more details, see J.L. Rodríguez Lainz, *Mitos, leyendas y otros sesgos doctrinales sobre el delito de ocupación ilegal de inmuebles. Parte I*, "Diario La Ley" 2024, no. 10583.

are in a completely uninhabitable state of repair) or situations where the owner lacks effective possession of the property. This has resulted in courts prioritising civil-law proceedings over criminal law (SAP Barcelona 27 November 2024[97] and 4 November 2024,[98] Cantabria 4 May 2023,[99] Guipúzcoa 31 March 2021[100] or Toledo 10 June 2020[101]). Another argument in this regard is the enactment of Organic Act 4/2015,[102] whose Article 37.7 classifies the occupation of any property, dwelling or building as an administrative (minor) offence when it does not constitute a criminal offence. This provision, which was deemed constitutional by STC 172/2020 of 19 November,[103] should be applied if the owner of the property does not exercise effective possession of it (SAP Islas Baleares 29 November 2018).[104] This line of reasoning has been supported by scholars, who argue that the owners of properties occupied by squatters are provided with sufficient (civil-law) remedies to end the occupation, and the issue should be addressed through these means.[105] Lastly, the personal, family and economic circumstances of the occupants must be taken into consideration when imposing the minimum fine provided for in Article 245.2 CP (SAP Madrid 24 July 2020[106]) and when applying exemption from criminal liability to occupants who are in a state of necessity under Article 20.5 CP (SAP Madrid 19 November 2018[107]).

At the legislative level, several proposals have been presented in the Spanish Congress,[108] tabling different approaches for addressing the phenomenon of squatting depending on the ideology (left-wing or right-wing) of the political party involved. These proposals include increasing the penalties for the crime of usurpation,[109] implementing precautionary measures to facilitate the eviction

[97] Judgment of the Provincial Court of Barcelona of 27 November 2024, ES:APB:2024:14168.

[98] Judgment of the Provincial Court of Barcelona of 4 November 2024, ES:APB:2024:14185.

[99] Judgment of the Provincial Court of Cantabria of 4 May 2023, ES:APS:2023:873.

[100] Judgment of the Provincial Court of Guipúzcoa of 31 March 2021, ES:APSS:2021:570.

[101] Judgment of the Provincial Court of Toledo of 10 June 2020, ES:APTO:2020:824

[102] Organic Law 4/2015 of 30 March 2015 on the protection of public safety, BOE-A-2015-3442, https://www.boe.es/eli/es/lo/2015/03/30/4/con [access: 4.03.2025].

[103] Judgment of the Constitutional Court of Spain of 19 November 2020, Case No. 172/2020, ES:TC:2020:172.

[104] Judgment of the Provincial Court of Islas Baleares of 29 November 2018, ES:APIB:2018:2520.

[105] F. Muñoz Conde, *Derecho Penal. Parte especial*, Tirant lo Blanch, Valencia 2023, p. 370; see also M. Roig Torres, *Delito de ocupación pacífica de inmuebles (art. 245.2 CP). Las últimas proposiciones de ley de reforma*, "Revista de Derecho Penal y Criminología" 2021, no. 25, p. 125 et seq.

[106] Judgment of the Provincial Court of Madrid of 24 July 2020, ES:APM:2020:8427.

[107] Judgment of the Provincial Court of Madrid of 19 November 2018, ES:APM:2018:15539.

[108] *Homepage*, https://www.congreso.es/en/ [access: 4.03.2025].

[109] Proposición de Ley Orgánica contra la ocupación ilegal y para la convivencia vecinal y la protección de la seguridad de las personas y cosas en las comunidades de propietarios (124/000003) of 23 February 2024, in parliamentary procedure. This measure is supported by F.J. Rodríguez

of squatters,[110] prohibiting squatters from registering in the Municipal Register of Inhabitants[111] and even decriminalising squatting entirely.[112]

In our view, an increase in the penalty does not necessarily mean fewer squatting cases, particularly when they involve families in need, who may continue to squat if they do not find alternative housing elsewhere. An increased penalty could have a deterrent effect in those cases where squatting pursues criminal purposes. However, challenges have been identified when seeking to apply the offence of criminal organisation,[113] as illustrated by a recent case in which a family was convicted of this crime (STS 17 May 2024[114]). Although the explicit regulation of a precautionary measure would provide legal certainty to homeowners and courts,[115] case law has effectively already granted such measures in squatting cases based on Article 13 LECrim, thanks to Instruction 1/2020 of 15 September, issued by the State Attorney General's Office,[116] provided that both *fumus boni iuris* and *periculum in mora* are present (Orders AP Burgos 17 October 2023,[117] Madrid 2 March 2023[118] and Barcelona 20 February 2023,[119] as well as Judgment SAP Santa Cruz de Tenerife 8 August 2022[120]). The effectiveness of the measure established in Organic Act 1/2025,[121] which amen-

Almirón, *Estudio jurisprudencial de las cuestiones más controvertidas en relación con el delito de usurpación del artículo 245 CP*, "Cuadernos de Política Criminal" 2020, no. 132, p. 222.

[110] Proposición de Ley de medidas urgentes para hacer frente a la ocupación ilegal de inmuebles (Orgánica) (122/000150) of 31 January 2025 (BOCG-15-B-173-1), in parliamentary procedure.

[111] Proposición de Ley de modificación de la Ley 7/1985, de 2 de abril, Reguladora de las Bases del Régimen Local, con el fin de modificar el padrón municipal en los casos de ocupación y de inmigración ilegal (122/000039) of 21 December 2023, rejected. The measure was supported by M. Cuena Casas, *La ocupación ilegal…*, p. 335.

[112] Proposición de Ley de emergencia habitacional en familias vulnerables en el ámbito habitacional y de la pobreza energética (122/000172) of 9 February 2018, rejected.

[113] Indeed, it is difficult to identify the members of the group or criminal organisation that promotes such behaviour. See J.C. Rodríguez Utrera, O*cupación ilegal y allanamiento de morada: Disfunción penológica y procesal*, https://confilegal.com/20210819-opinion-ocupacion-ilegal-y-allanamiento-de-morada-disfuncion-penologica-y-procesal/ [access: 4.03.2025].

[114] Judgment of the Spanish Supreme Court of 17 May 2024, Case No. 2558/2024, ES:TS:2024:2558.

[115] This measure was proposed by J. Muñoz Ruiz, *La ocupación pacífica de inmuebles: el delito leve de usurpación (art. 245.2 CP)*, "Cuadernos de Política Criminal" 2021, no. 134, p. 120–121. The author also argues in favour of the possible application of Article 334 LECrim (p. 118–119).

[116] Instruction 1/2020 of 15 September 2020, of the State Attorney General's Office on criteria for applying for precautionary measures in the crimes of breaking and entering and seizing property, BOE-A-2020-11243, https://www.boe.es/diario_boe/txt.php?id=BOE-A-2020-11243 [access: 4.03.2025].

[117] Judgment of the Provincial Court of Burgos of 17 October 2023, ES:APBU:2023:717A.

[118] Judgment of the Provincial Court of Madrid of 2 March 2023, ES:APM:2023:2579.

[119] Judgment of the Provincial Court of Barcelona of 20 February 2023, ES:APB:2023:1856A.

[120] Judgment of the Provincial Court of Santa Cruz de Tenerife of 8 August 2022, ES:APTF:2022:2000.

[121] Organic Act 1/2025 of 2 January 2025 related to measures regarding the efficiency of the Public Justice Service, https://www.boe.es/eli/es/lo/2025/01/02/1/con [access: 4.03.2025].

ded Article 795 of the LECrim, remains to be seen. The amendment expands the scope of the article to include the crime of usurpation, which means that expedited proceedings will be followed.

The decriminalisation of usurpation could, in turn, lead the legislature to redefine property rights based on the social function of the property, thereby granting greater protection to squatters. In fact, lower courts have invoked this principle to justify prioritising civil-law proceedings over criminal proceedings when landowners seek to recover possession of a property, particularly when the owner (a bank) has not been actively exercising its property rights (SAP Barcelona 3 June 2021[122]). As a matter of fact, Act 12/2023 has implemented a new regime governing the right of ownership of dwellings, granting public authorities the power to regulate their use. In light of the fact that the offence has been decriminalised, the question that arises is whether the legislature could go to the extreme of obliging certain owners of empty dwellings, whether natural or legal persons, to consent to their occupation by squatters who are at risk of social exclusion based on the social function of property. In our opinion, the ultimate safeguard for the right to private property lies in respecting its essential content, as established in Articles 33.1 and 53.1 of the Spanish Constitution. Any limitation must comply with the proportionality test (STC 48/2005 of 3 March[123]), which comprises three elements: (a) the judgment of appropriateness (the measure being assessed must be suitable for the constitutionally lawful objective to be achieved); (b) the judgment of necessity (the measure must be necessary, and no less onerous alternative exists); and (c) the judgment of proportionality in the strict sense, which entails a cost-benefit analysis, meaning the advantages obtained with the measure must outweigh the disadvantages it imposes.

Accordingly, a permanent legal legitimisation of squatting based on the social function of property would not pass the constitutionality test, since it would be neither appropriate (squatting cannot be considered a legitimate means of accessing housing, as discussed below) nor necessary (given the availability of other, more structural and less burdensome solutions). Furthermore, it would impose an undue burden on homeowners).[124]

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[122] Judgment of the Provincial Court of Barcelona of 3 June 2021, ES:APB:2021:7697.

[123] Judgment of the Constitutional Court of Spain of 3 March 1998, Case No. 48/1998, https://www.boe.es/buscar/doc.php?id=BOE-T-2005-5419 [access: 4.03.2025].

[124] As pointed out in H. Simón Moreno, *La ocupación de viviendas sin título habilitante y los derechos fundamentales y humanos en conflicto*, "Revista Critica de Derecho Inmobiliario" 2021, no. 786, p. 2165 et seq.

5. The right of ownership and the right to housing

5.1. Overview

The right to housing is enshrined in Article 25 of the Universal Declaration of Human Rights 1948[125] and Article 11 of the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR).[126] Its content is defined by a series of key elements, including security of tenure, availability of services, affordability, habitability, location and cultural adequacy. These standards do not impose obligations of result on States Parties, nor do they grant subjective rights in favour of citizens, as is the case with Article 47 CE.

However, some of the views expressed by the Committee on Economic, Social and Cultural Rights (CESCR), which monitors the implementation of the Convention and can study individual complaints alleging violations thereof (under Optional Protocol 1966[127]), stem from Spanish cases related to Article 11.1 ICESCR. In this regard, the CESCR has found that the right to adequate housing was violated in Spanish cases involving the eviction of squatters and tenants,[128] as these evictions took place without the Spanish authorities undertaking the required proportionality assessment. In squatting cases, the Committee emphasises that while the lack of legal title to a dwelling may justify an eviction,

[125] Universal Declaration of Human Rights of 10 December 1948, https://www.un.org/en/about-us/universal-declaration-of-human-rights [access: 4.03.2025].

[126] International Covenant on Economic, Social and Cultural Rights of 16 December 1966, https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights [access: 4.03.2025].

[127] Optional Protocol to the International Covenant on Civil and Political Rights of 16 December 1966, https://www.ohchr.org/en/instruments-mechanisms/instruments/optional-protocol-international-covenant-civil-and-political [access: 4.03.2025].

[128] Regarding squatters, see Communication from the Committee on Economic, Social and Cultural Rights, on the case of Yaureli Carolina Infante Díaz v. Spain, Communication No. 134/2019, E/C.12/73/D/134/2019, Decision of 27 February 2023; Communication from the Committee on Economic, Social and Cultural Rights, on the case of Sara Vázquez Guerreiro (represented by Plataforma de Afectados por la Hipoteca de Leganés) v. Spain, Communication No. 70/2018, E/C.12/74/D/70/2018, Decision of 9 October 2023; Communication from the Committee on Economic, Social and Cultural Rights, on the case of Maribel Viviana López Albán v. Spain, Communication No. 37/2018, E/C.12/66/D/37/2018, Decision of 11 November 2019. Regarding tenants, see Communication from the Committee on Economic, Social and Cultural Rights, on the case of Aicha Naser v. Spain, Communication No. 127/2019, E/C.12/71/D/127/2019, Decision of 28 February 2022; Communication from the Committee on Economic, Social and Cultural Rights, on the case of Mohamed Ben Hakima El Goumari and Ahmed Tidli v. Spain, Communication No. 85/2018, E/C.12/68/D/85/2018, Decision of 16 March 2021; and Communication from the Committee on Economic, Social and Cultural Rights, on the case of Mohamed Ben Djazia and Naouel Bellili v. Spain, Communication No. 5/2015, E/C.12/61/D/5/2015, Decision of 5 July 2017.

this process must comply with the provisions of the ICESCR, meaning that the court must assess the balance between the benefits of implementing the measure at that time (in this case, safeguarding the property rights of the entity that owns the property) and the potential consequences that this measure could have on the rights of the evicted persons (an analysis that was not carried out in this case). The CESCR proposes assessing the following aspects: the personal circumstances of the occupants and their dependents, whether the person occupied the property in good faith and whether they cooperated with the authorities in seeking suitable solutions. The ICESCR violation also occurred because the State denied families access to social housing due to their lack of legal title to the property, and also because it offered alternative accommodation (shelters) that could not be considered decent and adequate housing, since it did not provide legal security of tenure.

5.2. Discussion

The right to housing must be upheld and developed by public authorities at the state, regional and local levels. This obligation is founded on the provisions of both Article 47 CE and the ICESCR:

- Firstly, the right to housing cannot be seen as encouraging squatting, as this is an internationally recognised form of homelessness. Indeed, the European typology of homelessness and housing exclusion developed by the European Federation of National Associations Working with the Homeless[129] advocates a broader definition of homelessness that encompasses not only people without shelter or living in temporary accommodation, but also people living in inadequate or insecure housing. The latter category includes people in need of housing who are occupying a dwelling without a legal title.

It makes no sense to consider squatting a viable alternative for gaining access to housing, when it simultaneously constitutes a form of homelessness. For this reason, the convenience of legitimising this situation through the provisions of Catalan Decree-Law 17/2019 and Spanish Decree-Law 1/2021 must be called into question.

- Secondly, human rights have allowed international bodies to consider the rights of people who are evicted from their primary residence. Ho-

[129] *ETHOS – European Typology on Homelessness and Housing Exclusion*, https://www.feantsa.org/en/toolkit/2005/04/01/ethos-typology-on-homelessness-and-housing-exclusion [access: 4.03.2025].

wever, in reality the practical application of such rights in the civil-law sphere still raises serious doubts.

In its judgment from 6 November 2018,[130] the European Court of Human Rights ruled that Article 8 of the European Convention of Human Rights[131] (right to respect for private and family life) does not apply to relationships between private individuals. Consequently, the principle of proportionality (i.e. assessing the impact of eviction on the right to respect for private and family life) can only be invoked if a specific legal provision allows for it. The overall impact of the CESCR recommendations is likely to be quite limited in Spain due to the difficulty of conferring on them legal effect at the national level and their limited influence on the practices of national courts. These recommendations are not binding on Spanish courts, and no specific legal procedure requires courts to consider them. Moreover, Act 12/2023 only provides for the temporary suspension of an eviction (two months for natural persons and four months for legal persons) so that, during that time, the social services can take any measures they deem appropriate (Article 441.6 LEC). Therefore, this act has not fully implemented the requirement to evaluate the proportionality of the evictions, which is the standard mandated by the CESCR.[132] From the perspective of the CESCR, another question is whether social services should offer alternative accommodation to the occupants. In our view, this is not necessarily required. The CESCR stipulates that the State must have taken reasonable measures, to the maximum of its available resources, to provide alternative housing for those involved in eviction proceedings.[133] For this reason, a failure to provide suitable accommodation would not, in itself, give rise to financial liability for the administration (according to the CEDSC's views), provided that it can demonstrate an adequate use of available resources.

Nevertheless, it is important to remember that the right to private property is a fundamental right in Spain (Art. 33.1CE), whereas it is absent from the ICESCR principles. Therefore, the implementation of housing policies must take this right into consideration.

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[130] Decision of the European Court of Human Rights of 6 November 2018, 76202/16, *F.J.M. v. the United Kingdom*, LEX 2594235, para. 41 et seq.

[131] Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, https://www.echr.coe.int/documents/d/echr/convention_ENG [access: 4.03.2025].

[132] A. Macho Carro, *El examen de proporcionalidad de los desalojos forzosos y su recepción en el ordenamiento español*, "Revista de Derecho Político" 2023, no. 116, p. 330 et seq.

[133] See also A. Macho Carro, *La tutela del derecho a la vivienda en la doctrina del Comité de Derechos Económicos, Sociales y Culturales de Naciones Unidas (comentario a los dictámenes de febrero de 2021 sobre las comunicaciones 85, 54 y 48/2018)*, "Revista de Estudios Europeos" 2022, vol. 80, p. 228–229.

– Thirdly, public authorities, in view of the tangible content of the right to housing (Art. 47 EC), should seek structural solutions to the problem of squatting. For example, Spain needs to establish a comprehensive range of functional housing tenures covering the whole spectrum from public housing to full ownership. This should include various types of social housing, intermediate tenures (shared ownership and temporary ownership, a structural measure of civil law which is currently only regulated in the CCC – Arts. 547-1 et seq. and 556-1 et seq.) and a diversity of private rental options. These types of tenancy should cater to both young professionals in need of high mobility and households seeking long-term stability. Collaborative housing may also play a role. A broader spectrum of functional housing tenures would ensure more affordable housing options for every type of household, reducing reliance on financial markets and minimising the need for intervention by the public administration, which would ultimately mean more freedom for citizens.[134]

Another structural solution would be to increase the public stock of social housing. There are various ways to achieve this objective, ranging from housing construction to the mobilisation of vacant housing stock. In the latter case, in addition to providing owners with guarantees related to rent collection, housing maintenance, protection against non-payment etc., it is worth considering other measures or incentives. These might include financial aid for property renovations, close collaboration with real estate agents and the third sector to find suitable housing for specific groups or subsidies for property taxes and rubbish collection charges for owners who allocate their properties to the social rental sector. In any case, any expansion of the social housing stock should be accompanied by private partnerships to ensure proper management. There are currently a wide variety of providers/managers (public, mixed, private for-profit and private not-for-profit) operating in an unstructured and uncoordinated manner, with significant differences in terms of their nature and size (housing stock and staff).[135]

Another less intrusive option available to the legislature would be to encourage homeowners and squatters (provided they are in a proven state of

[134] S. Nasarre-Aznar, H. Simón Moreno, *Spain*, in: C. Schmid (ed.), *Ways Out of the European Housing Crisis*, Edward Elgar Publishing, Cheltenham 2022, https://housing.urv.cat/wp-content/uploads/2022/09/NasarreSimon-TenuresInnovationDiversification2022.pdf [access: 4.03.2025].

[135] N. Lambea Llop, *Social Housing Management Models in Spain*, "Revista Catalana de Dret Públic" 2016, no. 52, p. 115 et seq.

residential exclusion) to voluntarily reach a consensual solution by means of a proactive mediation/intermediation service provided by the public administration. Of course, in the case of public housing, this must not alter the ordinary allocation of social housing. Thus, access to subsidised housing must follow the corresponding administrative procedure and adhere to the same award criteria applied to all citizens, even in cases where specific regulations already provide for the allocation of housing in situations of extreme need (SAP Cáceres 29 January 2018[136]).

Conclusions

I. Squatting reflects the failure of multilevel public housing policies in Spain, which have lacked the effective structural measures required to combat this phenomenon. As a result, the duty of the public authorities to provide social housing has been shifted to private owners, particularly legal entities, thus exposing the ineffectiveness and inefficiency of the public authorities.

II. The analysis of the human and fundamental rights at stake shows that 1) while the right to private property is already protected under civil law, attempts to expediate the procedure have had limited success; 2) criminal procedures could be made more effective through the implementation of precautionary measures, whereas neither increasing the penalties nor decriminalising the offence constitute structural solutions; 3) squatting can hardly be protected by the right to housing when it is simultaneously considered to be a type of homelessness, which should therefore not be afforded legal protection; 4) the right to housing could be the basis for requiring the completion of a proportionality test to assess the level of interference in the private and family life of squatters when an eviction takes place, as advocated by the CESCR. In any case, the application of the principle of proportionality raises the issue of limitations, something which has yet to be resolved: to what extent can the fundamental right to property be restricted in such cases.

III. Public authorities must adopt structural measures to address housing affordability and the phenomenon of squatting. These measures include ensuring that the justice system has a sufficient level of material and human resources, diversifying land tenures, augmenting the social housing stock and mobilising

[136] Judgment of the Provincial Court of Cáceres of 29 January 2018, ES:APCC:2018:128.

empty dwellings, in addition to improving existing civil-law and criminal-law remedies.

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