

# The constitutional protection of property rights in European and United States systems – a comparative analysis

## Abstract

This article sets out a comparative overview of the legal and constitutional protection of property rights in the systems operating in Europe and the United States with a view to seeing how the right to property is protected through constitutions and international treaties. Most countries have established systems of human rights protections through constitutions, but many have also been influenced by the direct application of important international or regional human rights instruments. Evidently, constitutions set out basic rules which are not only established as superior law but which also set an example for citizens in emphasising the most important aspects of society. Simultaneously, international instruments for the protection of human rights lay out important responsibilities for states which have been interpreted in terms of both positive and negative obligations in the protection of such rights. In some systems, these international treaties take precedence over all domestic laws in that respective country while in others they even take precedence over the constitution where there are conflicts.

**Keywords:** human rights, property, European Convention on Human Rights, US constitution

## Introduction

In the United States, as in many other countries around the world, the Constitution is the most powerful ground for protecting private property rights from exercises of government power. It provides clauses on Takings, Contract and Due Process which became viable grounds for challenging excessive government regulation during the 19<sup>th</sup> and early 20<sup>th</sup> centuries. The right to own property is essential to individual liberty and is the birthright of every American.<sup>1</sup> That concept did not emerge from the property rights movements unless its origins were to be as recent as the Constitution or the Declaration of Independence.<sup>2</sup> Rather, as people who cherish liberty have always understood, property is the natural right of free individuals<sup>3</sup> while

1 It was from such stellar European thinkers as Locke and Montesquieu that the framers of the US Constitution drew both their inspiration and their worldview, considering property rights as rights that were both natural and inalienable.

2 Steven Eagle (2005) *The Birth of the Property Rights Movement* 4 CATO Institute Policy Analysis.

3 *ibid.*

the founding generation stressed the significance of property ownership as a safeguard of political liberty and the economic utility of private property.<sup>4</sup>

The protection given to property was fully consistent with one major theme of American constitutionalism – the restraint of government power over individuals since, historically, property ownership was viewed as establishing the economic basis for freedom from government coercion and the enjoyment of liberty.<sup>5</sup> The Fifth Amendment in the Bill of Rights contained two important clauses dealing with property: the due process clause; and the takings clause. Both were designed to limit the scope of majority rule over matters deemed fundamental in a free society.<sup>6</sup>

Over the past two centuries, the Supreme Court of the United States has used different clauses in the constitution as the basis for the protection of property rights.

In comparison to the US system, most European countries have included the right to property as a human right protected in their constitutions, but they have also been heavily influenced by the vast volume of cases produced by the European Court of Human Rights (ECtHR), especially during the last four decades. These cases, which provide an interpretation of Article 1 of Protocol 1 of the European Convention on Human Rights (ECHR), have involved citizens from different countries which are members of the Council of Europe (CoE). Thus, these court decisions have shaped the legal systems of the 47 European countries which are currently CoE members<sup>7</sup> while, in addition, they have had influence in some countries which are not members of the organisation but which have made the European Convention directly applicable in their countries by making it part of their constitutions or their legislation.<sup>8</sup>

Property rights were not included in the original text of the European Convention on Human Rights but, as already indicated, they were included rather later on as part of Protocol 1, which entered into force in 1954.<sup>9</sup> Since then, the European Court has gone on to interpret these provisions and to point out the basic rule that enjoyment of possessions is guaranteed but that such a guarantee is not without limits.<sup>10</sup> Moreover, through its decisions, the ECtHR has established three main principles that are important to understand when interpreting the rights to property:

- 4 James W. Ely, Jr. (1992) *The Guardian of Every Other Right: A Constitutional History of Property Rights* 3, New York: Oxford University Press.
- 5 *ibid.*
- 6 *ibid.*
- 7 Current member states to the Council of Europe are available at: <https://www.coe.int/en/web/about-us/our-member-states>.
- 8 e.g. the Constitution of the Republic of Kosovo (currently not a member of the CoE) at Article 22, which has made the European Convention on Human Rights directly applicable and binding in its legal system. Available at: <http://www.kryeministri-ks.net/repository/docs/ConstitutionIKosovo.pdf>.
- 9 Not all countries that have ratified the ECHR have also ratified its Protocol: two out of the 47 members of the CoE have not done so; these being Monaco and Switzerland. A full list of signatories, ratifications, declarations and reservations can be found here: [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/009/signatures?p\\_auth=jqyqUvPX](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/009/signatures?p_auth=jqyqUvPX).
- 10 See a general overview of Article 1 of Protocol 1 provided by the ECHR at: <http://echr-online.info/right-to-property-article-1-of-protocol-1-to-the-echr/introduction/>.

- the principle of lawfulness
- the principle of the existence of a legitimate aim which is in the public interest
- the principle of fair balance.<sup>11</sup>

The drafting history of the Convention casts light on the differences that existed (and which, in some cases, still exist) among member states with respect to the protection of property rights. It was this that led to the exclusion of provisions related to property from the original text of the Convention which entered into force in 1953, being added with effect from the following year at the insistence of the Parliamentary Assembly of the Council of Europe. These differences can, however, also be seen in the views the European Court has taken on this provision since it has not always given it the same interpretation.<sup>12</sup>

One important aspect of property rights in the European system remains compensation for the deprivation of property under the Convention. The text of Article 1 of Protocol 1 is not particularly clear with respect to compensation in cases where state institutions authorise the taking of property and it has taken the European Court at least three decades, and quite a number of cases, to make the situation clearer. This article also looks at the different principles that were taken into account in these court cases in order to determine the balance between public interest and individual property rights when such property is acquired. It will also look at the various circumstances that were examined by the European Court as a means of determining the right to compensation in each of these cases.

### Constitutional property rights in the United States: a brief history

The legal foundation for property rights during the colonial period was provided by English common law. *Magna Carta* (1215), which provided for important safeguards against arbitrary decisions of government, provided that:

No freeman shall be taken, imprisoned, or stripped of his rights or possessions... except by lawful judgment of his peers and by the law of the land.<sup>13</sup>

Colonial laws were, therefore, influenced by the principles found in *Magna Carta* when dealing with property rights, but private property was also subject to ‘eminent domain’, a principle which provides for the inherent power of the government to take property for public purposes without the consent of the owner, but with the provision of compensation.<sup>14</sup> In failing to respect the high value of property rights held in the

11 *ibid.*

12 See e.g. *Beyeler v. Italy* and *Suljagic v. Bosnia and Herzegovina*.

13 *Magna Carta*, para. 39, available at: <https://www.bl.uk/magna-carta/articles/magna-carta-english-translation>.

14 Fifth Amendment to the United States Constitution, available at: [https://www.senate.gov/civics/constitution\\_item/constitution.htm#amdt\\_5\\_1791](https://www.senate.gov/civics/constitution_item/constitution.htm#amdt_5_1791). See also the definition of ‘eminent domain’ provided by Black’s Law Dictionary: [www.thelawdictionary.org/eminent-domain](http://www.thelawdictionary.org/eminent-domain) and Cornell Law School: [www.law.cornell.edu/wex/eminent\\_domain](http://www.law.cornell.edu/wex/eminent_domain). In addition, see Steve Calandrillo (2003) ‘Eminent Domain Economics: Should “Just Compensation” be

colonial mind, English imperial policy after 1763 led to a revolutionary crisis, while the cry ‘Liberty and Property’ became the motto of the revolutionary movement.<sup>15</sup>

‘Property must be secured, or liberty cannot exist,’ John Adams proclaimed in 1790 and this quote, in itself, explains the paramount value given to the right to acquire and own property.<sup>16</sup> However, the Constitution as originally drafted did not contain a Bill of Rights to guarantee individual liberty including property rights. As finally adopted, the Bill of Rights contains important property guarantees.

Three important clauses are included in the Constitution which offer considerable protection to property rights: the Contract clause; the Due Process clause; and the Takings clause. This article further analyses the extent of constitutional protection for property rights by discussing each of these clauses.

### *The Contract clause*

For more than a decade, the judiciary’s experience with the Contract clause evolved around three main ideas. First of all, the courts confirmed that a contract is ‘property’ and that the term property was not limited to land or physical things but also included the rights and duties that arise from an agreement.<sup>17</sup> Second, a contract was especially protected if it was considered to be ‘vested’, i.e. if a contract or property right was already in place, properly originated under the law, and in effect prior to the legislative action seeking to abolish or restrict it.<sup>18</sup> Finally, when the courts guarded contracts against impairment, the essence of their action was often the protection of individual rights against retroactive interferences.<sup>19</sup>

Later, liberal notions came into play and the Contract clause lost its ability to protect property, with the courts holding that all contracts reserved the essential attributes of sovereign power, the power to police being one of them.<sup>20</sup>

The courts of the 21<sup>st</sup> century, however, have turned back these challenges and held that contracts may be immunised from the application of a power to police if they are protected by the operation of the Constitution’s Contracts clause.<sup>21</sup> Constitutional protection is usually triggered when the state is a party to the contract, but

abolished and would “Takings Insurance” work instead?’ *Ohio State Law Journal* 64(2), at p. 451.

15 James Ely also believes that, throughout the revolutionary era, Americans emphasised the centrality of the right to property in constitutional thought. He quotes Arthur Lee of Virginia who declared that: ‘The right to property is the guardian of every other right and to deprive a people of this is in fact to deprive them of their liberty.’ See Ely *supra* Note 4, at p. 25.

16 *ibid.* at p. 43.

17 Jan G. Laitos (2004) *Law of Property Rights Protection: Limitations on Governmental Power* Aspen Publishers, at pp. 8-27.

18 *ibid.* at pp. 2-29.

19 *ibid.*

20 See e.g. *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398 (1934).

21 *Cranley v. National Life Insurance Co.*, 318 F.3d 105 (2d Cir.2003).

some courts have held that, in certain circumstances, protection extends even to contracts between two private parties.<sup>22</sup>

### *The Due Process clause*

The Due Process Clause of the Fourteenth and Fifth Amendments reads, in part:

No person shall be deprived of... liberty or property without due process of law.<sup>23</sup>

Thus, the clause prevents the government from depriving individuals of liberty or property. James Ely considers this clause a direct descendant of *Magna Carta* which became the most significant constitutional guarantee of property rights.<sup>24</sup>

Substantive due process had little vitality before the Civil War as a check on the power to police. In certain decisions during the 19<sup>th</sup> century,<sup>25</sup> the Supreme Court interpreted the word ‘liberty’ in the Fourteenth and Fifth Amendments in a way that encouraged the courts to strike out legislation which interfered with the freedom of individuals to enter into agreements which would bring them profit.<sup>26</sup> In some other decisions, known as the Railroad Commission cases, the Supreme Court interpreted the Due Process clause as requiring that legislation be directed at a ‘legitimate governmental objective’ and use rational means in accomplishing that government objective.<sup>27</sup>

### *The Takings clause*

The Fifth Amendment’s Takings clause was introduced because of fears that the government would take private property from citizens without giving just compensation in return. This clause also has its roots in paragraph 39 of *Magna Carta*<sup>28</sup> and similar clauses existed in some state constitutions prior to the adoption of the Fifth Amendment.<sup>29</sup>

As previously stated, the government’s power to take private property for public use is known as the power of ‘eminent domain’. The government most often exercises its power of eminent domain to condemn property needed for public improvements, such as highways or parks, but the Fifth Amendment’s Takings clause prohibits such action without just compensation.<sup>30</sup>

It is evident from the text of the amendment that the two requirements that need to be met for the exercise of eminent domain are:

22 See e.g. *Allied Structural Steel v. Spannaus*, 438 U.S. 234 (1978).

23 US Constitutional Amendments V, XIV.

24 *supra* Note 2, at p. 59.

25 See *Allgeyer v. Louisiana*, 65 U.S. 578 (1897).

26 Laitos, *supra* Note 17, at pp. 2-34.

27 115 U.S. 307, 331 (1886).

28 See also William Treanor (1985) ‘The Original Understanding of the Takings Clause and the Political Process’ 95 *Colum. L. Rev.* 782, 787.

29 See e.g. the Massachusetts and Vermont constitutions.

30 William Burnham (2003) *Introduction to the Law and the Legal System of the United States* 464.

1. the requirement for public use of the taken property
2. the provision of just compensation for the owner of the taken property.

### The public purpose requirement

The public use requirement is generally easy to meet as it will often be apparent from the nature of the project, such as the construction of a highway or government building.<sup>31</sup> If this requirement is not met, however, a court may annul the decision of the government to take the property from the owner.

There have been some instances, however, in which the courts have approved takings which were not directly for public purposes. In *Poletown Neighborhood Council v. City of Detroit*, the state Supreme Court found that a city's condemnation of an entire neighbourhood to allow the construction of a privately-owned factory was for a public purpose since the factory would create new jobs and reduce employment in a depressed area.<sup>32</sup>

Additionally, the US Supreme Court held, in *Hawaii Housing Authority v. Midkiff*, that the taking of the property of certain landlords and transferring that property in fee simple to their tenants was for a public purpose, the reasoning being that, since most of Hawaii's land was controlled by a small group of landowners, it was in the public interest to have real estate more widely distributed.<sup>33</sup> This has been interpreted to mean that an 'eminent domain' taking fulfils the 'public use' requirement as long as it provides a public benefit or it serves a legitimate purpose<sup>34</sup> and it is irrelevant that the exercise of eminent domain transfers property from one private owner to another.<sup>35</sup> However, the Constitution does prohibit a taking that is entirely non-public in character, executed for no other reason than to confer a private benefit on a particular private party, even when the taking is compensated.<sup>36</sup>

### The compensation requirement

The requirement for 'just compensation' has, as one of its primary purposes, the aim of barring the government from:

Forcing some people alone to bear public expenses which, in all fairness and justice, should be borne by the public as a whole.<sup>37</sup>

By requiring that the government pay for what it takes, the burden of public improvements is spread across all taxpayers.<sup>38</sup>

31 *ibid.*

32 304 N.W.2d 455 (Mich.1981).

33 467 U.S. 229 (1984).

34 *Ruckelhaus v. Monsanto Co.*, 467 U.S. 986 (1984); *Berman v. Parker*, 348 U.S. 26 (1954).

35 *State v. Evans*, 966 P.2d 1252 (Wash.1998); *Porter v. DiBlasio*, 93 F.3d (7th Cir. 1996).

36 467 U.S. 229 (1984).

37 *Armstrong v. United States*, 364 U.S. 40 (1960).

38 *Burnham*, *supra* Note 31, at p. 465.

When a government decision has caused a permanent taking, the proper measure of just compensation is the property's fair market value at the time of the taking.<sup>39</sup> However, where the taking is only temporary, just compensation is the value of the property during the period of the temporary taking, i.e. the amount that the owner has lost as a result of the taking.<sup>40</sup>

Despite everyone agreeing that the compensation requirement needs to be met, there have been different opinions on what actually constitutes a taking. For that reason, many court decisions have made a difference between partial and total takings which, in some cases, has been controversial.

### Partial and total takings

*Kelo v. City of New London* was decided by the US Supreme Court in 2005<sup>41</sup> and was based on a complaint by Susette Kelo that the City of New London had misused its power of eminent domain. Kelo argued that takings against her property violated the requirement in the Fifth Amendment that the government may take private property by eminent domain only for 'public use' and the plan was really for a private use that would benefit private parties.<sup>42</sup>

The Connecticut Supreme Court, however, disagreed and allowed the takings by the private developer, arguing that the economic development plan, although carried out by a private party, would have a public benefit and public interest.<sup>43</sup> This led the plaintiff all the way to the US Supreme Court.

The US Supreme Court gave a quite controversial interpretation of the 'public use' requirement in eminent domain, leading to a reaction from the public as well as from political representatives at both state and federal level.<sup>44</sup> According to the Court, the public use requirement also encompasses a public purpose and the City's development plan, which intended to create new jobs, increase economic prosperity and deliver benefits to the community, met this public purpose despite being carried out by a private developer.<sup>45</sup>

39 *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 474 (1973); *Northeast City Economic Alliance, Inc. v. ATC Partnership*, 776 A.2d 1068 (Conn. 2001).

40 Laitos, *supra* Note 17, at 8-27.

41 545 U.S. 469 (2005).

42 See a summary of the case provided at: <http://www.klgates.com/us-supreme-court-decides-landmark-eminant-domain-case-07-07-2005/>.

43 *ibid.*

44 The decision, with five votes in favour and four against, led to reactions from the President (see Executive Order at: <https://georgewbush-whitehouse.archives.gov/news/releases/2006/06/20060623-10.html>) and from members of Congress (see e.g. the Bill sponsored by several senators at <https://www.congress.gov/bill/109th-congress/senate-bill/1313/cosponsors>), as well as state legislation (see *Report on legislative initiatives at state level following Kelo*, available at: <http://castlecoalition.org/50-state-report-card/>).

45 The full text of the decision is available here: <https://www.law.cornell.edu/supct/pdf/04-108P.ZO>. In particular, see pages 16-20 for the reasoning of the court on the 'public purpose' that can be achieved even through private parties.

The decision was met with staunch criticism, both from scholars and politicians. Unfortunately, a decade after the decision, the taken land remains as a 90-acre vacant wasteland and had not achieved the development and public purpose that had been intended for it.<sup>46</sup>

Two other recent cases involving partial takings have developed a requirement for there to be a ‘rough proportionality’ between the nature and extent of the harm caused by an owner’s proposed land use and a relevant government regulation.<sup>47</sup>

In *Dolan v. City of Tigard*,<sup>48</sup> the owner of a commercial property wished to expand her building and add a paved car park, so she applied for a permit from the city authorities. The city granted the request, conditioning the grant of the permit on the property owner’s dedication of part of the land for a ‘greenway’ along a creek to provide flood control as well as a cycle route and footpath. The court struck down these conditions, holding that there must be some ‘rough proportionality’ between the harm caused by the owner’s land use and the conditions the city wished to impose.<sup>49</sup>

In *Nollan v. California Coastal Commission*,<sup>50</sup> the owner of a beachfront property wanted to demolish a house and build a larger one in its place. The Commission conditioned the permit on the owner providing a public easement across his property, reasoning that the building of a larger house would block the public view to the ocean. The Supreme Court ruled that the condition resulted in an unconstitutional taking because there was no ‘nexus’ between the potential harm caused by a larger beach house and the condition of granting greater access to the beach.

The efficacy of the ‘*Nollan-Dolan*’ rule set out in these two cases will be determined by how assiduously the courts enforce it.<sup>51</sup> In one of the most recent ‘eminent domain’ cases in 2017, the US Supreme Court gave a more recent interpretation of what constitutes a ‘taking’, holding in *Murr v. Wisconsin* that:

The family had not been deprived of all economically beneficial use of their property, which is the test for determining whether a zoning regulation has gone too far and constitutes an uncompensated ‘taking’ of private property.

## Protection of property rights in Europe: a brief history

*Magna Carta* was a document of influence not only for the US colonies: it was a document born in Europe and influenced human rights around Europe as well. The French revolution, which took place between 1789-1799, put an emphasis on the protection of human rights and freedoms, and resulted in the adoption of the Declaration of the Rights of Man and of the Citizen. The Declaration addresses the protection of property and possessions and states, in particular, that:

- 46 See news reports on this story at: <https://www.nationalreview.com/2014/02/nine-years-after-kelo-seized-land-empty-alec-torres/> and <https://www.theday.com/section/specialreports&Profile=1268>.
- 47 Burnham, *supra* Note 31, at p. 467.
- 48 512 U.S. 374 (1994).
- 49 *ibid.*
- 50 483 U.S. 825 (1987).
- 51 Laitos, *supra* Note 17.



No one may be deprived of property rights unless a legally established public necessity required it and upon condition of a just and previous indemnity.<sup>52</sup>

In 1948, in the aftermath of the Second World War, the Universal Declaration on Human Rights was adopted, with the clashes between countries on how far they should go in the protection of property rights creating quite some battlegrounds.<sup>53</sup> However, the west won this battle and the Declaration included general protection of the right to property<sup>54</sup> in Article 17 which states:

Everyone has the right to own property alone as well as in association with others... No one shall be arbitrarily deprived of his property.<sup>55</sup>

A few years later, a number of European countries decided to draft and ratify the European Convention on Human Rights. This time, they would not just stop at writing a document but they would also create a mechanism to enforce it: the European Court of Human Rights. The debate around property rights during the drafting process was anything but easy. It will be shown below that this resulted in an initial exclusion of this right from the original text of the Convention, ending up only one year later with the inclusion of the protection of property rights under Article 1 of Protocol 1 of the Convention.

### *Property rights in the European Convention*

Case law from the Strasbourg Court has very much shaped the way we view property rights. We could even argue that ECtHR decisions have shaped the entire legal systems in some Council of Europe member states. In order to understand how the interpretation of property rights has developed over the years, a number of ECtHR decisions interpreting Article 1 of Protocol 1 will be analysed. The text of this provision provides as follows:

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.<sup>56</sup>

52 Article 17 of the Declaration of the Rights of Man and of the Citizen, available at: [http://avalon.law.yale.edu/18th\\_century/rightsof.asp](http://avalon.law.yale.edu/18th_century/rightsof.asp).

53 A. Chapman (1999) *A Human Rights Perspective on Intellectual Property, Scientific Progress, and Access to the Benefits of Science* WIPO Publication No.762(I), Geneva, at p. 230.

54 J. Ristik (2015) 'Right to Property: From *Magna Carta* to the European Convention on Human Rights' *SEEU Review* 11, at p. 148.

55 Universal Declaration on Human Rights, available at: <http://www.un.org/en/universal-declaration-human-rights/>.

56 Article 1 of Protocol 1 of the European Convention on Human Rights, available at: [https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf), p. 31.

The very first case to address this provision was *Marckx v. Belgium*,<sup>57</sup> a case which concerned the rights to property and inheritance of a child born out of wedlock who, according to Belgium law at the time, were considered to be ‘illegitimate’ children. In that judgment, the Court defined the scope of Article 1 of Protocol 1 as applying only to existing possessions and stated that it ‘does not guarantee the right to acquire possessions’.<sup>58</sup>

We can see from the text of the provision above that, while the right to property is protected, it does provide for exceptions under which a country may limit individuals’ property rights in the public and general interest, or to carry out and enforce laws and regulations related to taxes or similar contributions. It requires, as in other rights protected by the ECHR, that deprivations must be foreseen by the law but, unlike many other provisions, it also refers to general provisions in international law. Thus, a country must look not only at the requirements of its own domestic legal system but also the principles of international law which regulate interferences with property rights.

This article will further provide an analysis of case law where these requirements of the property rights provision have been interpreted by the European Court on Human Rights, with a particular focus on the public and/or general interest requirement.

#### *The requirement of ‘public interest’ and/or ‘general interest’*

The first paragraph of Article 1 of the Protocol to the ECHR vests in public authorities the power to deprive individuals’ property rights for purposes of ‘public use’.<sup>59</sup> At the same time, paragraph 2 allows the state further to deprive the right to property in cases when it needs to enforce laws for purposes of the ‘general interest’.

The very first question that arises is whether the intention of the drafters was to distinguish these two interests. The ECHR Handbook on the Right to Property, published by the Council of Europe, refers to both interchangeably and does not seem to differentiate between the two. It states, among others, that:

Any interference with property rights, irrespective of the rule it falls under, must satisfy the requirement of serving a legitimate public (or general) interest.<sup>60</sup>

It further states that the notion of ‘public interest’ is quite extensive and that the ECHR gives states a wide margin of appreciation in evaluating the circumstances as they are better placed to understand what constitutes ‘public interest’ within their own domestic legal and political systems.<sup>61</sup> Contrary to many ECHR provisions,<sup>62</sup> Article 1 of Protocol 1 does not list objectives which may justify interferences but

57 Available at: <https://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%22MARCKX%20v.%20BELGIUM%22%22%5D%22itemid%22:%5B%22001-57534%22%5D%7D>.

58 Council of Europe (2007) *The Right to Property under the European Convention on Human Rights* Human Rights Handbooks No.10, at p. 5.

59 *supra*, Note 57.

60 *supra*, Note 59, at pp. 13-14.

61 *ibid.*

62 See e.g. Articles 8-11 of the European Convention on Human Rights.

simply facilitates judgment on a case-by-case basis as regards whether the state was pursuing a legitimate aim when interfering with the individual's right to property.<sup>63</sup>

The burden of proof, obviously, lies with the state in terms of convincing the Court that the limitation it has put on the exercise of property rights by individuals had to occur because of the public (or the general) interest. Depending on the circumstances, governments use different kinds of argument in proving that they were pursuing a legitimate aim that was in the interest of the public.

For example, in the case of *Former King of Greece and ors. v. Greece*, members of the royal family claimed access to particular land sites, but the government argued that it was pursuing a legitimate interest in preserving the country's constitutional status as a Republic and that it was also protecting archaeological sites.<sup>64</sup>

In the case of *Beyeler v. Italy*, the state was contesting the applicant's ownership rights over a painting, stating that, when interfering with property rights over that painting:

It was in the public interest that there be an obligation to file a full declaration and it was unacceptable for an individual to circumvent that aim for personal reasons connected to the purchase arrangements... it was in the public interest for the State to control transfers of works of art which were important for the national artistic heritage and added that in order to do so the State had to be fully informed of the nature of such transfers.<sup>65</sup>

Finally, in the most recent ECtHR judgment on Article 1 of Protocol 1, decided by the Court on 22 May 2018, the issue of the 'general interest' was amongst the main issues argued by the parties in a case involving a moratorium on agricultural land.<sup>66</sup> The Ukraine government insisted that it was pursuing a legitimate aim in that the continuation of the moratorium was a decision of the legislature and that:

The goal of the moratorium was to protect food and national security. Releasing land into circulation risked creating conditions for the concentration of land in the hands of a few tycoons or a 'foreign and unfriendly power' in exchange for a fraction of its real value, its withdrawal from cultivation and the impoverishment of farmers.<sup>67</sup>

Despite the conflicting arguments between the applicant and the Ukraine government, the Court held as follows:

Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is 'in the public interest'. Under the system of protection established by the Convention, it is thus for the na-

63 *supra*, Note 10.

64 *Former King of Greece and others v. Greece*, HUDOC, 2002, available at: <https://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%22King%20of%20Greece%22%2C%22itemid%22:%5B%2201-59051%22%5D%7D>.

65 *Beyeler v. Italy*, ECHR, HUDOC, 2000, available at: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-58832%22%5D%7D>.

66 *Zelenchuk and Tsytsyura v. Ukraine*, ECHR, HUDOC, 2018, available at: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-183128%22%5D%7D>.

67 *ibid.* at paras. 74-78.

tional authorities to make the initial assessment as to the existence of a problem of public concern warranting measures to be applied in the sphere of the exercise of the right of property. Since the margin of appreciation available to the legislature in implementing social and economic policies is wide, the Court will respect the legislature's judgment as to what is in the public interest, unless that judgment is manifestly without reasonable foundation.<sup>68</sup>

This interpretation sums up the position that the Court has held in most cases when looking at whether the requirement for the public (or general) interest has been met. This does not mean, however, that the Court is not minded to look at those circumstances on a case-by-case basis: it also needs to make sure that, even where there is a legitimate aim, the state strikes a balance between that aim and the individual property it needs to protect. It is required to do this in order to pass the proportionality test.

#### *Compensation in cases of limitations on property rights*

Article 1 of Protocol 1 does not specifically talk about the right to compensation for property that has been taken by the state, but the European Court of Human Rights has confirmed that this is an implicit requirement. In *The Holy Monasteries v. Greece*, the Court held that:

Compensation... is material to the assessment whether the contested measure respects the requisite fair balance and, notably, whether it does not impose a disproportionate burden on the applicants... The taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference and a total lack of compensation can be considered justifiable under Article 1 (P1-1) only in exceptional circumstances.<sup>69</sup>

When looking at exceptional circumstances, the court found that they existed in *Jahn v. Germany*, where the situation was linked to the unique circumstances of the unification of Germany.<sup>70</sup>

The language of Article 1 is indeed silent when it comes to compensation, but this has not stopped the Court from being rigorous in this requirement, even when states want to enact legislation removing individuals' right to compensation when their property is taken. In *Pressos v. Belgium*, for example, state legislation which aimed at depriving the applicants of their claims to compensation was considered inconsistent with the fair balance principle and, consequently, the state was in breach of Article 1 of Protocol 1.

Evidently, the court has awarded just compensation to applicants in many cases by linking it to the principle of fair balance. However, it is often difficult properly to calculate the amount of compensation in order for it to be considered 'just' as well as

68 *ibid.* at para. 100.

69 *The Holy Monasteries v. Greece*, ECHR, HUDOC, 1994, at para. 71. Available at: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-57906%22%7D>.

70 *supra*, Note 59, at pp. 5-6.

to achieve fair balance. Even so, it has been argued both in Court cases as well as in scholarly work that:

The market value of the property is relevant to the balancing process, as it indicated the value that the community attached to the property in ordinary private transactions.<sup>71</sup>

### *The proportionality test*

The principle of proportionality requires that the interests of the individual affected by the interference have to be weighed against the public (and/or general) interest.<sup>72</sup> The Court evidently puts quite an emphasis on a fair assessment of the public interest that the state is pursuing in comparison to the property rights of the individuals affected. In particular, the Court has talked about the need for proportionality when awarding compensation to applicants whose right to property has been interfered with.

In the judgment of *Valkov v. Bulgaria*, the Court has clarified that the interference must not impose an excessive or disproportionate burden on the individual.<sup>73</sup>

Similarly, in one of its most famous cases, *Sporrong and Lönnroth v. Sweden*, the Court held that interference with the peaceful enjoyment of possessions must be based on the striking of a fair balance between the demands of the general interests of the community and the requirement of the protection of individual property rights.<sup>74</sup>

And, once again, in its most recent 2018 case, *Zelenchuk and Tsytsyura v. Ukraine*, the Court confirmed the importance of the principle of proportionality by concluding that, in the face of:

The Government's failure to advance sufficient reasons to justify the measures applicable to the applicants' land... the respondent State has overstepped its wide margin of appreciation in this area and has not struck a fair balance between the general interest of the community and the property rights of the applicants.<sup>75</sup>

### *Influence of ECHR in other jurisdictions*

We pointed out in the Introduction that the ECHR has also influenced jurisdictions outside the Council of Europe. One example is the case of Kosovo, where the Constitution requires that the decisions of public authorities (including the courts)

71 Tom Allen (2007) 'Compensation for Property under the European Convention on Human Rights' 28 *Mich. J. Intl. L.* 287 at p. 335.

72 *supra*, Note 10.

73 *Valkov v. Bulgaria*, available at: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-107157%22%5D%7D>.

74 *Sporrong and Lönnroth v. Sweden*, ECHR, HUDOC, para. 69. Available at: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-57580%22%5D%7D>.

75 *supra*, Note 62, at para. 148.

that interpret human rights shall be consistent with ECHR standards.<sup>76</sup> The specific constitutional provision (Article 53) provides that:

Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights.

This would mean that, once issues related to property (or any other human right) are interpreted by the courts in Kosovo, they would need to look at the precedents set by the European Court of Human Rights and reach a decision that is consistent with the standards set by that Court.

Furthermore, the influence that these European standards have had on Kosovo is also visible if we look at how the Constitution of Kosovo deals specifically with the protection of property as a human right. The wording of that provision is very much similar to the interpretation that the European Court has given to Article 1 of Protocol 1 of the ECHR. Article 46(3) of the Constitution of Kosovo provides that:

No one shall be arbitrarily deprived of property... [A] public authority of the Republic of Kosovo may expropriate property if such expropriation is authorized by law, is necessary or appropriate to the achievement of a public purpose or the promotion of the public interest, and is followed by the provision of immediate and adequate compensation to the person or persons whose property has been expropriated.

Despite the constitutional obligation to follow ECtHR decisions, the courts in Kosovo are yet to take seriously the commitment to those standards. Unfortunately, apart from the Constitutional Court of Kosovo, which has often looked at ECHR standards to justify its decisions,<sup>77</sup> other courts are yet to start using this jurisprudence. Nevertheless, this has not stopped other public institutions from looking at those standards while drafting legislation and other rules and regulations. For example, a law adopted in 2009 (later amended in 2010 and 2012) to regulate the expropriation of immovable property provides for the conditions that need to be met in order for the expropriation to happen. These are very much in line with the requirements mentioned in a number of ECtHR decisions. Article 4 of the Law on the Expropriation of Immovable Property provides that the following requirements shall be met by the public authority in order for the expropriation to be authorised:

1.1. the Expropriation is directly related to the accomplishment of a legitimate public purpose within its competence as specified in paragraph 2 or 3 of this Article;

76 See Article 53 of the Constitution of Kosovo, available at: <http://www.kryeministri-ks.net/repository/docs/Constitution1Kosovo.pdf>.

77 See e.g. the case of Valon Bislimi v. MIA, at pages 8-14, available at [http://gjk-ks.org/wp-content/uploads/vendimet/ki\\_06\\_10\\_eng.pdf](http://gjk-ks.org/wp-content/uploads/vendimet/ki_06_10_eng.pdf). See also generally the Constitutional Review of the non-execution of Decision KKKPK/D/R230/2014 of Kosovo Property Claims Commission, 13 March 2014, available at: [http://gjk-ks.org/wp-content/uploads/vendimet/ki\\_90\\_16\\_agj\\_ang.pdf](http://gjk-ks.org/wp-content/uploads/vendimet/ki_90_16_agj_ang.pdf), as well as other cases decided by the Constitutional Court of Kosovo in relation to property, available at: [http://gjk-ks.org/en/decisions/?prej=&deri=&elp\\_txt\\_email=&elp\\_txt\\_name=&elp\\_txt\\_group=vendimet&tjala=property+right#nav-id](http://gjk-ks.org/en/decisions/?prej=&deri=&elp_txt_email=&elp_txt_name=&elp_txt_group=vendimet&tjala=property+right#nav-id).

- 1.2. the legitimate public purpose cannot practically be achieved without the Expropriation;
- 1.3. the public benefits to be derived from the Expropriation outweigh the interests that will be negatively affected thereby;
- 1.4. the choice of the property to be expropriated has not been made for, or in the furtherance of, any discriminatory purpose or objective; and
- 1.5. the Expropriating Authority has complied with all applicable provisions of the present law.<sup>78</sup>

However, while the legislation and constitutional principles regarding this matter are very much influenced by ECHR standards, it will be interesting to see whether the courts in Kosovo will meet their constitutional obligation to comply with ECtHR decisions when looking at expropriation cases in the near future. That is particularly important given the extensive ongoing public debate in Kosovo around the expected expropriations of a large number of properties in two localities: Hade and Shipitullë, because of the necessary undertakings related to energy and the expansion of coalmines.<sup>79</sup>

## Conclusion

The importance of property rights was recognised from the early years of American history. Despite frequent abuses of these rights by the government, the Supreme Court has been sensitive to the need for some constitutional check on government regulation and has protected these rights using the Contract clause, the Due Process clause and, finally, the Takings clause. As one clause fell in prominence, another always came forward: the substantive economic elements of Due Process followed the demise of the Contract clause and, when this also fell, the Takings clause emerged. There are significant differences between each of these three clauses, and one clause has never wholly replaced another, but they all serve the same general purpose. What is important is that the Court has always been able to find ways to use the Constitution as a viable ground for the protection of property rights.

At the same time, the early history of the protection of human rights in Europe was also characterised by efforts to include the protection of individual property. That was the case with *Magna Carta* in England as well as with other documents that followed, either domestically or regionally. With the adoption and entry into force of the European Convention of Human Rights, a whole new historic chapter emerged in the development and protection of human rights. The right to property was not included in the Convention's original text, but it did become part of Protocol 1 to the Convention just a year later, becoming seen by the European Court of Human Rights as one of the most fundamental provisions. The latter, through its decisions on property rights and other human rights, has shaped not just legal systems in many coun-

78 Article 4 of the Law on Expropriation of Immovable Property, available at: <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2636>.

79 See media reports on this issue: <http://www.gazetaexpress.com/en/news/government-approves-expropriation-plans-avoids-energy-crisis-172845/>; and <http://balkanenergy.com/land-expropriation-open-pit-coalmine-expansion-completed-kosovo-27-december-2017/>.

tries in Europe but, additionally, their political systems and levels of democracy and good governance. These features have often been evaluated by looking at the level of protection that a certain government provides for its citizens' property, thus leading to such a right frequently – and quite correctly – being called 'the guardian of all other rights'.<sup>80</sup>

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