Reconciling the Right of Property and Planning in the Light of the European Convention on Human Rights

Dr. H. Burak Gemalmaz*

This paper examines in which manner and perspective the European Court of Human Rights (hereinafter Court or ECtHR) deals with the planning issues, in light of the argument that planning and the right of property may be approached, at least in certain aspects, as contradicting matters.[1] The Court has produced an impressive volume of cases under the right of property contained in the First Protocol (P1-1) to the European Convention on Human Rights.[2]

Text of the P1-1 is reads as follows:

French	*English*
Toute personne physique ou morale à droit au respect de ses biens. Nul ne peut être privé de sa propriété que pour cause d'utilité publique et dans les conditions prévues par la loi et les principes généraux du droit international.	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.

* (LLB, LLM, MA, PhD). Assistant Professor at the Faculty of Law, Istanbul University, Beyazıt, Istanbul-Turkey (b_gemalmaz@yahoo.com)

1 Generally see, E. R. Alexander, "*Planning Rights and Their Implications*", **Planning Theory**, Vol.6 (2), 2007, pp.112-126, 116.

2 Convention on the Protection of Human Rights and Fundamental Freedoms, *as amended by* Protocol 11, Nov. 4, 1950, 213 U.N.T.S. 221 (hereinafter Convention).

Les dispositions précédentes ne portent pas atteinte au droit que possèdent les états de mettre en vigueur les lois qu'ils jugent nécessaires pour réglementer l'usage des biens conformé ment à l'intérêt général ou pour assurer le paiement des impôts ou d'autres contributions ou des amendes.	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.

I) The Concept of Property under the ECHR

P1-1 does not mention a right of property in explicit terms.[3] While in Article 1, paragraph 1, of the P1 the phrase "peaceful enjoyment of possessions" has been used, the term "property" appears merely in the second paragraph, referring basically, to the goods. In the *Marckx* Judgment of 13 July 1979, however, the Court pointed out that "Article 1 (P1-1) is in substance guaranteeing the right of property".[4] Accordingly, clarification of elements constituting and differentiating the notions of "property" or "possession" is a pre-requirement for a better understanding of P1-1.

Since there are certain differences with respect to the definition of property in the national legal systems of States Parties to the Convention, the Court needed to elaborate on an autonomous meaning of the concept of "possession" which does not depend on the formal classification in the domestic law. The question was whether such a definition should be limited to the traditional concept of property (*rights in rem*), or whether it should be defined more broadly as it is done in public international law and some national constitutional law, in which property is equated with vested rights or all patrimony. The Court preferred the second approach. As follows from the ECtHR case-law, 'possession' includes not only the right of ownership but also a whole range of pecuniary rights.

---

[3] Becasuse "the right to property is the problem child of the European family of rights and freedoms". See, David Anderson, "*Compensation for Interference with Property*", **EHRLR**, Vol. 6, 1999, pp. 543-558, 545.

[4] *Marckx v. Belgium*, Judgment of 13 July 1979, para.50

Apart from ownership of immovable and movable property, rights arising from shares, arbitrational awards, intellectual property rights, established entitlement to a pension, entitlement to a rent and even rights arising from running a business also qualify as 'possession' within the meaning of P1-1.

Here is the abstract principle as stated by the Court in the *Gasus Dosier* case:

> "the notion 'possession'…is certainly not limited to ownership of physical goods: certain other rights and interests constituting assets can also be regarded as "property rights" and thus as "possession".[5]

The Court has interpreted the term 'possession' as "concrete proprietary interest(s)" having economic value.[6] More recently, in the *Öneryıldız* case the Court stated:

> "the concept of 'possessions' in the first part of Article 1 of Protocol No. 1 has an autonomous meaning which is not limited to ownership of physical goods and is independent from the formal classification in domestic law: the issue that needs to be examined is whether the circumstances of the case, considered as a whole, may be regarded as having conferred on the applicant title to a substantive interest protected by that provision".[7]

As a conclusion, one may safely argue that economic interest of any kind constitutes possession within meaning of P1-1.[8]

---

[5] *Gasus Dosier- und Fördertchnik GmbH v. Netherlands*, Case No.43/1993/438/517, Judgment of 23 February 1995, para.53.

[6] Also see Timothy Jones, "*Property Rights, Planning Law and the European Convention*", **EHRLR**, Issue 3, 1996, pp. 233-242, 234-235.

[7] *Öneryıldız v. Turkey*, App. No. 48939/99, GC, Judgment of 30 November 2004, para.124.

[8] Also see, Hendrik D. Ploeger, Danielle A. Groetelaers, Menno van der Veen, "*Planning and the Fundamental Right to Property*", (http://aesop2005.scix.net/data/papers/att/394.fullTextPrint.pdf).

However, P1-1 protects only existing property; namely, it does not guarantee the right to acquire property. As the Court has consistently stated "possessions can be either existing possession or assets, including claims, in respect of which the applicant has at least a legitimate expectation of obtaining effective enjoyment of a property right."[9] The expression *legitimate expectation* holds a quite important meaning for the right of property within the meaning of P1-1. In the view of the Court, as stated in *Kopecky* in 2004, a mere "hope of recognition of a property right which it has been impossible to exercise effectively is not protected, nor is conditional claim which lapses as a result of the non-fulfillment of the condition".[10]

It is true that the Court in its early precedent in the 1979 *Marckx* case expressed that the expectation of inheritance did not constitute a 'possession.'[11] This holding, however, was slightly revised in subsequent cases, and the Court held that when the person providing the inheritance has died, heirs gain the ownership of the estate jointly and it constitutes possession.[12] Similarly, the Court pointed out the necessity of the existence of a solid basis of the future interests in domestic law such as a statute or a judicial ruling which recognize their existence.[13]

Accordingly, P1-1 does not provide a "right to property", it merely protects "right of property" or enshrines the "right to protect property".[14]

---

9 *Kopecky v. Slovakia*, App. No.44912/98, GC, Judgment of 28 September 2004, para.35.

10 *Kopecky v. Slovakia*, para.35

11 *Marckx v. Belgium*, Judgment of 13 July 1979, para.50

12 *Inze v. Austria*, Case No.15/1986/113/161, Judgment of 28 October 1987.

13 *Zhigalev v. Russia*, App. No. 54891/00, Judgment of 06 July 2006.

14 Cf. Henry G. Schermers, "*The International Protection of the Right of Property*", **Protecting Human Rights: The European Dimension- Studies in honour of Gerard J. Wiarda**, (Ed. Franz Matscher-Herbert Petzold), Carl Heymans Verlag KG, Köln, 1988, sf:565-580, 569.

II) The Three Rules and Planning Interferences

According to the European Court, P1-1 comprises three distinct rules. In the case of *Sporrong and Lönnroth*, the ECtHR stated that:

> "[t]he first rule, which is of the general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognises that the States are entitled, among other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph".[15]

These rules are not "distinct" in the sense of being unconnected. The Court in its *James and Others* Judgment of 21 February 1986 ruled that,

> "[t]he second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule".[16]

These rules can be summarized as follows: i) Peaceful enjoyment of the possessions; ii) Deprivation of possessions, and iii) Control of use.

In accordance with the function and the content of the rules, the second and third rules are going to be considered first.[17]

---

[15] *Sporrong and Lönnroth v. Sweden*, App. Nos. 7151/75 and 7152/75, Judgment of 23 September 1982, Series A No. 5, para.61.

[16] *James and Others v. the United Kingdom*, App. No.8793/79, Judgment of 21 February 1986, Series A No. 98, para.37.

[17] *Sporrong and Lönnroth v. Sweden*, App. Nos. 7151/75 and 7152/75, Judgment of 23 September 1982, Series A No. 5, para.61.

A) Deprivation of Possessions

When one talks about deprivation of property, he/she means the dispossession of the subject of property, or the extinction of the legal rights of the owners. It is sometimes problematic to decide which interference constitutes deprivation. Generally, deprivation of property includes transfer of property. The ECtHR stated that the sentence "deprived of his possession" applies only to someone who is "deprived of ownership".[18] But in subsequent cases the Court has used more flexible terms of in identifying the interference. For example, in *James and Others* the Court ruled that a law which obliged an owner to sell his property to a leaseholder was a measure involving the deprivation of property.[19]

Also, indirect deprivation was identified by the Court in *Håkansson and Sturesson* case, concerning forced sales. The applicant had bought farming land at an auction but had been obliged to resell it, since the authorities did not grant him the necessary permit.[20] On the other hand, temporary dispossession cannot be regarded as deprivation; it constitutes control of the use of property.[21]

Accordingly, the investigation of two matters is quite important in order to confirm if there has been a deprivation of property. The first matter is related to the existence of a formal expropriation of transfer of ownership and the second matter is related to the existence of a *de facto* taking of property.

In relation to planning, one may take expropriation as a starting point. In the *Bramelid and Malmström* the European Commission of Human Rights (EComHR) stated that although there is no explicit reference to 'expropriation' as such in the P1-1, its wording shows that it is

---

[18] *Handyside* v. *the United Kingdom,* App. No. 5493/72, Judgment of 7 December 1976, para.62.

[19] *James and Others* v. *United Kingdom*, para. 40.

[20] *Håkansson and Sturesson* v. *Sweden*, App. No. 11855/85, Judgment of 21 February 1990.

[21] *Handyside*, para.62.

intended to refer to expropriation.[22] *Zubany* case, concerning the forced taking of land in order to build houses for disadvantaged persons, is a clear example of expropriation.[23] It should be added that the ECtHR not only takes into account whether there has been a formal expropriation or transfer of ownership but it also examines a situation in order to decide whether there has been a *de facto* expropriation.

In the *Sporrong and Lönnroth,* concerning the imposition of expropriation permits and construction prohibitions, the Court decided that in the absence of formal expropriation of property, it is a necessity for the Court to look behind the appearances and investigate the realities of the situation complained of.[24] Similarly, in the *Papamichalopoulos* case the applicants' agricultural land had been taken by the military dictatorship and transferred to the Navy Fund which then established a naval base. The applicants were unable to make a use of their property or to sell, bequeath, mortgage or make a gift of it. Although, the applicants' property had not been formally expropriated and they remained the title of the land, they lost all ability to dispose of the land in question. As the facts of the case disclose, the European Court did not hesitate to identify the situation as *de facto* expropriation which amounts to a violation of P1-1.[25]

---

[22] *Bramelid and Malmström* v. *Sweden*, App. Nos. 8588/79 & 8589/79, Admissibility Decision of 12 October 1982.

[23] *Zubany* v. *Italy*, App. No. 14025/88, Judgment of 7 August 1996.

[24] *Sporrong and Lönnroth v. Sweden,* App. Nos. 7151/75; 7152/75, Judgment of 23 September 1982, para.63: "In the absence of a formal expropriation, that is to say a transfer of ownership, the Court considers that it must look behind the appearances and investigate the realities of the situation complained of (…). Since the Convention is intended to guarantee rights that are 'practical and effective' (…), it has to be ascertained whether that situation amounted to a *de facto* expropriation, as was argued by the applicants."

[25] *Papamichalopoulos and Others* v. *Greece,* App. No. 14556/89, Judgment of 24 June 1993, para.45: "The loss of all ability to dispose of the land in issue, taken together with the failure of the attempts made so far to remedy the situation complained of, entailed sufficiently serious consequences for the applicants *de facto to have been expropriated* in a manner incompatible with their right to the *peaceful enjoyment of their possessions*." (Emphasis added).

As a conclusion, we can note that whether or not there is a *de facto* expropriation, is a matter of fact and degree.

B) Control of the use of property

The second paragraph of P1-1 allows States almost unlimited power "to impose restrictions on the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties." The scope of the control rule is very wide; it includes all measures taken by public authorities to regulate use of property which do not amount to deprivation.

In many cases it is not easy to clearly distinguish a situation regarded as deprivation of property and the imposition of limitation on use of property. The existence of such problem can be illustrated by the *Sporrong and Lönnroth* case. As was already noted in this case expropriation permits were issued for properties located in Stockholm and remained in force for a period over 20 years, but actual expropriation never took place. The Court therefore concluded that, while examining the situation whether or not amounted to *de facto* expropriation, the applicant's property right lost some of its substance but did not totally disappear, thus, such kind of situation did not fall within the ambit of the deprivation rule.[26]

The case-law lacks a precise definition on the degree of limitation which is needed for interference to be qualified as being so substantial as to amount to a taking of property. The Court usually takes the intensity of interference and the duration of the limitation measures into account.[27]

Nevertheless, some of the measures constitute interference with the first rule. Similarly with the situation described above, the criteria to distinguish when an act amounts to control of the use of property or interference with substance of property is also not clear. In the *Sporrong*

[26] *Sporrong and Lönnroth v. Sweden,* App. Nos. 7151/75; 7152/75, Judgment of 23 September 1982, para.63.

[27] For the critical detailed analyses of the distinction between deprivation and control of use see, Anderson, pp.553-554.

and Lönnroth case the ECtHR stated that prohibition of construction amounted to control of the use of property on the one hand, expropriation permits constituted interference with the substance of property, as they neither fall within the ambit of the deprivation rule, nor were they intended to control the use of property, on the other. Such border-line cases make the differentiation between the three rules of P1-1 vague.

Planning interferences usually fall within the ambit of the control rule. Two main objectives for imposing restrictive measures are: to serve "the general interest" and "to secure the payment of taxes or other contributions or penalties". The concept of 'general interest' is very wide. A variety of aims expressed by the public authorities have been considered to be in 'the general interest' such as town planning, protection of the environment, housing policy, rent control. Control rule can be also labeled as regulator taking within the terminology of American constitutional law.[28]

C) Peaceful enjoyment of the possessions

The peaceful enjoyment of the possession rule is of a general nature. It is an umbrella category that covers all situations of interferences with property rights which do not constitute deprivation of property or control of its use.[29] Unlike the previous two rules, which are deduced from the letter of P1-1, this rule is a purely judicial construction.

When it is difficult to make a distinction between 'deprivation of possession' and 'control of the use of property' as mentioned above, the Court bases its decision on the first rule. In the *Beyeler* case the ECtHR stated that the complexity of the factual and legal situation prevents the case being classified in a precise category, "the Court therefore considers

---

[28] Jerome J. Curtis, Jr., "*Comparison of Regulatory Takings under the United States Constitution and the European Convention on Human Rights*", **European Law Review**, Vol. 14, 1989, pp. 71-72.

[29] Laurent Sermet, **The European Convention on Human Rights and Property Rights**, Human Rights Files No.11 rev., Council of Europe Publishing, revised edition, 1998, p.29; Anderson, p.551.

that it should examine the situation complained of in the light of general rule."[30]

In this particular context, we again meet the *Sporrong and Lönnroth* case in which the Court considered that long-term expropriation permits did not constitute deprivation of property as the applicants could continue to utilize their possession and had the possibility to sell it. These expropriation permits had neither been intended to limit nor to control use of property. So, the Court found that expropriation permits violated rights of "peaceful enjoyment of possessions".[31]

In a number of cases concerning planning regulations the ECtHR stated that construction prohibitions imposed over property without paying compensation in exchange constitute an interference with the "peaceful enjoyment of possessions".[32]

III) Justification of Planning Interferences with the Right of Property

As the right of property is not absolute, it may be subjected to limitations prescribed in P1-1. Interferences with the right of property may be justified only if:

- it is prescribed by law;

- it is in the public or general interest; and

- it is proportionate to the aim pursued.

[30] *Beyeler* v. *Italy*, App. No. 33202/96, Judgment of 5 January 2000, para.98.

[31] *Sporrong and Lönnroth v. Sweden,* App. Nos. 7151/75; 7152/75, Judgment of 23 September 1982, para.64-65.

[32] *Katte Klitsche de la Grance* v. *Italy*, App. No. 12539/86, Judgment of 27 October 1994, para.40; *Phacas* v. *France*, App. No. 17869/91, Judgment of 23 April 1996, para.52.

A) Lawfulness of interference

The European Court pointed out that the *rule of law* is one of the fundamental principles of a democratic society, inherent in all the Articles of the European Convention Human Rights. Accordingly, the first and most important requirement of P1-1 (right of property is that any interference by a public authority with the peaceful enjoyment of possession should be lawful and not arbitrary[33].

Thus, interference with the right to property must first satisfy the requirement of legal certainty. The principle of legal certainty as one of the fundamental principles of a democratic society is inherent in the Convention as a whole and must therefore be satisfied whichever of the three rules applies. According to the Court, it is not sufficient for the act, on the basis of which a State limited the enjoyment of possessions, to be a formal legal source within the meaning of the domestic law, but it must furthermore contain certain qualitative characteristics and afford appropriate procedural safeguards so as to ensure protection against arbitrary action. For example, in the case of *James v. the United Kingdom*, the Court reiterated that:

> "it has consistently held that the terms 'law' or 'lawful' in the Convention [do] not merely refer back to the domestic law but also [relate] to the quality of the law, requiring it to be compatible with the rule of law."[34]

Accordingly, the law must be accessible and its provisions formulated with sufficient precision to enable the persons concerned to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail and to regulate their conduct. This requires a certain level of foreseeability, which depends on the content of the instrument in question, the field it is designed to cover and the number and status of those to whom it is addressed.

---

[33] *Iatridis v. Greece*, App. No.31107/96, GC, Judgment of 25 March 1999, para.58; *Perdiago v, Portugal*, App. No.24768/06, [GC], Judgment of 16 November 2010, para.63

[34] *James and Others v. the United Kingdom*, Judgment of 21 February 1986, para.67.

What is important in the context of planning interferences is that the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights be subjected to some form of adversarial proceedings before an independent body competent to review the reasons for the measures and the relevant evidence. P1-1 implies that any interference with the peaceful enjoyment of possessions must be accompanied by procedural guarantees affording to the individual or entity concerned a reasonable opportunity of presenting their case to the responsible authorities for the purpose of effectively challenging the measures interfering with the rights guaranteed by this provision.[35]

In order to show the importance of the judicial review in planning issues one may recall the *Antonetto* case.[36] In this case, although the applicant's judicial appeal against her neighbor's building permit provided by the competent local authority was successful, she was not able to demolish the unlawful building which then became legal through the new enacted legislation of Italian Parliament. When the issue was brought before the European Court, it first observed that local planning authorities rejected to implement regulations concerning unlawful constructions. Unlawful construction in question partially restricted the view and the day light of the applicant's property. The value of applicant's property also decreased. Under those situations, the European Court easily found the acts of the planning authorities violate the applicant's property right since rule of law principle implies the duty of state organs to accept judgments against them.[37]

In the *Belvedere* case concerning constructive expropriation, the applicant company's land was expropriated by the authorities in order to build a road. The competent domestic court found the decision of

[35] *Capital Bank AD v. Bulgaria*, App. No.49429/99, Judgment of 24 November 2005, para.134.

[36] Also see, Jean-Jacques Paradissis, "*Unlawful Planning Development and the Right to Peaceful Enjoyment of Possessions: The Antonetto Case*", **Journal of Planning & Environment Law**, June 2002, pp.674-683.

[37] *Antonetto v. Italy*, App. No.15918/89, Judgment of 20 July 2000, para.35. Also see, *Frascino v. Italy*, App. No. 35227/97, Judgment of 11 December 2003, para.33.

expropriation unlawful but later it declared that the transfer of property had become irreversible and applicants' request to return the land was dismissed. The ECtHR ruled that the rejection of the restitution of land had been in breach of P1-1.[38]

B) Public and General Interest

The wording of P1-1 so clear that the deprivation rule requires that interference should be "in the public interest", and the control rule requires that measures should be "in accordance with the general interest". According to the European Court, there is no fundamental distinction between public and general interest and "any interference with property rights, irrespectively of the rule it falls under, must satisfy the requirement of serving a legitimate public or general interest".[39]

The concept of public or general interest is very wide and States have an almost absolute margin of appreciation when it comes to determination what the 'public interest' is.[40] In the *James and Others* case the Court stated that the national authorities are in principle in a better place to appreciate what is in the public interest.[41] The Court, accordingly, "will respect the legislature's judgment as to what is in the general interest unless that judgment be manifestly without any reasonable foundation."[42] The Court assumed that national authorities have a better knowledge of their society and its needs; law which allows interference with property involves consideration of political, economical and social issues on which opinions within a democratic society may reasonably differ widely.[43]

[38] *Belvedere v. Italy,* App. No. 31524/96, Judgment of 30 May 2000, paras.61-63. Also see, *Carbonara and Ventura v. Italy*, App. No. 24638/94, Judgment of 30 May 2000, paras.64-65.

[39] *James and Others v. United Kingdom*, Judgment of 21 February 1986, paras.43-45

[40] The position is to a certain extent different in Turkish administrative law. See, Cemil Kaya, **Kararlarından Hareketle Kamu Yararı Kavramına Danıştay'ın Bakışı**, XII Levha Yay., İstanbul, Eylül 2011, pp.57-63.

[41] *James and Others*, para.46.

[42] *Mellacher and others v. Austria*, App. Nos.10522/83-11011/84 and 11070, Judgment of 19 December 1989, Series A No.169, para.45.

[43] *James and Others*, para.47.

A deprivation of property can be in the public interest even in the cases when property is transferred to private individuals. The Court held that "the compulsory transfer of property from one individual to another may, depending upon the circumstances, constitute a legitimate means for promoting the public interest." Furthermore, it stated that the notion 'in the public interest' cannot be understood as implying "that the transferred property should be put into use for the general public or that the community generally, or even a substantial proportion of it, should directly benefit from the taking".[44]

Many complaints arising from the interferences concerning the considerations of environmental protection and urban/town planning[45] have been brought before the Strasbourg Court. In general, they include the grounds for restrictions such as suspension, prohibition or refusal of

[44] *James and Others*, para.40-45. Also see, *Association of General Practitioners v. Denmark*, App. No. 12947/87, Admissibility Decision of 12 July 1989, para.1 (The Law); *E. P. v. Slovak Republic*, Application No. 33706/96, Admissibility Decision of 9 September 1998, paras.2-3 (The Law); *Back v. Finland*, App. No. 37598/97, Judgment of 20 July 2004, paras.53, 60; *Allard v. Sweden*, App. No. 35179/97, Judgment of 24 June 2003, para.52; *Offerhaus and Offerhaus v. Netherlands*, App. No.35730/97, Admissibility Decision of 16 January 2001, para.1; *Paeffgen GMBH v. Germany,* App. Nos.25379/04, 21688/05, 21722/05 and 21770/05, Admissibility Decision of 18 September 2007, especially para.1; *Luordo v. Italy*, App. No.32190/96, Judgment of 17 July 2003, para.68.

[45] It is assumed that "the purpose of the planning activity is to provide the highest benefit fort he public". See. İlker Çolak-Kemal Şahin, *"Main Characteristic of urban Planning and Its Effects on Fundamental Rights and Freedoms –with special Reference to Turkish Law"*, **Law and Justice Review**, Vol.1, Issue 1, Year 1, April 2011, pp.151-204, 170-172. With regard to perspective of Turkish Supreme Administrative Court in this regard, see, Kaya, **Kamu Yararı**, pp.116-137.

building permits[46]; expropriation[47] or *de facto* expropriation[48]; expropriation permits of indefinite duration[49]; town plan modifications[50]; housing policy (compulsory purchase[51] and rent control regulations[52]), protection of cultural immovable properties which subject to private property.[53] It must be added that in *Buckley* case the Court acknowledged the importance of urban planning in respect to margin of appreciation in the context of Article 8.[54]

---

[46] For example see, *Sporrong and Lönnroth v. Sweden*, App. Nos.7151/75 and 7152/75, Judgment of 23 September 1982, Series A No. 52 (prohibition of building / expropriation permit); *Allan Jacobsson v. Sweden,* App. No.10842/84, Judgment of 25 October 1989, Series A No. 163, para.59 (prohibition of building); *Pine Valley Developments Ltd. and others v. Ireland*, App. No.12742/87, Judgment of 29 November 1991, Series A No. 222, para.57 (abolition of building permit); *Katte Klitsche de la Grange v. Italy*, App. No.12539/86, Judgment of 27 October 1994, Series A No. 293-B, para.35 (changes in town plan and decreasing in building value); *Phocas v. France*, App. No.17869/91, Judgment of 23 April 1996, paras.54-55 (prohibition of construction/expropriation permit); *Matti and Marianne Hiltunen v. Finland*, App. No.30337/96, Admissibility Decision of 28 September 1999 (prohibition of construction); *Pialopoulos and others v. Greece*, App. No. 37095/97, Judgment of 15 February 2001, para. 58; *Ansay and others v. Turkey*, App. No. 49908/99, Admissibility Decision of 2 March 2006 (forestation in cadastral, prohibition of building).

[47] *Platakou v. Greece*, App. No.38460/97, Judgment of 11 January 2001; *Yıltas Yıldız Turistik Tesisleri v. Turkey*, App. No.30502/96, Judgment of 23 April 2003.

[48] *Papamichalopoulos and others v. Greece*, App. No. 14556/89, Judgment of 24 June 1993, Series A No. 260-B.

[49] *Rosinski v. Poland*, App. No. 17373/02, Judgment of 17 July 2007, paras.70, 76; *Skrzynski v. Poland*, App. No. 38672/02, Judgment of 6 September 2007, para.80.

[50] *Pincock v. the United Kingdom*, App. No. 14265/88, Admissibility Decision of 19 January 1989, DR Vol. 59, pp.281-285.

[51] *James and Others v. United Kingdom*, Judgment of 21 February 1986.

[52] *Mellacher and others v. Austria*, App. Nos.10522/83-11011/84 and 11070, Judgment of 19 December 1989, Series A No.169; *Hutten-Czapska v. Poland*, App. No.35014/97, Judgment of 22 February 2005, paras.149, 156-160, 165-166, 178; *Ghigo v. Malta*, App. No.31122/05, Judgment of 26 September 2006.

[53] *Kozacıoğlu v. Turkey*, App. No.2334/03, GC Judgment of 19 February 2009.

[54] *Buckley v. the United Kingdom*, App. No.20348/92, Judgment of 25 September 1996, para.75. Detailed analyses of planning interferences with Article 8 can be found in Jones, pp.236-239. Also see Richard Drabble QC-James Maurici-Tim Buley, **Local Authorities and Human Rights**, OUP, 2004, sf:104-152 (Chapter 5).

As a result, it is proper to conclude that all those interferences considered as legitimate by the European Court as a presumption without examining the substance of the measures in question.[55]

C) Proportionality of the planning interference: compensation and related factors

Although the principle of proportionality is not explicitly mentioned in the Convention and its Protocols, the Court nevertheless makes use of this principle in reviewing cases. The national authorities should maintain a fair balance between the means employed and the aims sought to be realized. The Court referred to the principle of proportionality in cases where the property rights of the applicants were in question. For example, in the *Sporrong and Lönnroth* case, the ECtHR stated:

> "[t]he Court had to determine whether a fair balance was struck between the demands of the general interests of the community and the requirement of the protection of the individual's fundamental rights… The search for this balance is inherent in the whole of the Convention and is also reflected in the structure of Article 1 (P1-1)."[56]

In view of the European Court, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realized by any measure applied by the State, including measures depriving a person of his possessions.[57] Again here the States have margin of appreciation with regard to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the public/general interest for the purpose of achieving the object of the law in question. But here, contrary to the situation concerning public/general interest concerns, the Court has competence to review the

[55] For comparative comments concerning Court's hesitation see Curtis, p.78.

[56] *Sporrong and Lönnroth v. Sweden*, App. Nos.7151/75 and 7152/75, Judgment of 23 September 1982, para.69.

[57] *Sporrong and Lönnroth v. Sweden*, para.73; *Zwierzynski v. Poland*, App. No.34049/96, Judgment of 19 June 2001, para.71; *Perdiago v, Portugal*, App. No.24768/06, [GC], Judgment of 16 November 2010, paras.64, 67

measures and determine whether the requisite balance was maintained in a manner consonant with the applicants' right to the peaceful enjoyment of their possessions.[58] The European Court points out that where an issue in the public/general interest is at stake it is incumbent on the public authorities to act in an appropriate manner and with the utmost consistency.[59]

In all types of interference with property the principle of proportionality must be respected. But we may say that the measures of proportionality differ in the application of different rules since a deprivation of property is inherently more serious than the control of its use, where full ownership is retained. The proportionality shall be assessed with reference to the severity of the restriction imposed.[60]

According to the Court, the right to compensation under domestic legislation is material to the assessment of whether the contested measure respects the requisite fair balance and whether it imposes a disproportionate burden on the applicants. As far as P1-1 is concerned, the protection of the right of property it affords would be largely illusory and ineffective in the absence of any equivalent principle.

In this regard, a deprivation or taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference, and that a total lack of compensation can be considered justifiable under Article 1 of Protocol No. 1 only in exceptional circumstances.[61]

---

58 *Scordino v. Italy*, No. 1, App. No. 36813/97, GC Judgment of 29 March 2006, para.94.

59 *Zwierzynski v. Poland*, App. No.34049/96, Judgment of 19 June 2001, para.73.

60 Cf. Anderson, p.550-551.

61 *N.A. and Others v. Turkey*, App. No.37451/97, Judgment of 11 October 2005, para.41; *Yıldırır v. Turkey*, App. No. 21482/03, Judgment of 24 November 2009, para.44.
In Turkish administrative law, if the interference with the right of property based on the valid and accurate public interest concerns, even deprivation of property is legally possible without payment of an amount related to its value. Kaya, **Kamu Yararı**, p.63. The case-law of the European Court indicates that the approach of Turkish Supreme Administrative Court is incompatible with the European standards in property protection.

The right of property under the P1-1 does not guarantee a right to full compensation in all circumstances.[62] In many cases of lawful expropriation, such as the distinct expropriation of land with a view to building a road or for other purposes "in the public interest", only full compensation can be regarded as reasonably related to the value of the property, that rule is not without its exceptions. Legitimate objectives in the "public interest", such as those pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value.[63]

For example, in the *James* case, the issue was whether, in the context of leasehold-reform legislation, the conditions empowering long-term leasehold tenants to acquire their property struck the fair balance. The Court found that they did, holding that the context was one of social and economic reform in which the burden borne by the freeholders was not unreasonable, even though the amounts received by the interested parties were less than the full market value of the property.

Moreover, less than full compensation may also enough where property is taken for the purposes of "such fundamental changes of a country's constitutional system as the transition from monarchy to republic"[64]. The State has a wide margin of appreciation when enacting laws in the context of a change of political and economic regime[65] In the context of the country's transition towards a democratic regime, and has specified that rules regulating ownership relations within the country "involving a wide-reaching but controversial legislative scheme with significant economic impact for the country as a whole" could involve decisions restricting compensation for the taking or restitution of property to a level below its market value.[66]

---

[62] See Anderson, pp.552-553.

[63] *James and Others v. United Kingdom*, Judgment of 21 February 1986, para.54.

[64] *Former King of Greece and others v. Greece*, App. No.25701/94, Judgment of 23 November 2000, para.89.

[65] *Kopecky v. Slovakia*, App. No.44912/98, [GC], Judgment of 28 September 2004, para.35.

[66] *Maltzan and Others v. Germany* (dec.) [GC], App. Nos. 71916/01, 71917/01 and 10260/02, GC Admissibility Decision of 2 March 2005, paras.77, and 111-112.

In the *Papachelas* case the issue concerned the expropriation of more than 150 properties, including part of the applicants' property, for the purposes of building a major road. The Court held that the compensation awarded to the applicants had not upset the fair balance between the opposing interests, since it was only GRD 1,621 per square meter less than the value of the land as estimated by the Association of Sworn Valuers.[67]

The European Court held that the "fair balance" is damaged in the case that if the applicant's right to property is subjected to an intervention and consequently he/she/it is placed under "unusual" and "excessive" obligation.

In this context, the establishment of a system which provides the flexibility of the legislation that grounds the interference and the specific circumstances under each fact is quite important for procedural guarantees. This factor usually comes up in the interferences with immovable property and in the interferences which has their source directly in the legislation.

1) Deprivation of property arising from long-lasting cases in domestic courts

In the *Yagtzilar and others* case, involving the lengthy proceedings instituted following the occupation and the subsequent expropriation of the land in question which ended without the applicants receiving compensation because of the statutory time-limit, the Court first indicated an obligation to the respondent Government that the latter should provide a convincing explanation of the reasons why the Greek authorities did not at any time pay compensation to the applicants or their heirs for the taking of their possessions. The Court then stated that "by operation of the statute of limitations, the applicants were awarded nothing, at the end of proceedings which had started in 1933, for pecuniary or non-pecuniary

[67] *Papachelas v. Greece*, App. No.31423/96, [GC], Judgment of 25 March 1999.

damage sustained as a result of their being deprived of their property, without compensation, for over seventy years."[68]

Similarly, in *Akyüz* the Court dealt with the consequence of application of the national legislation, namely, Article 38 of Law no. 2942 in which it was stated that applications for compensation for a deprivation of property had to be made within twenty years from the date the property was occupied. This provision applied widely in Turkey, and by applying this provision retrospectively, the national courts deprived the applicants of any possibility of obtaining compensation for the annulment of title deeds. When the issue was brought before it, the Court considered that the application of Article 38 of Law no. 2942 had the consequence of depriving the possibility to obtain damages for the annulment of title. The Court went of saying that "although such an interference was founded on legislation that was valid at the material time, it could only be described as arbitrary, in so far as no compensation procedure capable of maintaining the fair balance which had to be struck between the demands of the general interest of the community and the requirement of the protection of the individual's fundamental rights had been put in place."[69]

2) Failure to take into account of the diversity of situations in compensation and failure to provide effective mechanism for the applicants

In this particular context, one may again refer to the *Sporrong* Judgment of the European Court, which found a violation of right of property as a result of prohibition of and expropriation permit lasted for 25 years. In its judgment, the Court emphasized the inflexibility of legislation in question and stated that, "the law provided no means by which the situation of the property owners involved could be modified at a later date. The Court notes in this connection that the permits granted to the City of Stockholm were granted for five years in the case of the Spor-

[68] *Yagtzilar and others v. Greece*, App. No. 4127/97, Judgment of 6 December 2001, para.41.

[69] *Akyüz v. Turkey*, App. No. 35837/02, Judgment of 20 November 2007, paras.20-22.

rong Estate - with an extension for three, then for five and finally for ten years - and for ten years in the case of Mrs. Lönnroth. In the events that happened, they remained in force for twenty-three years and eight years respectively. During the whole of this period, the applicants were left in complete uncertainty as to the fate of their properties and were not entitled to have any difficulties which they might have encountered taken into account by the Swedish Government".[70]

In the *Papachelas* case the Court stated that: "In the system applied in this instance the compensation is in every case reduced by an amount equal to the value of an area fifteen meters wide, without the owners concerned being allowed to argue that in reality the effect of the works concerned either has been of no benefit – or less benefit – to them or has caused them to sustain varying degrees of loss. This system, which is too inflexible and takes no account of the diversity of situations, ignoring as it does the differences due in particular to the nature of the works and the layout of the site... The applicants were prevented from asserting before the domestic courts their right to compensation in full for the loss of their property and were awarded compensation for only 6,962 sq. m of the 8,402 sq. m that were expropriated. They thus had to bear a burden that was individual and excessive and could have been rendered legitimate only if they had had the possibility of proving their alleged damage and, if successful, of receiving the relevant compensation. It is not necessary at this stage to determine whether the applicants were in fact prejudiced; it was in their legal situation itself that the requisite balance was no longer to be found."[71]

In the *Erkner and Hofauer* case, although the Court found that to authorize a provisional transfer at an early stage of the consolidation process intended to ensure that the land in question could be continuously and economically farmed in the interests of the landowners gener-

---

[70] *Sporrong and Lönnroth v. Sweden*, App. Nos.7151/75 and 7152/75, Judgment of 23 September 1982, para.70.

[71] *Papachelas v. Greece*, App. No.31423/96, GC Judgment of 25 March 1999, paras.53-55; *Efstathiou and Michailidi & Co. Motel America v. Greece*, App. No.55794/00, Judgment of 10 July 2003, paras.27-33.

ally and of the community and, although the applicants lost their land in consequence of the transfer decided on in 1970, they received other land in lieu, the applicable system suffered from a degree of inflexibility: "before the entry into force of a consolidation plan, it provided no means of altering the position of landowners or of compensating them for damage they may have sustained in the time up to the final award of the statutory compensation in land."[72]

In the *Mellacher and others*, concerning rental control legislation, the Court considered specific regional factors of the location of the rented property in decreasing the rent. The Court observed that the act under review divided apartments to which the square-meter rent provisions apply into four classes on the basis of their standard of accommodation and irrespective of the geographical situation of the building in which they are located and certain properties were excluded from the scope of these provisions. The said act did not impose an automatic reduction on all rents, but leaves it to the tenants to take the initiative of making the appropriate application. Legislation instituting a system of rent control and aiming at establishing a standard of rents for equivalent apartments at an appropriate level must, perforce, be general in nature. It would hardly be consistent with these aims nor would it be practicable to make the reductions of rent dependent on the specific situation of each tenant. As to the field of application chosen for the 1981 Rent Act, the various exceptions and exclusions complained of could not, taking the aims of the Act into account, be said to be inappropriate or disproportionate.[73]

---

[72] *Erkner and Hofauer v. Austria*, App. No. 9616/81, Judgment of 23 April 1987, Series A No. 117, para.78. Also see, *Poiss v. Austria*, App. No. 9816/82, Judgment of 23 April 1987, Series A No. 117, para.68. Also see, Curtis, p.73.

[73] *Mellacher and others v. Austria*, App. Nos.10522/83-11011/84 and 11070, Judgment of 19 December 1989.

3) Failure to consider the decrease in the value of the remaining part of the expropriated land and decrease in income

Since the Convention is intended to guarantee rights that are practical and effective, in some cases the Court have regard to the reality of the situation, which requires an overall examination of the various interests in issue; this may call for an analysis not only of the compensation terms – if the situation is akin to the taking of property – but also of the conduct of the parties to the proceedings, including the steps taken by the State.

For example, in the *Bistrovic* case, the Court, having found that expropriations were the most serious interference with the right of property, considered that a careful examination of all relevant factors by a court dealing with the case was necessary to ensure that the requirements of P1-1 were complied with. The Court then made a connection between the rule of law which can be identified with the good administration of justice and the proceedings before the national courts. The Court stated that in the absence of any obligation for a judicial authority to give reasons for their decisions, the rights guaranteed by the Convention would be illusory and theoretical. Without requiring a detailed response to each argument presented before a court, this obligation nevertheless presupposes the right of a party to the proceedings to have his or her essential contentions carefully examined. Moreover, the Court held that only after verification of all factors concerning the effects of the motorway construction on the applicants' remaining property, such as the decrease in the value of their estate, the possibility of selling it and the applicants' interest in further use of the remaining estate, would it be possible for the domestic authorities to fix adequate compensation in the expropriation proceedings.[74]

In some cases for the fulfillment of the proportionality principle compensation shall also include loss of income. For example, in the *Lallement* case the ECtHR found that a compensation which did not cover

[74] *Bistrovic v. Croatia*, App. No. 25774/05, Judgment of 31 May 2007, paras.39, 42-44.

the loss of applicant's source of income as a result of expropriation of the land plot created an excessive burden to the farmer.[75]

According to the European Court, failing to establish all the relevant factors for establishing the compensation for the applicants' expropriated property, and failing to grant indemnity for the decrease in the value of their remaining estate, the national authorities may fail to strike a fair balance between the interests involved and may fail to make efforts to ensure adequate protection of the applicants' property rights in the context of expropriation proceedings which involved the ultimate interference on the part of the State with these rights.

4) Duration of the limitation and value of loss

This factor comes up especially in interferences which show the characteristic of control of the property (third rule). Duration of the interferences which inhibit the use of or benefit from the immovable properties mainly in prohibitions of constructions and expropriation permits is one of the most effective standards of the proportionality research. It is the situation in the well-known *Sporrong and Lönnroth* case[76] and *Allan Jacobsson* case[77]. In addition to these two leading cases, one may mention the recent *Rosinski* and *Skrzynski* Judgments herein[78].

The value of the loss also plays an important function in planning disputes. Again this factor has the applicability in control of use type interferences.

For example, in *Haider*, the applicant complained of the modification of the area zoning plan amounted to a *de facto* expropriation. With

---

[75] *Lallement* v. *France*, App. No. 46044/99, Judgment of 11 April 2002, para.24.

[76] *Sporrong and Lönnroth v. Sweden*, App. Nos.7151/75 and 7152/75, Judgment of 23 September 1982. The Court decided the violation of right of property as a result of prohibition of and expropriation permit lasted for 25 years.

[77] *Allan Jacobsson v. Sweden,* App. No.10842/84, .Judgment of 25 October 1989, Series A No. 163, para.62

[78] *Rosinski v. Poland*, App. No.17373/02, Judgment of 17 July 2007, paras.79-80; *Skrzynski v. Poland*, App. No. 38672/02, Judgment of 6 September 2007, paras.83-84

regard to the proportionality of the zoning the Court stated that "the applicant had failed to substantiate if and to what extent the challenged amendment of the area zoning plan had actually reduced the value of his land. Moreover, the applicant had bought the plot of land when it was designated as undeveloped land and according to the uncontested submissions of the Government he only paid the corresponding price. Thus the Court finds that the amendment of the area zoning plan did not impose an excessive burden on the applicant."[79]

Hiltunen case, concerning prohibition of construction, can also be cited here. In this case, the applicants complained that the prohibition on construction on their property had impaired their right to the peaceful enjoyment of their possessions and that the continued prohibition has rendered the rational and effective use of their property impossible. The Court held that although the applicants have been left in uncertainty for a certain period as to their possibilities to replace their summer cottage with a larger permanent dwelling, the regional plan which reserved the area in question for urban development would prevent them from renovating the summer cottage on the property or from continuing to make use of the property on the same conditions as when they acquired it. Moreover, the Court decided that that the applicants had not submitted any evidence showing that the value of the property in question had been substantially diminished on account of the ongoing building prohibition.[80]

Conclusion

Economic interest of any kind constitutes possession within meaning of P1-1. However, P1-1 protects only existing property, it does not guarantee the right to acquire property.

Planning decisions would always affect the right of property and therefore considered as interference with said right. However, the Eu-

---

[79] *Haider v. Austria*, App. No. 63413/00, Final Admissibility Decision of 29 January 2004, para.2.

[80] *Matti and Marianne Hiltunen v. Finland*, App. No.30337/96, Admissibility Decision of 28 September 1999.

ropean Court does not review the substance of planning decisions due to the margin of appreciation left to the States. The Court reviews the proportionality of the planning interferences by taking into account of compensation and procedural safeguards.

Above considerations indicate that the mistakes or errors of the State authorities should serve to the benefit of the persons affected, especially where no other conflicting private interest is at stake. In other words, the risk of any mistake made by the State authority must be borne by the State and the errors must not be remedied at the expense of the individual concerned.[81]

The European Convention on Human Rights is intended to safeguard rights which are practical and effective. In the light of the principle of effectiveness, P1-1 generally requires from domestic authorities and courts to act consistently in different of proceedings concerning same property.[82]

Jurisprudence of the Court concerning planning and the principles identified by the Court can be used with a view to reconcile the right of property and planning. By taking into account of the principles identified in planning interferences, right of property and planning co-exists at the same time. Therefore, the inherent opposition between planning and right of property can be resolved.[83]

---

[81] *Gashi v. Croatia*, Judgment of 13 December 2007, para.40.

[82] *Jokela v. Finland*, App. No.28856/95, Judgment of 21 May 2002, para.61.

[83] In the planning literature, a new concept of "planning rights" introduced with a view to reconcile propert rights and planning. See, E. R. Alexander, "*Planning Rights and Their Implications*", **Planning Theory**, Vol.6 (2), 2007, pp.112-126.