

COMPENSATION FOR PROPERTY UNDER THE EUROPEAN CONVENTION ON
HUMAN RIGHTS

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ABSTRACT

This Article investigates the nature of the right to property guaranteed under the First Protocol to the European Convention on Human Rights ('P1-1'). It argues that the European Court of Human Rights has been torn between two theories of the right to property. The first is the "integrated theory", and it holds that the right to property shares common values and purposes with other Convention rights. Hence, the interpretation of P1-1 should reflect principles developed in the interpretation of other Convention rights. It is argued that the application of the integrated theory should support a "social model" of property. The second theory is the "comparative theory". It tends to look outside the Convention, to the comparative law on rights of property, for guidance on the interpretation of P1-1. Implicitly, it rejects the notion that there is a strong link between the right to property and other Convention rights. In addition, it supports the use of either a "legal model" or an "economic model" of property in the application of P1-1.

The Article demonstrates that the rhetoric of Court of Human Rights follows the integrated theory, but the development of substantive doctrine more often reflects the comparative theory. It shows this by exploring the development of the implied right to compensation for the expropriation of property. There is no express guarantee of compensation in P1-1, and hence the development of compensation principles provides insight into the Court's views on the nature of the interest protected by a human right to property.

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INTRODUCTION

This Article asks whether the right to property, as a human right, serves the same general purpose as other human rights. It does so by examining the standards relating to compensation for deprivations of property under the European human rights system. If property is protected for similar reasons as other fundamental rights, the interpretation of the right to property should draw upon the principles developed in relation to the interpretation of other rights. However, if the right to property is distinct from other human rights, then perhaps guidance on its interpretation should come from comparative law, specifically in relation to rights to property that may be found in constitutional law or perhaps other international treaties.

The Article focuses on the work of European Court of Human Rights, primarily because it has produced an impressive volume of cases under the right to property contained in the First Protocol¹ to the European Convention on Human Rights,² with

¹ Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, Europ. T.S. No. 9 (in force May 18, 1954). Article 1 provides as follows:

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

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in

most of these in the last thirty years. Many of these cases deal with compensation, and these cases often put questions regarding the purpose of protecting property into sharp relief. This is partly due to the lack of clarity in the Protocol itself. It declares that everyone is "entitled to the peaceful enjoyment of his possessions", and that property can only be taken in the public interest and according to law, but fails to tell us what we really want to know: if the state authorizes the taking of our property, how much money will we get? The Protocol itself appears to say nothing on this crucial point, and hence the Court's decisions on compensation provide a particularly valuable insight into its views on the right to property.

It took nearly thirty years for the situation to be clarified, and we can now say that Protocol contains an implied right to compensation. The state must maintain a "fair balance" between public and private interests and "normally" this means that it must provide compensation that is "reasonably related to the value of the property".³ Further investigation would show that market value compensation is required for the typical

accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

² Convention on the Protection of Human Rights and Fundamental Freedoms, as Amended By Protocol 11, Nov. 4, 1950, Europ. T.S. No. 5 (in force Sept. 3, 1953). Case reports are available through the database of the European Court of Human Rights, at <<http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>>.

³ James v. United Kingdom, 98 Eur. Ct. H.R. (ser. A), 36 (1986).

taking of property for public use.⁴ There are exceptions, however: as the image of a balance suggests, there may be circumstances where the public interest outweighs the need to protect the individual's rights. In such cases, the Protocol "may call for less than reimbursement of the full market value".⁵

But, leaving aside the exceptions, we may ask why the market value should be relevant to a human right to property. The exceptions are important, and are examined in this Article, but not to the exclusion of asking why the market value should provide a presumptive standard of fairness. The market reflects the community's perception of value, rather than the owner's.⁶ Adopting it as the standard seems to abandon the idea that human rights should protect an area of personal choice, at least where the individual does not have the same desires, preferences or plans for their property as the community at large. These values are perhaps not so important under constitutional or statutory law of every state, or possibly other areas of international law, but human rights law should require the community to accept at least some idiosyncratic preferences. Indeed, this seems implicit in the idea of the 'fair balance': it is plainly quite vague, but at least it

⁴ *Scordino v. Italy* (No. 1), Appl. No. 36813/97 (Eur. Ct. H.R. Mar. 29, 2006) (G.C.).

⁵ *James*, 98 Eur. Ct. H.R. (ser. A), at 36; *Lithgow v. United Kingdom*, 102 Eur. Ct. H.R. (ser. A), 51 (1986). It falls to the state to justify a departure from the market standard: see *Scordino*, *id.*

⁶ Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines As Land Use Controls*, 40 U. CHI. L. REV. 681, 735-37 (1973).

appears sufficiently open to allow the Court to consider individual preferences in determining whether there has been due respect for property rights.

An examination of the reasoning in the European cases on compensation reveals that there is a serious division over the very nature and function of a human right to property. This Article shows that the rhetoric of the Court of Human Rights often supports the idea that the right to property shares common values with other Convention rights, but a closer examination reveals that it rarely follows through on the full implications of this belief. Instead, compensation standards more often reflect a comparative view of the right to property, under which the Court looks outside the Convention for guidance, to existing rules of national and international law on property.

In Part I, the Article opens with a brief review the historical background. It argues that the Protocol was never intended to do more than provide an international guarantee that states would adhere to the rule of law when exercising their powers over property. This view eventually gave way to two different and competing visions of the right to property. The Article calls the first the 'integrated theory': it holds that the human rights recognized by the Convention and its Protocols reflect common values and are subject to common principles. In particular, the right to property, like other Convention rights, is subject to the general principle of proportionality. This leads to the duty to compensate, as a taking without compensation would not strike a fair balance between public and private interests. As explained briefly above, the fair balance principle has provided the source of the implied right to compensation.

The integrated view can be set against the comparative theory of the right to property. It also accepts that the substantive protection of the right to property goes

beyond the narrow confines of the rule of law. However, it bases the compensation standard on national legal systems and their existing practices relating to the exercise of state power over property. As states normally provide market value compensation on expropriation, and the same standard should apply under the Protocol. The principles of proportionality and fairness that apply to other human rights are not relevant. While these principles may be consistent with principles of national law, and may produce the same outcome in many circumstances, but they are not a necessary part of the Court's analysis in a specific case.

While the Court's rhetoric supports the integrated theory and the fair balance test that follows from it, Part II asks whether it actually recognizes its full implications. The fair balance test requires the Court to assess the impact of state action on the victim. In order to do so, it must identify the interests that the right to property is intended to protect. Part II sets out three different models of property that the Court employs under P1-1, and argues that only one of them – the social model – is consistent with the integrated theory. The social model recognizes the function of property in relation to individual autonomy and dignity, and hence the amount of compensation needed to strike the balance in taking (for example) commercial property might be different than it would be for taking highly personal property, even if both had the same market value. However, the social model is only applied sporadically: in many cases, the Court relies on legal and economic models of property. Part II demonstrates that the use of these models is not consistent with the integrated theory.

Part III accepts that the social model may appear unworkable in some situations. In practice, the application of the social model would require the Court to re-evaluate the

importance of the market standard. While this would not necessarily require states to pay more than the market value, and indeed in some cases it may require less, at the very least the Court should not readily assume that payment of market value compensation does strike a fair balance. It may be argued, however, that this would be impractical; perhaps the market standard represents the best approximation of the just result for the majority of cases. However, this Part argues that this objection is not insurmountable, and makes some suggestions on how the Court might bring its doctrines in line with the integrated theory that it espouses.

Part III is followed by a brief conclusion.

I. THE RISE OF THE BALANCING PRINCIPLE

The European Convention on Human Rights is a product of the Council of Europe. The Council itself came into being in May 1949, with the signing of the Statute of Europe by Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom.⁷

One of the Council's first tasks was the preparation of a treaty on human rights. It took more time than anticipated, partly due to disagreements over the content of a right to property.⁸ In principle, the states agreed that a right to property should be included in the

⁷ Statute of the Council of Europe, May 5, 1949, Europ. T.S. No.1 (in force Aug. 3, 1949).

⁸ *See generally* TOM ALLEN, PROPERTY AND THE HUMAN RIGHTS ACT 1998, 17-28 (2005); Wolfgang Peukert, *Protection of Ownership under Article of the First Protocol to the European Convention on Human Rights*, 2 HUM. RTS. L.J. 37 (1981); Egon Schwelb,

treaty, but every proposal that contained a reference to compensation was rejected, no matter how weakly drawn. Even a prohibition on the "arbitrary confiscation" of property was rejected at one point: some governments feared that it would be interpreted as a guarantee of compensation.⁹ Eventually, the states agreed to sign the Convention without a right to property, but committed themselves to continue negotiations with a view to its incorporation in a later treaty.

The states that opposed a compensation guarantee were concerned that it might compromise plans for ambitious economic and social policies. For example, the British government not only denied that compensation should be required for every taking, but also that the international community had a legitimate interest in the content of a member

The Protection of the Right to Property of Nationals under the First Protocol to the European Convention on Human Rights, 13 AM. J. COMP. L. 518, 533-41 (1964); AW.B. SIMPSON, HUMAN RIGHTS AND THE END OF EMPIRE: BRITAIN AND THE GENESIS OF THE EUROPEAN CONVENTION, chap. 15 (2001).

⁹ Consultative Assembly, Recommendation No. 24 to the Council of Ministers on the Draft Convention for the Protection of Human Rights and Fundamental Freedoms, adopted 25 August 1950, at the conclusion of the Debate on the Report from the Committee on Legal and Administrative Questions, in COUNCIL OF EUROPE, 8 COLLECTED EDITION OF THE "TRAVAUX PRÉPARATOIRES" OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: RECUEIL DES TRAVAUX PRÉPARATOIRES DE LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME, 192, 194 (1975-85).

state's rules on compensation.¹⁰ Eventually, the states only concluded negotiations by

¹⁰ See generally SIMPSON, *supra* note 8 (see also Jacob W.F. Sundberg, *Human Rights in Sweden: The Breakthrough of an Idea*, 47 OHIO ST. L.J. 951 (1986) on the position in Sweden). The *travaux préparatoires* record that the British Government "did not think it possible to express this principle [compensation] in terms which would be appropriate to all the various types of case which might arise, nor could it admit that decisions taken on this matter by the competent national authorities should be subject to revision by international organs." Report of the Committee of Experts, 24 February 1951, in COUNCIL OF EUROPE, 7 COLLECTED EDITION, *supra* note 9, 204, 208. The French and Saar delegations joined the British in expressing reservations, even in relation to a relatively modest guarantee that expropriation should be subject to "such compensation as shall be determined in accordance with the conditions provided for by law." Meeting of the Committee of Experts, 18 April 1951, in COUNCIL OF EUROPE, 7 COLLECTED EDITION, *id.*, 222-24. They "could not accept a definition of the right to property comprising in all cases the principle of compensation in the event of private property being acquired by the State." *Id.* at 250. Instead, the British proposed the following for the right to property:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. This provision, however, shall not be considered as infringing in any way the right of a State to enforce such laws as it deems necessary either to serve the ends of justice or to secure the payment of monies due whether by way of taxes or otherwise, or to ensure the acquisition or use of property in accordance

saying as little as possible about compensation. The relevant part of P1-1 declares that "[n]o one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law." The cryptic reference to international law meant only that the principles of customary international law that require states to compensate aliens for the taking of their property would remain in force.¹¹ The reluctance to give P1-1 any real substantive content is even more striking in its third sentence. As worded, a state may do whatever it, and not the Court (or any other organs of the Council of Europe), "deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties." The negotiations had left the right to property without any real substantive content, except for the commitment to the rule of law.

A. P1-1 as a guarantee of the rule of law

As a guarantee of the rule of law, the focus of P1-1 fell on procedural issues. Nevertheless, the wartime experience in continental Europe demonstrated that an international guarantee of the procedural aspects of the rule of law was significant in

with the general interest. Letter addressed on 7th February 1951 by the Secretary-General to the Foreign Ministers of the Member States, in COUNCIL OF EUROPE, 7 COLLECTED EDITION, *id.*, 184, 186.

The absence of any reference to compensation was, of course, quite deliberate.

¹¹ See generally Hélène Ruiz Fabri, *The Approach Taken by the European Court of Human Rights to the Assessment of Compensation for 'Regulatory Expropriations' of the Property of Foreign Investors*, 11 N.Y.U. ENVTL. L.J. 148, 162-163 (2002).

itself.¹² Moreover, the war crimes trials in Nuremberg and Tokyo would have suggested that international tribunals could be given some scope for developing substantive criteria of legality and the rule of law. For example, at the domestic level, moves were already being made in the Federal Republic of Germany to restore Jewish property seized under Nazi 'law' on the basis that the 'law' under which title had been taken should not be recognized as such.¹³ Arguably, the Court could have extended these principles so as to treat some uncompensated takings as unlawful. In such cases, international law would dictate that the appropriate remedy would be restitution of the property or its monetary equivalent, together with damages.¹⁴ Hence, it could have been argued that P1-1 did impose substantive obligations on states, even though it only required expropriations to be lawful.

¹² For example, Mr. Bastid, a French delegate, argued that a right to property was a necessary part of a human rights treaty, because individuals had to be protected from "arbitrary confiscation, that is to say, from those high-handed administrative or private measures of which all the totalitarian regimes have furnished such sinister examples." Sitting of the Consultative Assembly, 24-25 August 1950, COUNCIL OF EUROPE, 6 COLLECTED EDITION, *supra* note 9, 72, 76.

¹³ For a description, see Robert Alexy, *A Defence of Radbruch's Formula*, in RECRAFTING THE RULE OF LAW: THE LIMITS OF LEGAL ORDER 15 (David Dyzenhaus, ed., 1999) at 18-19 and Frank Haldemann, *Gustav Radbruch vs. Hans Kelsen: A Debate on Nazi Law*, 18 *RATIO JURIS* 162 at 175 (2005).

¹⁴ See *Papamichalopoulos v. Greece*, 260-B Eur. Ct. H.R. (ser. A) (1993).

To a very limited extent, the Court has developed the idea of legality with a view to its substantive content. P1-1 requires deprivations to be "subject to the conditions provided for by law", and the Court has taken this beyond formal compliance with the rules of the domestic legal system. Lawfulness incorporates criteria reflecting the "quality of law", by which an interference with property that complies with domestic legal rules may still breach P1-1 if the rules are not sufficiently "accessible, precise and foreseeable."¹⁵ Nevertheless, it was always doubtful that these criteria could be extended to create a general duty to compensate for takings. Ultimately, the argument was rejected in *James v. United Kingdom*.¹⁶ Instead, standards of lawfulness have focused on the pace and manner of legal change, especially in relation to the quality of the democratic process. There were hints of this in *James*, as the Court noted that the legislation in question had been debated extensively in Parliament.¹⁷ Perhaps the Court would have scrutinized it with more care if the legislation had amounted a sudden, unexpected

¹⁵ *Carbonara and Ventura v. Italy*, 2000-VI Eur. Ct. H.R. 91 at 107; *Beyeler v. Italy*, 2000-I Eur. Ct. H.R. 57 at 88 (G.C.); *Hentrich v. France*, 296-A Eur. Ct. H.R. (ser. A), 19-20 (1994); *Lithgow*, 102 Eur. Ct. H.R. (ser. A), 47 (1986); *Belvedere Alberghiera srl v. Italy*, 2000-VI Eur. Ct. H.R. 135. *See generally*, Helen Mountfield, *The Concept of an Unlawful Interference with Fundamental Rights*, in JEFFREY JOWELL & JONATHON COOPER, eds., *UNDERSTANDING HUMAN RIGHTS PRINCIPLES* (2001).

¹⁶ 98 Eur. Ct. H.R. (ser. A), 40-41 (1986).

¹⁷ 98 Eur. Ct. H.R. (ser. A) at 32-34; *see also Lithgow*, 102 Eur. Ct. H.R. (ser. A) at 13-16.

development in the law, especially if it had been pursued in a way that minimized democratic debate. In other words, where the Court has confidence in the state's democratic processes, it is content to allow issues regarding the substantive justice of property laws to be resolved by those processes.

B. The rejection of the rule-of-law model and the adoption of the integrated theory

The narrow focus on the rule of law was not seriously challenged until 1982, in the landmark case of *Sporrong and Lönnroth v. Sweden*.¹⁸ The Court stated that, to determine whether an interference with property complied with P1-1, it was necessary to "determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights."¹⁹ It was not enough to say that the interference satisfied the limited criteria of the rule of law.

This remains the case. The rule of law is plainly important; indeed, the Court has said that "one of the fundamental principles of a democratic society", "inherent in all the Articles of the Convention", and that "the first and most important requirement of Article 1 of Protocol No 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful".²⁰ However, the requirement is easily

¹⁸ 52 Eur. Ct. H.R. (ser. A) (1982).

¹⁹ *Id.*, at 29.

²⁰ *Iatridis*, 1999-II Eur. Ct. H.R. at 97.

satisfied in the vast majority of cases, and the real issue is whether the interference strikes a fair balance between community and individual interests.

(i) The source of the fair balance test

It is worth emphasizing that the source of the fair balance test lies outside the text of P1-1 itself. There is no mention of a "fair balance" in P1-1 itself. However, the Court stated that "[t]he search for this balance is inherent in the whole of the Convention and is also reflected in the structure of Article 1 (P1-1)".²¹

The second of these claims—that the "structure" of P1-1 provides a basis for the fair balance test—is very weak, but it leads us back to the claim that the balance is "inherent in the whole of the Convention". On its face, the structure of P1-1 is quite simple: it states a right in generous terms in the first sentence, and allows two broad limitations in the remaining sentences. The threshold issue in a specific case is whether there has been some interference with the "enjoyment of possessions". If so, P1-1 is applicable, and the analysis shifts to the limitations in the second and third sentences. The language of P1-1 suggests that, if the interference does fall within either one of the two limitations, there can be no violation. As the limitations were deliberately drawn very broadly, the intended effect was to minimize the impact of P1-1 on state powers over property. Put differently, the original conception of P1-1 did embody a balance between community and private interests, as neither the state nor the owner held an absolute power over property. However, if the conditions of the second and third sentences were satisfied, the balance had been struck without any need for the Court to

²¹ *Id.*

assess the fairness of the interference. States were the sole judge as to the necessity for the interference, and the Court would only have the power to judge whether the interference complied with the rule of law.²²

Plainly, the Court rejected this reading of P1-1 in *Sporrong*, but equally important was its reliance on Convention principles as the source of the standards of substantive justice that would apply to property. This followed from its reconstruction of the scope of each of three sentences of P1-1. The second sentence was narrowly restricted to the appropriation of full ownership: the taking of some interest short of ownership was excluded. The third sentence covered regulatory controls and taxation (and their enforcement), but seemed to exclude the appropriation for other purposes. Everything else fell into a residual category, not governed by the limitations of the second or third sentence, but only by the general principles of the first sentence. But since the first sentence appears to prohibit all interferences with property that do not fall under the second or third sentences, it may have seemed that the Court had dramatically extended the protection provided by P1-1. This was not the intention: indeed, there is nothing about the residual category that warrants higher scrutiny. For example, *Sporrong* concerned steps taken in preparation for an expropriation. Other cases under the first

²² For a pre-*Sporrong* example of this position, see *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) (1976), where the Court stated that the states were the sole judges of the necessity of measures taken to enforce regulatory controls on the use of property, even if confiscation was the result.

sentence include appropriations of intangible property²³ or interests in tangible property other than full ownership,²⁴ and generally anything that is not clearly an outright expropriation or a regulatory control over property.²⁵ Plainly, P1-1 was not intended to treat all such residual cases as breaches of the right to property. Hence, the structure of P1-1 as developed in *Sporrong* does require some kind of implied limitation on the right to property, and the Court found this implied limitation in the general principle of proportionality, rather than ideas of substantive justice derived from the rule of law.

At this point, having decided that this residual category did exist, and that it was not restricted by the express limitations of the second and third sentences, the Court was able to turn to one of its first judgments in support of the fair balance test. In *Certain Aspects of the Laws on the Use of Languages in Education in Belgium ('Belgian Linguistics Case')*,²⁶ the Court remarked that the Convention "implies a just balance

²³ *E.g.* *Brumărescu v Romania*, 1999-VII Eur. Ct. H.R. 201 (cancellation of a state debt); *Stran Greek Refineries v. Greece*, 301-B Eur. Ct. H.R. (ser. A) (1995) (cancellation of an arbitration award against the state); *cf.* *Pressos Compania Naviera SA v. Belgium*, 332 Eur. Ct. H.R. (ser. A) (1996) (extinction of tort claims).

²⁴ *E.g.* *Iatridis v. Greece*, 1999-II Eur. Ct. H.R. 75 (taking of a leasehold interest); *Bramelid and Malmström v. Sweden*, Appl. No. 8588/79, 8589/79 (Eur. Comm'n H.R. Oct. 12, 1982) (compulsory buy-out of company shares); *cf.* *Lithgow*, 102 Eur. Ct. H.R. (ser. A) (nationalization of company shares).

²⁵ *See*, ALLEN, *supra* note 8, 107-12.

²⁶ 5 Eur. Ct. H.R. (ser. A) (1968).

between the protection of the general interest of the Community and the respect due to fundamental human rights while attaching particular importance to the latter."²⁷ This case dealt with Article 14, which, like P1-1, does not include the 'necessity in a democratic society' formula. On its face, Article 14 is an absolute right, as it states simply that

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Hence, the Court found it necessary to develop some basis for determining when laws provide differential treatment violate the Article 14. The idea of balancing was adopted.

As put by the Court,

Article 14 (art. 14) does not prohibit distinctions in treatment which are founded on an objective assessment of essentially different factual circumstances and which, being based on the public interest *strike a fair balance* between the protection of the interests of the community and respect for the rights and freedoms safeguarded by the Convention."²⁸

The same implied limitation was therefore applied in *Sporrong*, to deal with the 'discovery' of the residual category of interferences with property.

It was not at all obvious that the "whole of the Convention" would provide a source for interpreting the substantive content of P1-1. There were other potential

²⁷ *Id.* at para. 5.

²⁸ *Id.* at para. 7; emphasis added.

sources of principle: in particular, the Court might have relied upon comparative law to identify common principles relating to state powers over property. In other words, instead of looking for guidance to other Convention rights, it might have looked outside the Convention, to rights to property in other contexts. In national law, it might have looked to constitutional bills of rights and the protection of property. In international law, other human rights treaties or possibly investment and economic treaties might have provided another source for determining a state's obligations to property owners. The *Sporrong* approach reflects the theory that the Convention and Protocol represent an integrated, coherent code relating not only to the procedure for protection rights, but also to their content.

This theory goes back to a crucial preliminary decision regarding the form of the proposed human rights treaty. Some countries argued for a treaty that simply enumerated rights, without elaboration, so that their content could be determined by subsequent interpretation. However, other countries were not at all confident that the Council of Europe, and its proposed court of human rights, should have the power to develop rights in this way. Instead, they argued that the rights should be enumerated *and* defined as precisely as possible.²⁹ Ultimately, the Committee of Experts, appointed by the

²⁹ Report to the Committee of Ministers Submitted by the Committee of Experts Instructed to Draw Up a Draft Convention of Collective Guarantee of Human Rights and Fundamental Freedoms, in COUNCIL OF EUROPE, 4 COLLECTED EDITION, *supra* note 9, 1. France, Ireland, Italy and Turkey supported enumeration; the United Kingdom, Greece, Norway, and the Netherlands supported precise definition; the other states were

Committee of Ministers, "rejected the method of general statement, and adopted the system of precise definition to the greatest extent possible of the specific rights to be secured."³⁰

If, as seems likely, a sparse text would have encouraged the Court to search for common principles, the 'method of general statement' would have supported the integrated view of Convention rights from its inception. Conversely, the 'system of precise definition', if properly executed, would have suggested that the rights do not necessarily form a coherent whole, or at least that the interpretation of specific rights would not draw upon implicit principles of general application. Instead, the detailed text of each right would disclose its own principles for interpretation. If subsequent developments proved that there were gaps in the protection of rights, the member states could act through the Council's legislative organs; new protocols could be added to the Convention, or new treaties could be agreed. Indeed, to some extent, this has happened: since the Convention was adopted, additional protocols have recognized a number of new

equivocal. *See generally*, SIMPSON, *supra* note 8, at 370-71, 687-88, 692-93, 705-707, 713-17 and Sundberg, *supra* note 10, at 956-57.

³⁰ Memorandum and Letters from the Secretariat-General, COUNCIL OF EUROPE, 8 COLLECTED EDITION, *supra* note 9, 126, 126-128 (although elsewhere the *travaux préparatoires* suggest that the final product was also seen as a compromise: Report of the Conference of Senior Officials, COUNCIL OF EUROPE, 4 COLLECTED EDITION, *id.*, 242, 248).

rights (including the right to property)³¹ and there have been a number of new conventions on different aspects of individual rights.³² Nevertheless, the vagueness of

³¹ In addition to P1-1, see: Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, Europ. T.S. No. 9 (in force May 18, 1954), Article 2 (right to education) and Article 3 (right to free elections); Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, Sept. 16, 1963, Europ. T.S. No. 046 (in force May 2, 1968), Article 1 (prohibition of imprisonment for debt), Article 2 (freedom of movement), Article 3 (prohibition of expulsion of nationals), and Article 4 (prohibition of collective expulsion of aliens); Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty, Apr. 28, 1983, Europ. T.S. No. 114 (in force March 1, 1985), Article 1 (abolition of the death penalty), Article 2 (death penalty in time of war); Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 22, 1984, Europ. T.S. No. 117 (in force Nov. 1, 1988), Article 1 (procedural safeguards relating to expulsion of aliens), Article 2 (right of appeal in criminal matters), Article 3 (compensation for wrongful conviction), Article 4 (right not to be tried or punished twice), Article 5 (equality between spouses); Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 2000, Europ. T.S. No. 177 (in force April 1, 2005), Article 1 (general prohibition of discrimination); and Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental

the language of P1-1 suggests that the 'system of precise definition' was not fully achieved, as the *Sporrong* derivation of the fair balance test from the "whole of the Convention" demonstrates.

(ii) Compensation and the fair balance

The specific issue of compensation was also broached in *Sporrong*, as the Court linked it to the fair balance test. The case concerned the issue of permits that authorized the expropriation of the applicants' land. The applicants remained entitled to occupy, rent and sell their land, although there were some restrictions on its development and its market value declined. It was the duration of the permits that concerned the Court: in some cases, they were in place for over twenty years. This upset the fair balance between "the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights". However, the balance could have been maintained if the applicants had been given "the possibility of seeking a reduction of the

Freedoms, concerning the abolition of the death penalty in all circumstances, May 3, 2002, Europ. T.S. No. 187 (in force July 1, 2003), Article 1 (abolition of the death penalty in all circumstances).

³² See, e.g., European Social Charter, Oct. 18, 1961, Europ. T.S. No. 035 (in force Feb. 26, 1965); European Convention on Social and Medical Assistance, Dec. 11, 1953, Europ. T.S. No. 014 (in force July 1, 1954); Convention for the protection of Human Rights and dignity of the human being with regard to the application of biology and medicine: Convention on Human Rights and Biomedicine, Apr. 4, 1997, Europ. T.S. No. 164 (in force Dec. 1, 1999).

time-limits *or of claiming compensation*."³³ Compensation was relevant to the fair balance, although the Court fell short of saying that there was a right to compensation.

The Court took the next step in *James*³⁴ and applied the fair balance to deprivations of property under the second sentence of P1-1. It stated that "compensation terms are material to the assessment whether a fair balance has been struck between the various interests at stake and, notably, whether or not a disproportionate burden has been imposed on the person who has been deprived of his possessions."³⁵ Accordingly, the "taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which could not be considered justifiable".³⁶

The duty to compensate was plainly very weak, as it only required payment of an amount "reasonably related" to the value of the property. Even so, it did not apply in every case. In *James*, the Court stated that the fair balance might be struck without providing full compensation, depending on the circumstances. As a matter of general principle, it accepted that compensation should be related to the value of the property, but declared that:

³³ *Sporrong*, 52 Eur. Ct. H.R. (ser. A) at 28 (emphasis added).

³⁴ 98 Eur. Ct. H.R. (ser. A).

³⁵ *James*, 98 Eur. Ct. H.R. (ser. A) at 36; *Lithgow*, 102 Eur. Ct. H.R. (ser. A) at 50.

³⁶ *James, id.*; *Lithgow*, 102 Eur. Ct. H.R. (ser. A) at 50-51;

Legitimate objectives of "public interest", such as 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.³⁷

³⁷ *James, id.* at 36. A similar statement appears in *Lithgow*, 102 Eur. Ct. H.R. (ser. A) at 51, in relation to the nationalization of the aircraft and shipbuilding industries in Britain, and it is often cited by the Court with *James* in support of the principle in the passage quoted in the text. However, the reasoning in *Lithgow* concentrates on the method of valuation rather than the standard of compensation. Compensation for shares in companies whose shares did not trade on the Stock Exchange was determined on the basis of the "hypothetical share price model", which was based primarily on price-earnings ratios of listed companies. The shareholders argued that this was unfair and artificial because it excluded the consideration of the value of the underlying assets of the company, among other things. However, the Court held that the hypothetical share price model did produce a valuation that was "reasonably related" to the value of the target companies, and hence it implicitly decided that there had been no departure from the ordinary standard. This conclusion may be doubted: for example, in many cases the amount of compensation fell short of the company's cash reserves. Nevertheless, the Court's reasoning suggests that the public interest in economic restructuring was given weight only in relation to the choice of valuation method. *See generally* Maurice Mendelson, "The United Kingdom Nationalization Cases and the European Convention on Human Rights" (1986) 57 BRIT. Y.B. INT'L L. 33.

For reasons discussed in more detail in Part II, the Court held that social justice allowed a redistribution of title from landlords to tenants at a price that fell below full market value of the landlords' interests.

The Court has also made it clear that the states would be given a wide "margin of appreciation" in determining the level of compensation, as it stated that "it will respect the legislature's judgment in this connection unless that judgment was manifestly without reasonable foundation."³⁸ Nevertheless, *James* does impose a duty on states, and it is significant that it was derived from Convention principles of fairness and proportionality rather than a substantive theory of the rule of law, or from a comparative analysis of national or international law.

The integrated theory of *Sporrong* opens up other points for consideration. As explained below, it suggests that the Court should identify the interests protected by P1-1

³⁸ *Lithgow*, 102 Eur. Ct. H.R. (ser. A) at 51. The doctrine of the margin of appreciation recognizes that the Convention was not intended to impose uniformity on the member states. The Convention system is based on the principle of subsidiarity, under which states have primary responsibility for ensuring that human rights are protected within their jurisdiction (see especially Articles 1 and 13). Hence, the margin of appreciation allows national governments some discretion in determining policies and weighing competing interests in a way that is compatible with the protection of Convention rights. In cases such as *Lithgow, id.*, and *James*, 98 Eur. Ct. H.R. (ser. A), the recognition of a wide margin of appreciation has the practical effect of watering down the compensation standard even further.

in a manner that reflects the "whole of the Convention". Other Convention rights are interpreted with the liberal values such as individual autonomy, dignity and security in mind; indeed, it has been said that the "essence" of Convention rights is "respect for human dignity and human freedom".³⁹ If the *Sporrong* argument in favor of the integrated view is carried through to its logical conclusion, these values should also influence the interpretation of P1-1.⁴⁰ Accordingly, the Court should take the role served by the property in securing the individual's autonomy and dignity into account under the fair balance test. The amount of compensation needed to strike the balance would depend on the social function of the property in question.

C. Comparative legal method and compensation

General Convention principles of fairness and proportionality were not the only possible source for a duty to compensate. Other textual elements of the Convention that might have provided an alternative source, although they would have led the inquiry in the direction of the comparative theory.

³⁹ Ghaidan v. Godin-Mendoza, [2004] 2 A.C. 557, 605 (H.L.) (Baroness Hale), referring to *Pretty v. United Kingdom*, 2002-III Eur. Ct. H.R. 155, 193.

⁴⁰ For example, one eminent jurist has said that property fits into the Convention scheme of human rights because "freedom as enshrined in the Convention cannot subsist without a meaningful protection of private property." J.A. Frowein, "The Protection of Property" in *The European System for the Protection of Human Rights* (R. St. J. Macdonald, F. Matscher and H. Petzold, eds., 1993), 515.

In one of its first decisions, the Consultative Assembly called on the member States, acting through the Committee of Ministers,⁴¹ to draw up a treaty that would "maintain intact the human rights and fundamental freedoms assured by the constitutions, laws, and administrative practices actually existing in the respective countries at the date of the signature of the convention."⁴² This suggests that the common standards of the member states would define the content of the Convention rights. Arguably, this method would not have required the Court to engage in its own evaluation of the fairness or justice of a taking of property, but only to determine whether most states would have required compensation in similar circumstances. As such, P1-1 would have provided further security for property as defined by national law, but no more than that. Moreover, the compensation rules of P1-1 would be limited to those were normally applied in the member states.

This argument was raised and rejected in *James*. The Court acknowledged that rules on compensation could be found in the national laws of the member states, and that these might provide some guidance on the application of the fair balance. Nevertheless, the Court did not rely on comparative law to develop the principles of compensation that

⁴¹ The Consultative Assembly of the Council of Europe (now the Parliamentary Assembly) comprises delegates appointed by each state; it makes recommendations to the Committee of Ministers, but the primary decision-making power is reserved to the Ministers.

⁴² First Session of the Consultative Assembly Held at Strasbourg 10 August to 8 September 1949, COUNCIL OF EUROPE, 1 COLLECTED EDITION, *supra* note 9, 28, 36.

apply under P1-1.⁴³ Moreover, the fair balance test has led the Court beyond the minimum common standards, since it applies to all forms of interference, including regulatory measures, taxes, contributions, penalties, and anything else that falls under the third sentence of P1-1. For example, in *Hutten-Czapska v. Poland*, the Court held that Poland breached P1-1 because its rent control legislation prevented landlords from enjoying "their entitlement to derive profit from their property".⁴⁴ Similarly, in *Azinas v. Cyprus*, the withdrawal of a civil service pension as a penalty for criminal fraud was found to breach P1-1 because it was too harsh.⁴⁵ And, in *Chassagnou v. France*, the Court held that P1-1 was violated by laws that required landowners who had strong

⁴³ *James*, 98 Eur. Ct. H.R. (ser. A) at 36; *see also Lithgow*, 102 Eur. Ct. H.R. (ser. A) at 50 ("Like the Commission, the Court observes that under the legal systems of the Contracting States, the taking of property in the public interest without payment of compensation is treated as justifiable only in exceptional circumstances not relevant for present purposes.")

⁴⁴ Appl. No. 35014/97 (Eur. Ct. H.R. June 19, 2006) (Grand Chamber), para. 239. (Judge Zupančič, in a partly dissenting judgment, asked "How can that be a landlord's human right?", but subsequent cases indicate that the Court accepts that it is: *see Ghigo v. Malta*, Appl. No. 31122/05 (Eur. Ct. H.R. Sept. 26, 2006), para. 66 and *Fleri Soler and Camilleri v. Malta*, Appl. No. 35349/05 (Eur. Ct. H.R. Sept. 26, 2006), para. 74)

⁴⁵ Appl. No. 56679/00, (Eur. Ct. H.R. June 20, 2002) (Third Section), (Eur. Ct. H.R. May 28, 2004 (Grand Chamber) (the Grand Chamber reversed on other grounds).

ethical objections to hunting to make their land available for it.⁴⁶ The idea that every kind of interference with property may be subject to review on substantive grounds was not a common principle of national or international law when P1-1 was drafted and had not become a common principle when *Sporrong* was decided.⁴⁷

The comparative legal method is therefore consistent with *Sporrong* in the belief the rule of law does not exhaust the substantive content of P1-1. However, it diverges from *Sporrong* in two important ways. The first, as explained above, is its identification of the source of these substantive principles. It is a conservative theory, in the sense that it draws general principles from the existing body of national laws.⁴⁸ Unlike the integrated theory, it does not accept that the values and content of international human rights stand apart from national law. In this respect, the comparative legal method and the integrated theory work from diametrically opposed positions.

The second concerns the role of the Court itself in developing standards. The adoption of the fair balance creates uncertainty that is bound to invite litigation. It therefore highlights the Court's own role in developing standards of fairness regarding the use of state power over property. Indirectly, the uncertainty of the test empowers the

⁴⁶ 1999-III Eur. Ct. H.R. 21.

⁴⁷ See the joint dissenting opinion in *Sporrong*, 52 Eur. Ct. H.R. (ser. A), of Mr. Zekia, Mr. Cremona, Mr. Thór Vilhjálmsson, Mr. Lagergren, Sir Vincent Evans, Mr. Macdonald, Mr. Bernhardt and Mr. Gersing.

⁴⁸ Except in the cases involving the expropriation of alien property, to which general principles of international law apply (under the second sentence of P1-1).

Court. Indeed, this was recognized by the states that preferred enumeration over precise definition, but it seems that the political climate was not ready for a more activist court (in relation to property) until *Sporrong*.

This reflects patterns that should be recognizable to American legal scholars. Indeed, the fair balance test was adopted only four years after the Supreme Court stated, in *Penn Central Transp. Co. v. City of New York*, that an *ad hoc* balancing test should determine whether regulatory controls on the use of property are compensatable takings under the Fifth Amendment.⁴⁹ Plainly, we cannot take the comparison too far: *Penn Central* concerned the narrower question of compensation for regulatory takings, whereas *Sporrong* concerned the basis of substantive justice in property matters as a whole. For example, in *Penn Central*, there was no doubt over the availability of compensation for an outright expropriation or the standard of compensation that should apply in such cases. *Sporrong* did not even settle the compensation standard: it merely signalled that it would need to be addressed in later cases. Moreover, *Penn Central* itself represented an elaboration of a theme set down as earlier as 1922, in the famous statement of Justice Holmes that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."⁵⁰ *Sporrong* represented a more radical break with the past. Nevertheless, the decision to base compensatability on broad principles and standards rather than specific rules is similar to both.

⁴⁹ 438 U.S. 104 (1978).

⁵⁰ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415.

The uncertainty inherent in balancing tests also produced a similar sense of unease in both systems. In the United States, the approach to regulatory takings is often criticized; as Marc R. Poirer put it, "[i]n judicial opinion and academic assessment alike, it seems almost *de rigueur* to include at least one or two choice sentences of complaint, before going about whatever business the opinion or article seeks to accomplish."⁵¹ The Supreme Court later supplemented the *Penn Central* balancing test with a variety of rules intended to provide some further guidance. In *Loretto v. Teleprompter*, it held that compensation should be payable on a physical occupation of tangible property;⁵² in *Lucas v. South Carolina Coastal Council*, it held that compensation should follow regulations that deprive the owner of all economically viable use of the land (unless the use would constitute a nuisance under common law).⁵³ Like the Supreme Court, the Court of Human Rights also attempted to develop supplementary doctrines relating to substantive review. The market value rule itself represents one such attempt. *Hutten-Czapska* hints at a test similar to that of *Lucas*, as it suggests that compensation should be paid to an owner denied the possibility of earning a profit from their property.⁵⁴ At least in part, the courts in both jurisdictions seem to search for precision and formalism in the belief that it provides an appropriate distance between their judicial functions and the political

⁵¹ Marc R. Poirer, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93, 97 (2002); see *id.* 97-129 for a full review.

⁵² 458 U.S. 419 (1982).

⁵³ 505 U.S. 1003 (1992).

⁵⁴ Appl. No. 35014/97 (Eur. Ct. H.R. June 19, 2006).

functions of other decision-makers. It is in this regard that the comparative legal method proved attractive to some members of the Court of Human Rights, as the comparative method gives an appearance of neutrality and certainty in cases involving difficult judgements on social and political policy. The comparative method limits Court's role in developing substantive doctrine to the identification of national trends relating to state power over property. It falls to national lawmakers to determine whether social and economic conditions require a change in the principles regarding the expropriation and regulation of property: the Court merely observes whether a consensus has developed amongst the member states. It follows social developments without prescribing them.

But, even if it could be argued that formalism can remove a tribunal from the setting of social policy or that it can produce greater predictability, in the European context it should be clear that the Court of Human Rights must exercise judgment in determining whether a consensus has emerged or that it ought to be applied to all member states or to the specific facts of the case at hand. Moreover, it should not be too surprising to American lawyers that the Court is inconsistent and unpredictable in its use of common standards. For instance, in *Stec v. United Kingdom*, the Court held that treating men and women differently in relation to retirement ages and benefits did not violate the Article 14 right to freedom from discrimination, because there were no common standards in the member states on these issues.⁵⁵ On the face of it, the Court avoided potential political controversy by leaving this issue to the member states. On the other hand, in *Marckx v. Belgium*, where the Court decided that discrimination in

⁵⁵ Appl. Nos. 65731/01 and 65900/01 (Eur. Ct. H.R. Apr. 12, 2006) (G.C.).

succession based on legitimacy of birth did violate freedom from discrimination, it acknowledged that there was no consensus on legitimacy and succession but felt it ought to take the lead in setting an international standard.⁵⁶ Similarly, in the cases mentioned above—*Hutten-Czapska*, *Azinas*, and *Chassagnou*—the Court did not wait for a consensus to emerge in the member states before setting its own standards. The cases involved difficult questions of social policy, on which there was no clear consensus in the member states, and yet the Court felt confident that it could impose its views on the states.

⁵⁶ 31 Eur. Ct. H.R. (ser. A) (1979); see generally George Letsas, *The Truth in Autonomous Concepts: How to Interpret the ECHR*, 15 EUR. J. INT'L L. 279, 299-301 (2004), who points out that the Court identified a lack of consensus, and seemed to regard it as an opportunity to act. That is, discrimination between 'legitimate' and 'illegitimate' children in matters of property and succession was the norm when the Convention came into force at a time. While some states had reversed the former position, many had not. There were international conventions that called for a reversal of discriminatory laws, such as the European Convention on the Legal Status of Children born out of Wedlock, Oct. 15, 1975, Europ. T.S. No. 085 (in force Aug. 11, 1978), but they had been ratified by only a minority of the member states of the Council of Europe. *Marckx*, *id.* at 10-11, 19-20. However, the Court declared that these developments established "a clear measure of common ground in this area amongst modern societies" and the fact that the new developments only commanded support from a minority of states should not be taken as a "refusal to admit equality between 'illegitimate' and 'legitimate' children on the point under consideration." *Id.* at 19.

The *Sporrong* judgment therefore has several dimensions beyond the call for substantive justice. The adoption of the fair balance test put faith in the Convention as the source of general principles. In addition, it also suggested that the Court preferred to work with standards rather than narrow rules, and with this went an implicit toleration of legal uncertainty and for its acceptance of a role in setting standards for the member states. *Sporrong* may give the impression that the Court resolved these issues, but in fact, the position remains unsettled. As the next section explains, these unresolved tensions, particularly in relation to the full implications of the integrated theory, have driven the judicial analysis of compensation.

II. THE FAIR BALANCE AND PROPERTY CONCEPTIONS

In simple terms, the fair balance test may be satisfied in one of two ways: either the victim receives offsetting benefits that reduce the impact of the interference to a modest level, or the public interest served by the interference is so compelling that even a severe impact is justified. Compensation is directed to the first possibility, as it reduces the impact on the victim by providing money as a substitute for the property. Of course, this works only where money is a substitute for what is lost, and whether it is a substitute depends on how the Court regards the interests that P1-1 protects.

The case law reveals that the Court applies three different conceptions of the P1-1 interest, which this Article describes as the legal, economic and social models. Briefly, the legal model conceives of the human rights interest in property in terms of the existing law of the relevant member state. As explained below, it does not fit with the integrated theory of P1-1 and the Convention, but rather with the comparative theory. The economic and the social models concentrate on the social function of property, although

the focus is different. The economic model focuses on the objective value of the property; in most cases, the Court assumes that this is the market value.⁵⁷ While the

⁵⁷ It is worth noting, however, that the Court has never subjected its conception of "value" to a close examination, although it is reasonably clear that it believes that "value", "full value", "market value" and "full market value" are synonymous. The terms were used interchangeably in *James*, 98 Eur. Ct. H.R. (ser. A) at 36 and *Lithgow*, 102 Eur. Ct. H.R. (ser. A) at 51. In *Pincová and Pinc v. Czech Republic*, 2002-VIII Eur. Ct. H.R. 311, 329, and *Holy Monasteries v. Greece*, 301-A Eur. Ct. H.R. (ser. A), 35 (1995) the Court assumed that the *James/Lithgow* formula required "market value". In *Scordino*, Appl. No. 36813/97, however, the Italian government seemed to assume that market value was subjective: at para. 90, it is recorded as arguing that "the 'market value' of property was a vague and uncertain concept, which depended on a great many variables and was essentially subjective: it could for example be influenced by the financial circumstances of the vendor or a particularly strong interest on the part of the purchaser." For this reason, Italy claimed that paying compensation at about half the rate of the objectively-determined market value did not violate the fair balance. The Court rejected this argument, with little discussion. In any case, if domestic law requires "market value" compensation, the Court is unlikely to question whether the valuation assumptions and methods do in fact produce the market value. In practice, the Court is unlikely to find a breach based on the choice of valuation methods, unless it appears that the methods relied on assumptions that are inconsistent. For example, a series of cases dealt with Greek rules that allowed the expropriating authority to reduce compensation by

Court takes the view that it is compatible with the integrated view, it will be shown that it is actually closer to the legal model in its orientation. Finally, the social model reflects the integrated view, as it seeks to identify the values of individual autonomy, dignity and equality that underpin other Convention rights, but as they relate to access and control over resources. By examining how the Court employs these models of property, we can test whether it applies the fair balance test in the manner that the integrated theory should require.

A. The legal model of property

The legal model is derived from two ideas. The first is the comparative method and the importance of the common standards of the member states. Since the member states generally do require compensation for expropriation, the comparative method could have provided an alternative basis for a compensation guarantee. It would not have relied on the fair balance test, or on proof that money can act as a substitute for property. Of course, it may be the case that compensation rules of a given state are indeed derived at least partly from a sense of fairness, and from a theory of the commensurability of

offsetting benefits; while the Court accepted that this in principle, it found a breach because the calculation of the offsetting benefits relied on irrebuttable presumptions. The Court said that it was unfair not to allow the owners an opportunity to demonstrate that there was no actual benefit. *Katkaridis v. Greece*, 1996-V Eur. Ct. H.R. 1673; *Tsomtsos and Others v. Greece*, 1996-V Eur. Ct. H.R. 1699; *Papachelas v. Greece*, 1999-II Eur. Ct. H.R. 1; *Efstathiou and Michaïlidis & Co. Motel Amerika v. Greece*, 2003-IX Eur. Ct. H.R. 79.

money and property, but that is really beside the point. As long as a practice of compensating for property can be established, P1-1 would prevent states from departing from that practice.

The second is the liberal idea of rights, as the legal model regards property as a protected area of individual autonomy. Of course, the state's power to expropriate in the public interest is recognized, but even so, there is an entitlement to compensation. Superficially, it has links with the integrated theory, because the liberal focus on autonomy and dignity is common to all Convention rights. However, as Laura Underkuffler argues, a liberal/legalist conception of property puts private interests in opposition to collective power and the public interest.⁵⁸ "Collective forces, under this

⁵⁸ LAURA UNDERKUFFLER, *THE IDEA OF PROPERTY: ITS MEANING AND POWER* (2003). Underkuffler describes the 'common' and 'operative' conceptions of property. These correspond to the legal and social models of property discussed in this Article. For discussions exploring similar ideas, in the American context, see GREGORY S. ALEXANDER, *COMMODITY AND PROPRIETY — COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776-1970* (1997); Gregory S. Alexander, *Property as Propriety*, 77 NEB. L. REV. (1999); William H. Simon, *Social-Republican Property*, 38 UCLA L. REV. 1335 (1991); Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 614 (1988). In relation to other jurisdictions, see Gregory S. Alexander, *Constitutionalizing Property: Two Experiences, Two Dilemmas*, in *PROPERTY AND THE CONSTITUTION* (Janet McLean, ed., 1999), 108; André van der Walt, *Property Theory and the Transformation of Property Law*, in *MODERN STUDIES IN PROPERTY LAW* (Elizabeth

conception, are clearly external to the protection that property, as an entity, affords."⁵⁹ Moreover, it assumes equal stringency for all rights of property, in the sense that all are equally worthy of protection against collective power.⁶⁰ This is what distinguishes it from the conceptual framework of the integrated view, as it holds that the content of property can be determined without reference to the social context: the possibility that collective interests exert pressure for a re-drawing of the boundaries of individual autonomy does not mean that those boundaries are defined by collective interests.

The reasoning in *Stran Greek Refineries v. Greece* demonstrates this position.⁶¹ The Greek government claimed that an arbitration award relating to a contract negotiated with the former military government could be extinguished without compensation, partly because there were suspicions regarding the relationship between the applicant and the military government.⁶² The Court dismissed these arguments. Full compensation was

Cooke, ed., 2005), 361; Kevin Gray, *Equitable Property*, 47 (2) CURRENT LEGAL PROBLEMS 157 (1994); Kevin Gray and Susan Francis Gray, *Private Property and Public Propriety*, in PROPERTY AND THE CONSTITUTION (Janet McLean, ed., 1999), 11.

⁵⁹ *Id.* at 40.

⁶⁰ *Id.*

⁶¹ 301-B Eur. Ct. H.R. (ser. A) (1995).

⁶² *Id.* at 87. (Greece claimed that the "laws were part of a body of measures designed to cleanse public life of the disrepute attaching to the military regime and to proclaim the power and the will of the Greek people to defend the democratic institutions".)

required because "according to the case-law of international courts and of arbitration tribunals any State has a sovereign power to amend or even terminate a contract concluded with private individuals, *provided it pays compensation*".⁶³ This was the key principle, and it is significant that its source was found in international law. While the Court stated that this principle "takes account of the need to preserve a fair balance in a contractual relationship",⁶⁴ it was the Court's discovery of the principle in international law that was conclusive, rather than the outcome of any balancing process of its own.⁶⁵ Indeed, the government's argument that the balance should be struck differently in a case where there were suspicions of wrongdoing was dismissed with the simple statement that "[i]t would be unjust if every legal relationship entered into with a dictatorial regime was regarded as invalid when the regime came to an end."⁶⁶ By stating this in terms of a blanket rule, without reference to the specific circumstances of *Stran Greek*, the Court effectively ruled out the possibility that the weight of public interest may vary from case

⁶³ *Id.*; emphasis added.

⁶⁴ *Id.*.

⁶⁵ The view of 'possessions' was also highly legalistic, as the Court held that the arbitration award constituted property simply because it constituted a "debt in their [the applicants'] favour that was sufficiently established to be enforceable". *Id.* at 84.

⁶⁶ *Id.* at 87. But equally important was the inconsistent conduct of the Greek government after the fall of the military regime: it had required the applicant to enter arbitration and then, when the award was given in favor of the applicant, it sought to extinguish it.

to case. Ultimately, the analysis of the Court did not focus on the balancing of interests, but on the existing principles of international law.

A further indication of the Court's views on the property model can be seen in cases on the applicability of P1-1. P1-1 is applicable only if there has been an interference with the "peaceful enjoyment of possessions". This, in turn, depends on whether the conception of "possessions" reflects the criteria of the social, legal or economic model. To be sure, the choice of model often makes no real difference to applicability. For example, with a clear expropriation, it matters not whether the property interest is described in terms of the legal, economic or social model: with all three, it is obvious that P1-1 does apply. With marginal cases, however, the legal model would limit P1-1 to cases where national law recognizes that the applicant holds a property interest.

As the Court has stated that P1-1 only applies to existing rights of property, rather than rights to acquire property, it may appear that it has adopted the legal model.⁶⁷ However, an important line of cases suggest that the *Sporrong* approach also applies to issues regarding the scope of P1-1. In *Gasus Dosier-Und Fördertechnik GmbH v. Netherlands*, the Court stated that:

"possessions" . . . has an autonomous meaning which is certainly not limited to ownership of physical goods: certain other rights and interests constituting assets

⁶⁷ See, e.g., *Marckx*, 31 Eur. Ct. H.R. (ser. A) (1979); *Inze v. Austria*, 126 Eur. Ct. H.R. (ser. A) (1988).

can also be regarded as "property rights", and thus as "possessions", for the purposes of this provision P1-1.⁶⁸

At first glance, the reference to an "autonomous" meaning suggests that the Court intended to take P1-1 beyond the strict legal model. Indeed, the doctrine seems to give the Court room to formulate its own principles for distinguishing between proprietary and personal rights. It could, for example, identify a core human rights interest to P1-1 possessions, with a view to the differences in the protection of proprietary and personal rights under the Convention and P1-1. It might note, for example, that the adoption of the fair balance test means that property interests receive substantive protection under P1-

⁶⁸ 306-B Eur. Ct. H.R. (ser. A), 46 (1995). The doctrine of the autonomous meaning first appeared in relation to the interpretation of "civil rights" and "criminal charge" under the Article 6 guarantees of a fair trial: *see, e.g.*, König v. Germany (No 1), 27 Eur. Ct. H.R. (ser. A) (1976) and Öztürk v. Germany, 73 Eur. Ct. H.R. (ser. A) (1984); *see generally* Letsas, *supra* note 56. In *James*, 98 Eur. Ct. H.R. (ser. A) at 31, the Court stated that the phrase "in the public interest", in the second sentence of P1-1, has an autonomous meaning. There are several cases pre-dating *Gasus* in which the Court did not say explicitly that it applied an autonomous meaning of possessions, but the judgments are only explicable if it did, because the interests in question were not treated as property in the relevant national systems; *see* Tre Traktörer Aktiebolag v. Sweden, 159 Eur. Ct. H.R. (ser. A), 21 (1991) and Van Marle v. Netherlands, 101 Eur. Ct. H.R. (ser. A).

1, but personal rights only receive procedural protection under other Convention rights.⁶⁹ From this, it could use the autonomous meaning doctrine to identify those interests that are sufficiently important to warrant substantive protection.

It has followed this approach in cases on social welfare benefits and conditions on entitlement based on gender or nationality. While Article 14 of the Convention guarantees freedom from discrimination, it applies only to discrimination in respect of the "enjoyment of the rights and freedoms set forth in this Convention".⁷⁰ While this includes the right to property under P1-1, it does not provide a free-standing right to freedom from discrimination.⁷¹ Hence, Article 14 only applies to conditions on social welfare if the benefits qualify as "possessions" under P1-1. In cases that do not concern social welfare benefits, the Court has generally said that only rights that have fully vested

⁶⁹ *E.g.* Article 6 (fair trial) and Article 8 (right to respect for the home, privacy, and correspondence).

⁷⁰ Article 14 provides that "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

⁷¹ This is now provided by Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 2000, Europ. T.S. No. 177 (in force April 1, 2005), Article 1 (general prohibition of discrimination), but as of October 25, 2006, only fourteen states have ratified it; in the remaining states, it is necessary to rely on Article 14 to challenge discriminatory laws.

under national law qualify as possessions.⁷² In effect, the legal model governs. This suggests that welfare benefits should not be treated possessions as long as the restrictions on qualification are pre-conditions on vesting. However, the Court has not been so restrictive. In its earlier cases, it allowed social welfare benefits to qualify as P1-1 possessions, as long as the benefits were given under a contributory scheme.⁷³ This excluded schemes based on "solidarity", where benefits are given on the basis of need. This approach reflected the view that the social function of property must be given weight.⁷⁴ That is, the Court is sensitive to the social function of welfare benefits and the social context in which entitlement arises.

In later cases, the Court dropped the requirement that only benefits that were 'earned' through contributions should be treated as P1-1 possessions.⁷⁵ This broadens the potential for reviewing discriminatory conditions on welfare entitlements. In that sense,

⁷² See ALLEN, *supra* note 8, at 46-57.

⁷³ X v. The Netherlands, 14 Y.B. Eur. Conv. On H.R. 224, 240-244 (1971) (Eur. Comm'n on H.R.).

⁷⁴ Indeed, as explained below, some cases in which the liberal model has been employed suggest that property that is earned deserves greater protection than property that is obtained as a windfall.

⁷⁵ Willis v. United Kingdom, 2002-IV Eur. Ct. H.R. 311 (2002); Koua Poirrez v. France, Appl. No. 40892/98 (Eur. Ct. H.R. Sept. 30, 2003). *Cf.* Staniszewski v. Poland, Appl. No. 53655/00, Oct. 6, 2005 (a failure to qualify for a pension due to a residency condition ruled out the applicability of P1-1 and Article 14).

the social function of welfare benefits is given even greater prominence. However, it is particularly interesting that these developments also reflect a retrenchment of the formalist legal model, as the Court has a strong preference for setting down formal criteria for identifying benefits that should be treated as P1-1 possessions. The most recent authority is *Stec*, where the Court justified abandoning the requirement of contributions as follows:

In the modern, democratic State, many individuals are, for all or part of their lives, completely dependent for survival on social security and welfare benefits. Many domestic legal systems recognise that such individuals require a degree of certainty and security, and provide for benefits to be paid—subject to the fulfilment of the conditions of eligibility—as of right. Where an individual has an assertable right under domestic law to a welfare benefit, the importance of that interest should also be reflected by holding Article 1 of Protocol No. 1 to be applicable.⁷⁶

This passage reveals both the concern with the social function of property and the legalist concern with neutral rules. Themes of subsistence, reliance, dependency and security

⁷⁶ Appl. Nos. 65731/01 and 65900/01 (Eur. Ct. H.R. July 6, 2005) (G.C.) (admissibility), para. 51. In the judgment on the merits, the Court held that treating men and women differently did not violate Article 14. *Stec v. United Kingdom*, Appl. Nos. 65731/01 and 65900/01 (Eur. Ct. H.R. Apr. 12, 2006) (G.C.). P1-1 does not guarantee a right to ownership or control over resources necessary for basic subsistence: *Kutepov and Anikeyenko v. Russia*, Appl. No. 68029/01 (Eur. Ct. H.R. Oct. 25, 2005), para. 55, 62.

dominate the first part of the passage. However, the second part reveals a sense that interpretation must divorce the property conception from its social function; or, alternatively, that it is possible to capture the social function of property in formal terms. Hence, the Court reduces the criteria that establish whether social welfare benefits qualify as P1-1 possessions to the formula of an "assertable right under domestic law". It seems that the Court is not convinced that introducing the social function of property directly into interpretive questions is either necessary or desirable.

In general, outside the context of social welfare, the autonomous meaning doctrine applies in two situations. The first arises where national law recognizes that the individual holds a bundle of rights, but classifies it as a personal interest rather than a proprietary one.⁷⁷ In *Gasus*, for example, the Court invoked the doctrine to refute the argument that P1-1 only applies to interferences with the ownership of physical goods.⁷⁸

⁷⁷ ALLEN, *supra* note 8, at 43-45.

⁷⁸ One reading of the reasoning is that did not even go that far: Belgium argued that the second sentence of P1-1 did not apply because there had been no "deprivation of possessions". The second sentence normally applies only to the taking of an ownership interest, and the facts concerned the seizure of property in which the applicant held a security interest. Hence, the argument was that a security interest is not a full ownership interest. However, the Court held that the facts came under the third sentence, because the security interest was taken to enforce a tax. The autonomous meaning doctrine was applied to establish that the security interest was a P1-1 possession, although it is not clear that Belgium disputed that point.

As in *Stec*, the Court relied on national law to determine whether there are rights that must be protected, but not to determine whether that bundle constitutes a property interest. In such cases, the Court often fails to explain where its conception of a property bundle finds its source, or whether its conception is formal or functional in nature. Nevertheless, where it does provide some guidance, it tends to turn to comparative law in support of its conclusions.⁷⁹ In that sense, it appears that the autonomous meaning doctrine is oriented to the legal model.

The second arises where it appears that the applicant does not hold anything recognized as a property right under national law. This type of case arises where the applicant and its government do not agree on the content of national law. In *Beyeler v. Italy*, for example, the applicant claimed to be victimized by the taking of a painting that he had obtained under a void 'contract'.⁸⁰ Italy maintained that P1-1 did not apply because the applicant had not acquired property in the painting; the applicant argued that Italian law did recognize that he held a form of property in it. The dispute therefore turned on the interpretation of national law. As the Court does not have the jurisdiction to refer the case back to the national courts for determination of a specific issue, it must

⁷⁹ The Court in *Gasus*, 306-B Eur. Ct. H.R. (ser. A), gave no real indication of the source of its conception; however, the Commission's decision, Appl. No. 15375/89 (Eur. Comm'n H.R., Oct. 21, 1993) at para. 56 and 58, does refer to 'normal' scope of the interest in question, which suggests that comparative law guided its decision

⁸⁰ 2000-I Eur. Ct. H.R. 57 (G.C.).

have some means for resolving these disputes.⁸¹ While it may seek to do so by providing its own interpretation of national law, it often prefers to ask only whether national authorities have treated the applicant as holding a property interest. For example, in *Beyeler*, the Court noted that the Italian authorities had treated the applicant as the owner of the painting on a number of occasions.⁸² In effect, the autonomous meaning doctrine was used to sidestep a lack of clarity in national law, without assuming a jurisdiction to resolve issues of national law.

Whether this represents a preference for the legal or social model of property is debatable. On the one hand, the autonomous meaning doctrine may represent a 'best guess' at the content of national law. If so, it is still based on national law, without any examination of the role of control and access relating to the resource in the social life of

⁸¹ The Court would declare the application inadmissible if it appears that the applicant did not exhaust the remedies available in domestic law. Generally, in these cases, the applicant has sought a resolution in the domestic courts, but the courts have not given a clear resolution on the issues and judicial process has dragged on for such a lengthy period that the Court of Human Rights is willing to consider the application. *See e.g. Iatridis*, 1999-II Eur. Ct. H.R.; *Matos e Silva, lda and others v Portugal*, 1996-IV Eur. Ct. H.R. 1092 (1997).

⁸² *Id.* at 86; *see also* Synod College of the Evangelical Reformed Church of Lithuania v. Lithuania, Appl. No. 44548/98 (Eur. Ct. H.R. Dec. 5, 2002); *cf.* Kötterl and Schittily v. Austria, Appl. No. 32957/96 (Eur. Ct. H.R. Jan. 9, 2003) and *see generally* ALLEN, *supra* note 8 at 64-71.

the applicant and community. On the other hand, it may show that the Court regards the expectation, reliance and dependency created by the conduct of public officials as something worthy of protection, even if their basis in national law is uncertain. If so, it reflects the concerns of the social welfare cases, but without the formalism of *Stec*.

In the end, therefore, the doctrine of the autonomous meaning reflects the tension between the different schools of thought on the importance of the social function of property. The potential for conflict with the integrated view of *Sporrong* remains in place.

B. *The economic model of property*

The economic model concentrates on property as wealth. Plainly, it is compatible with the principle that money is commensurable with property, and hence that compensation is relevant to the fair balance test. It is evident in cases such as *Krivosogova v. Russia*, where the Court stated that it would not find an interference with possessions unless the applicant could "demonstrate an increased financial loss".⁸³ Similarly, in *Haider v. Austria*, it dismissed an application that P1-1 applied to changes in land use controls because "the applicant had failed to substantiate if and to what extent the challenged amendment . . . had actually reduced the value of his land".⁸⁴ And, in *Ashworth and others v. United Kingdom*, it held that a planning board's decision to allow

⁸³ Appl. No. 74694/01 (Eur. Ct. H.R. April 1, 2004).

⁸⁴ Appl. No. 63413/00 (Eur. Ct. H.R. Jan. 29, 2004).

an airport to increase its flights over the applicant's land did not raise any issues under P1-1 because there was no evidence that his house had lost value.⁸⁵

It is also evident in cases involving the imposition of a liability to pay a sum of money. Under the legal model, it would not be obvious that it would qualify as an interference with possessions. Of course, assets may need to be sold or seized in order to discharge the liability, but there is still a formal distinction between property and liability.⁸⁶ While the language of P1-1 does not make it clear whether the imposition of a

⁸⁵ Appl. No. 39561/98 (Eur. Ct. H.R., Jan. 20, 2004). It is still necessary to show that there has been a real financial loss: a diminution in the possibility of earning future income is not, by itself, an interference with possessions. *Levänen v. Finland*, Appl. No. 34600/03 (Eur. Ct. H.R. Apr. 11, 2006).

⁸⁶ A similar issue arose in the United States, in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), where the Supreme Court considered the constitutionality of the retroactive imposition of civil liability under the Coal Industry Retiree Health Benefit Act of 1992. O'Connor, J., joined by Rehnquist, C.J., Scalia and Thomas, JJ., stated that the imposition of liability violated the takings clause of the Fifth Amendment; Kennedy, J., concurred in the judgment but stated that the Coal Act did not violate the takings clause, but substantive due process; Breyer J., joined by Stevens, Souter and Ginsburg, JJ., dissented on both points, and stated specifically that the "application of the Takings Clause here bristles with conceptual difficulties". *Id.* at 556. Hence, a narrow margin of 5-4 held that the imposition of liability was not, by itself, a taking of property.

liability, by itself, is an interference with possessions, the Court has assumed that it is.⁸⁷ The Court has never explained why it made this assumption, but it does suggest that moved beyond the formality of the legal model to an economic model of property.

In relation to compensation, the economic model has a narrow focus. It is not the economic security of the individual that is important, but simply the market value of the property. The focus is on the value to the community, as expressed through the market, rather than the function of the property in the life of the owner.⁸⁸ In the vast majority of cases, the overall impact on the victim's economic security is ignored. There are some isolated exceptions: for example, in *Azinas*, some members of the Court were concerned that the withdrawal of a pension would take away the sole means of subsistence of the applicant and his family: in other words, it was not just the value of the pension, but the role of that pension to the individual's security that was important.⁸⁹ Nevertheless,

⁸⁷ The third sentence refers to takings or controls on property to "secure" the payment of taxes, contributions or penalties, but not their imposition as such. Only in *Gasus*, 306-B Eur. Ct. H.R. (ser. A) (1995) at 48-49 do we see signs of doubt: the Court stated that "procedural" measures for the enforcement of tax were within P1-1, but declined to express an opinion on "substantive" tax laws. In other cases, the Court has assumed that substantive laws are within P1-1: *see e.g.*, *Špaček v. Czech Republic*, Appl. No. 26449/95 (Eur. Ct. H.R. Nov. 9, 1999).

⁸⁸ *See* Ellickson, *supra* note 6.

⁸⁹ Appl. No. 56679/00 (Eur. Ct. H.R. June 20, 2002) (Third Section) reversed on other grounds in 2004-III Eur. Ct. H.R. 1 (G.C.); *see also* *Jokela v. Finland*, 2002-IV Eur.

subject to the exceptions discussed in the next section, payment of market value compensation is normally sufficient to strike a fair balance, irrespective of the economic impact of the taking on the specific individual. By contrast, with other Convention rights, the social function of the interest at stake is viewed broadly, and the Court is more willing to consider the impact of state action on the individual's social relationships.⁹⁰ In this respect, the economic model also pulls P1-1 away from the integrated theory of *Sporrong*.

Characterizing the impact solely in terms of objective values limits the flexibility and utility of the fair balance. In principle, the fair balance principle allows states to say that certain public objectives may justify a departure from ordinary compensation standards, but the application of the economic model restricts the possibility of doing so. In most cases, the state's justification for taking property turns on the social advantages that would accrue from the change in ownership and use of the property. Hence, the weight given to the public interest side of the balance takes into account factors that are ignored when assessing the impact of the taking on the property owner. Not only is this inconsistent, but the idea that the balance may be struck when only the economic impact is weighed on one side means that no real content needs to be given to the other side. It makes it unnecessary to evaluate the importance or weight of the social advantages that

Ct. H.R. 1; *Solodyuk v. Russia*, Appl. No. 67099/01 (Eur. Ct. H.R. July 12, 2005);
Banfield v. United Kingdom, Appl. No. 6223/04 (Eur. Ct. H.R. Oct. 18, 2005).

⁹⁰ See Article 9 (freedom of thought, conscience and religion) and Article 10 (freedom of expression).

supports the taking: instead, it is often enough to say simply that there is a public interest.⁹¹ As such, in practical terms it is very close to the legal model, because it does not require the Court to develop its own substantive standards for takings. Instead, the Court has faith that national legislative and judicial processes will achieve the standard of fairness that human rights requires.

C. The social model of property

The social model reflects a concern with the social function of property. In this respect, it is similar to the economic model, although it does not focus so narrowly on the function of property in market exchanges. Like the legal model, it reflects the liberal concern with the values of individual autonomy, dignity and equality that underpin other Convention rights. However, the social model does not focus so narrowly on property as an autonomous zone, free from state interference. It recognizes that the allocation of property rights to one person necessarily restricts the choice of another; indeed, it is as much the function of the law of property to restrict choices as it is to enable them.⁹² Moreover, the state has a continuing role in ensuring that the allocation of power over resources conforms with the collective's ideas of justice and fairness. Redistributive and

⁹¹ Indeed, this is the pattern in the vast majority of cases. In general, the Court does not judge the legitimacy or rationality of purpose of taking by anything more than a weak standard of good faith. ALLEN, *supra* note 8, at 130-35.

⁹² See UNDERKUFFLER, *supra* note 58, at 141. ("Where rights to external, physical, finite resources are concerned, the establishment of a property regime *itself* is a necessarily and unavoidably allocative act.")

regulatory laws must be seen in this light. Hence, both the claims of individuals and the collective are grounded in social life: the individual requires control and access to resources that enable a meaningful role in social life, and the state seeks to ensure that the distribution and use of resources reflects social goals relating to (for example) justice, equality, dignity, and economic growth that is sustainable and environmentally sound. The public interest is reflected not only in the reason for taking (or regulating) property, but in the initial decision to recognize the individual as the owner of the property. That is, both the initial allocation and the subsequent re-allocation of resources are decisions that engage the public interest, and the content of property is continually revised and can only be understood in the social context in which it exists. It is this acceptance of the variability of the content of property that makes the social model consistent with the integrated view of *Sporrong*, because the fair balance test requires an open, contextual approach to P1-1. For example, in *James*, the Court accepted that social goals may justify redistribution, without any guarantee of full or even partial indemnity from loss. Moreover, it confirms that achieving a just distribution remains an ongoing project for the state.

(i) The commensurability of money and property under the social model

The integrated theory of *Sporrong* raises questions over the use of money as a substitute for property, since it does not serve this function with other human rights. For example, an interference with freedom of religion may be justified by showing that a compelling public interest outweighed the individual's interests, but not by showing that she was paid money as a substitute for the opportunity to exercise her beliefs. Under the integrated theory, the Court ought to take into account the function that the property plays

in the owner's social, economic and political relationships. Put differently, the fair balance test should be applied so that the interference does not have an excessive impact on the owner's autonomy and dignity (or other interests under the social model).

By this view, the argument that compensation is relevant to the fair balance only makes sense to the extent that money can provide a substitute for the interests recognized under the social model. Given the nature of those interests, it may be difficult to decide whether money really is a substitute for the property. If, for example, we focus on the relationship between property and individual autonomy, the impact of a taking would be minimized by paying the owner the amount that she would have demanded under a consensual sale, and perhaps an additional amount to reflect the loss of the power to withhold consent. Plainly, it may be difficult to determine what the owner's price would have been after the taking has already been completed. However, as some commentators have noted, subjective valuation is not intractable in every situation.⁹³ In some cases, such as those involving fungible or investment property, it is highly likely that money

⁹³ Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 963 ("the use of the word 'subjective' should not be understood as implying that these valuations are always befogged by sentimentality or emotion. Subjective value can include such 'hard' components as the out-of-pocket cost of moving to another place, the search costs of finding shops and services in the new location, or site-specific improvements that are well-suited to the owner's uses but do not enhance fair market value."); Christopher Serkin, *The Meaning of Value: Assessing Just Compensation for Regulatory Takings*, 99 NW. U. L. REV. 677.

would enable the owner to obtain a reasonable substitute. This would also be the case with property that has been adapted for an idiosyncratic use, assuming that property suitable for a similar adaptation could be obtained. Even in the case of property essential for subsistence, it may be possible for money to act as a substitute. While no rational person would give up their means of subsistence for nothing, there may be some amount of money that would enable the individual to achieve a similar degree of security with other resources.⁹⁴

It would mean, of course, that valuation is not subjective to the point that the owner could set her price at any figure, and then argue that the fair balance was not struck because she received something less than her price. The Court would need to consider the actual use and relevance of the property to the owner, but also to require element of reasonableness in seeking a substitute that would perform same function in owner's life. Alternatively, it could be said that the fair balance does not require indemnity against all loss: again, there would be a need for a judgment by the Court in determining what is just

⁹⁴ A related example arose in the United Kingdom, in relation to compensation for homes in areas of low demand. In areas where housing prices had fell relative to the general trend, market value compensation would not enable the owner to buy a home elsewhere. The possibility of awarding compensation on a home-for-a-home basis was discussed, and in many cases it would have come closer to the owner's subjective valuation of the home; but ultimately it was decided that this would go further than P1-1 required. See ALLEN, *supra* note 8 at 178-79 for a discussion.

and reasonable. But either way, the balancing exercise would take into account the social function of property and the owner's own preferences.

In some cases, money would not provide a substitute under the social model. Compensation would be of little value in respect of an object of religious veneration, personal correspondence, or for anything closely tied to individual identity. Moreover, even if the owner did receive the amount that they would have demanded in a consensual transaction, there may still be an intangible impact relating to the loss of the opportunity to refuse consent. This is not to say that such property cannot be expropriated: as with a number of other Convention rights, an interference with strongly personal interests may be justified by the need to pursue a sufficiently compelling public interest. Instead, it means that the Court would not approach the balancing test by saying that the payment of money reduced the impact of the taking to a negligible level. It would be necessary to evaluate the impact that remains, and to decide whether the objective was sufficiently important to outweigh it.

The key problem with the present law is its failure to identify the residual impact suffered by the owner, whether measurable in money or not. Indeed, leaving aside the question of incommensurable interests of the social model of property, the Court has not even acknowledged that subjective valuation might be appropriate in some circumstances.

To be sure, there are some isolated cases that do reflect the social model. As explained above, in *Azinas*, the Court held that the withdrawal of the applicant's pension as a penalty for fraud did not strike a fair balance, in part because it deprived him and his

family "of any means of subsistence".⁹⁵ While *Azinas* did not relate to compensation on a taking for public use, it does demonstrate a concern with the broader social function of property.

Subsistence is not the only area of concern. In *Pincová and Pinc v. Czech Republic*,⁹⁶ the applicants were left unable to buy a home after it was taken for less than its market value. The failure to consider their personal circumstances and their "uncertain, and indeed difficult, social situation" meant that the taking did not strike the fair balance.⁹⁷ In *Lallement v. France*,⁹⁸ the Court required more than market value compensation for the expropriation of a portion of the applicant's farm. He was paid a fair amount for the portion that was taken, but received nothing for the related loss of profit on the remaining part. The relevant law did provide a right to demand that the entire farm be purchased at its fair value, but the applicant chose not to do so because he did not wish to leave the family home. The Court suggested that the right to sell the

⁹⁵ Appl. No. 56679/00 (Eur. Ct. H.R. June 20, 2002) (Third Section) at para. 44. The case was referred to the Grand Chamber, *Azinas*, 2004-III Eur. Ct. H.R., which held that the application was inadmissible on technical grounds relating to the exhaustion of domestic remedies. Eleven of the 17 judges in the Grand Chamber declined to say anything on the merits; one of the judges agreed with the Third Section and five disagreed.

⁹⁶ 2002-VIII Eur. Ct. H.R.

⁹⁷ *Id.* at 331; *see also id.* at 332.

⁹⁸ Appl. No. 46044/99 (Eur. Ct. H.R. April 11, 2002).

entire property might provide a sufficient counterbalance in some cases, but given the applicant's attachment to his home, it did not do so in this case. Hence, the assessment of the impact of the taking should have taken the loss of profit into account.

The function of property in the expression of personal beliefs was relevant in *Chassagnou v. France*,⁹⁹ where the Court held that laws requiring certain landowners to allow hunting on their property violated P1-1¹⁰⁰ partly because the landowners in question were strongly opposed to hunting and sought to use their land as a wildlife preserve:

Compelling small landowners to transfer hunting rights over their land so that others can make use of them in a way which is totally incompatible with their beliefs imposes a disproportionate burden which is not justified under the second paragraph of Article 1 of Protocol No. 1.¹⁰¹

France argued that its laws struck a fair balance, because the applicants were given the reciprocal right to hunt on the land of others. However, the Court held that this did not constitute "any measure of compensation for landowners opposed to hunting, who, by definition, do not wish to derive any advantage or profit from a right to hunt which they refuse to exercise."¹⁰² On the other hand, in *Piippo v. Sweden*, it held that similar rules

⁹⁹ 1999-III Eur. Ct. H.R. 21.

¹⁰⁰ As well as Article 9 (freedom of thought, conscience and religion) and Article 11 (freedom of assembly and association).

¹⁰¹ 1999-III Eur. Ct. H.R. at 58.

¹⁰² *Id.* at 57.

did not violate P1-1, despite the applicant's inability to gain access to the land of others, because his inability arose from personal circumstances unconnected with conscience and personal belief.¹⁰³

These examples provide some evidence of a concern with the social function of property.¹⁰⁴ Not only is the importance of property in the social life of the owner recognized, but the Court implicitly suggests that some personal choices demand greater protection than others. This is not merely a question of determining whether the public interest for the taking is sufficiently compelling, but whether the burden should be regarded as being as severe as the owner claims. It is worth noting that, in *Lallement*, it was important that the applicant had acted reasonably in refusing the offer to buy out his entire interest. As the Court put it, he could not be faulted for wishing to remain in the family home; otherwise, the possibility of selling the entire plot would have been relevant.¹⁰⁵ Similarly, in *Chassagnou*, the Court remarked that the owners' beliefs regarding hunting "attain a certain level of cogency, cohesion and importance and are

¹⁰³ Appl. No. 70518/01 (Eur. Ct. H.R. Mar. 21, 2006).

¹⁰⁴ In cases not involving expropriation, where compensation has not been contested, the Court has shown greater concern with the protection of the home under P1-1: *see, e.g.*, *Venditelli v. Italy*, 293-A Eur. Ct. H.R. (ser. A) (1995) (sealing of flat as part of criminal investigation); *Öneryıldız v. Turkey*, 2004-XII Eur. Ct. H.R. 79 (G.C.) (failure to protect dwelling from destruction; compensation in the form of alternative accommodation was not sufficient, given the nature of the harm).

¹⁰⁵ Appl. No. 46044/99 (Eur. Ct. H.R. April 11, 2002) at para. 22.

therefore worthy of respect in a democratic society".¹⁰⁶ In both cases, there is a sense of the social value and function of property. Under the legal model, the social value of the rights in question would not be the subject of investigation by the Court. This is not to say that it has no relevance to property law generally, but only that the decisions relating to the social value of property rights are made at the national level. Under the economic model, the social value is recognized, but only as far as it is reflected in the market value of the property.

These cases are exceptional, however. *Lallement* is the only case where the Court has suggested that the market value was insufficient because the owner derived special value from the land. In any case, it was not the value of the land that was taken that was significant, but the impact on the land that remained. In *Pincová*, the compensation was based on the price the applicants had paid for the property many years earlier: if they had been paid the current market price, the fair balance would not have been upset. Moreover, while both *Lallement* and *Chassagnou* and show that the Court does consider personal factors in some situations, it must be noted that these cases concerned owners who were left in possession. Neither case dealt with the expropriation of the entire plot of land. It

¹⁰⁶ 1999-III Eur. Ct. H.R. 21 at 66. This statement was made in relation to the right to freedom of association, but it should also apply to P1-1, as it would be logical for the Court to apply the same standard of cogency to compulsion to join a hunting association and compulsion to allow hunting (and refusing to exercise the right to hunt on the land of others).

is doubtful that the applicants in either *Chassagnou* or *Lallement* would have had a strong case if the government had expropriated their entire landholding at market value.

(ii) Unearned value and the social model

There is one area where the social model is used in the fair balance test in a more consistent manner. These cases deal with windfalls, where states argue that the fair balance can be struck without full compensation. Their arguments relate both sides of the balance. The key point is that there is a real balancing of interests in these cases. Not only is the balance approached with greater flexibility, but there is also a willingness to consider factors that would not be relevant under the other models.

James, the first case in which these points were discussed, concerned British legislation that gave long-lease residential tenants the right to force their landlords to sell them the freehold of the property. The landlords claimed that this violated P1-1 because, among other things, the price was determined by a formula that excluded the value of the buildings. In response, the British government argued that, since most long-term leases obligated tenants to maintain the buildings in their original state, the tenants should not be required to pay for them when acquiring the freehold. In its view, by the end of a long lease, the building would be virtually worthless without the tenant's upkeep; if required to pay for the building, she would have paid twice over for the same asset.¹⁰⁷ Not surprisingly, the landlords objected that the rental charges would have been greater without the obligation to maintain. Nevertheless, the Court held that P1-1 was not violated. As a matter of general principle, it accepted that compensation should be

¹⁰⁷ *James*, 98 Eur. Ct. H.R. (ser. A) at 37.

related to the value of the property, but declared that different standards could apply to "measures of economic reform or measures designed to achieve greater social justice."¹⁰⁸ The "social justice" of the situation meant that the compensation rules were not unfair: as the Court put it, "the tenant and his predecessors are deemed already to have paid for the house."¹⁰⁹

The sense of injustice has its roots in Eric Kades's observation that that people are both risk-averse and windfall-averse.¹¹⁰ Ordinarily, they not only wish to share the burden of unpredictable and undeserved losses, but also to share the benefit of unpredictable and undeserved gains. Of course, agreement on the sharing of windfalls would only be obtained if there was some assurance that sharing was indeed the general rule. Individuals would not be content to give up a windfall unless they were satisfied that others would give up theirs. But instead of attempting to bring in general rules on windfall sharing, European governments have tended to promote ad hoc responses to specific circumstances, as prompted by the perception that other issues of fairness should be addressed.

For example, the social value of opportunist behavior has been a factor in some cases. It represents the converse of *Lallement* and *Chassagnou*, where the Court recognized the value of the social function of the property in question. In those cases, it was the attachment to the family home (*Lallement*) and the expression of beliefs of

¹⁰⁸ *Id.* at 36.

¹⁰⁹ *Id.* at 37.

¹¹⁰ *Windfalls*, 108 YALE L. J. 1489, 1491 (1998-99).

"cogency, cohesion and importance" (*Chassagnou*) that were at stake. As the Court plainly considered these to be of social value, there was a stronger argument for recognizing them when assessing the impact on the applicants. The opposite arose in *National & Provincial Building Society v. United Kingdom*¹¹¹ and *Jahn v. Germany*.¹¹² Briefly, in *National & Provincial*, the applicants paid money on account of a tax that was subsequently determined to be invalid, due to a drafting error in the relevant legislation. *Jahn* is similar, as it was said that the applicants managed to obtain title to land in the former German Democratic Republic by exploiting administrative failings in the socialist bureaucracy. Their titles were then confirmed by a drafting error in the GDR's "Modrow Law" on property, which was passed in the final stages of the socialist regime.

Hence, both applicants benefited from inadvertent errors. In both cases, their governments sought to reverse the errors: in *National & Provincial*, the legislature imposed the tax with retroactive effect and extinguished the applicants' claims for restitution of the amounts paid; in *Jahn*, after re-unification, the Federal Republic of Germany sought to recover the land from the applicants, without compensation.¹¹³ In

¹¹¹ 1997-VII Eur. Ct. H.R. 2325.

¹¹² Appl. Nos. 46720/99, 72203/01, 72552/01 (Eur. Ct. H.R. June 30, 2005) (Grand Chamber).

¹¹³ Indeed, in *Jahn, id.*, the Court accepted that the legislature had merely sought to plug a "loophole" in the Modrow Law: *id.* para. 84 ("The German legislature sought to remedy the loopholes in the Modrow Law . . .") and *id.* para. 106 (" . . . the Federal

both cases, the Court regarded the applicants as opportunists who had obtained their property by exploiting administrative failings and statutory loopholes. The gains were neither unearned nor unexpected, in the sense that the applicants took positive action to exploit the administrative oversights and errors.¹¹⁴ However, it was clear that the Court accepted the states' position that seeking to exploit such errors would have little social value.¹¹⁵ If anything, the recovery of these gains would serve the public interest by discouraging opportunist behavior.

Constitutional Court's finding . . . that the Modrow Law contained a 'hidden legislative loophole' does not appear to be unjustified.")

¹¹⁴ Compare *National & Provincial*, 1997-VII Eur. Ct. H.R. with *Dangeville SA v. France*, 2002-III Eur. Ct. H.R. 71: in *Dangeville*, a refusal to restore an improperly assessed (and collected) tax did not violate P1-1, partly because the applicants had not benefited from an unintended loophole in the legislation.

¹¹⁵ The reasoning is similar in *Former King of Greece v. Greece*, XII Eur. Ct. H.R. 119 (2001) (merits) (Grand Chamber), (2003) 36 Eur. H.R. Rep. CD 43 (Grand Chamber) (just satisfaction), where Greece argued that it could take property from its former king without compensation, on the basis that he had acquired it by means of state contributions and then retained it under the military regime because he failed to put up any resistance to it. The Court ultimately held that he was entitled to compensation, although the actual amount awarded in damages fell far below the market value of the property.

It is also clear, however, that the Court does not invariably take this view. The tension between the models of property is particularly evident in cases involving transitional justice. As explained above, in *Stran Greek*, the Court was reluctant to allow the Greek government to deny compensation on the basis of the applicant's relationship with the old regime. Similarly, in *Pincová*¹¹⁶ and *Zvolský and Zvolská v. Czech Republic*,¹¹⁷ the Court held that full compensation should be provided unless there was strong evidence that the current owner obtained the property by active participation in the abuses of the former regime. These cases concerned Czech restitution laws that allowed those whose property had been confiscated under the communist government to recover it from the current owners. As the price payable was based on the current owners' original cost and the cost of maintenance during their occupation of the property, it often fell far below the current market value. The Czech government defended the compensation standard on the basis that it only applied where the current owner had not acted in good faith when acquiring the property. Under the relevant statutes, good faith was established if the current owner had paid full value and complied the rules in force at the time of acquisition. The applicants did not fulfill these conditions. In that sense, they were opportunists and arguably in the same position as the applicants in *Jahn*. Nevertheless, the Court held that the fair balance would not be struck unless they were given the full market value for the property.

¹¹⁶ 2002-VIII Eur. Ct. H.R. 311.

¹¹⁷ 2002-IX Eur. Ct. H.R. 163.

Jahn therefore appears to represent a strong statement in favor of the social model of property.¹¹⁸ Even so, it is unlikely that it has resolved the uncertainty over the choice of the appropriate model of property, as a quick review of the voting pattern demonstrates. The Third Section decided 7-0 that Germany violated P1-1 and Grand Chamber 11-6 that it did not, but two of the dissenting judges in the Grand Chamber were also members of the Third Section panel. Hence, the seventeen judges of the Court that gave opinions in *Jahn* split 11-11.¹¹⁹ It is quite possible that the majority of the remaining 28 judges of the Court who did not sit in either the Grand Chamber or Third Section would have required compensation.

Opportunism is not the only factor that spurs governments to action. They have also justified the taking of windfalls in terms of the need to address inequality. It is not merely that some group managed to benefit from lapses in government, whether by effort, evasion, or dumb luck, but that some other similarly-placed group that did not benefit. This was an important consideration in *Jahn*, as the German government was responding to the widely held view that failing to correct the Modrow Law would be

¹¹⁸ *Pincová*, 2002-VIII Eur. Ct. H.R. and *Zvolský*, 2002-IX Eur. Ct. H.R are admittedly more equivocal, as the references to the importance of full compensation for the home suggests that a mix of liberal and legalist perspectives affected the judgment.

¹¹⁹ Mr. J.-P. Costa was the only judge who participated in all three cases. He decided in favor of the applicants in *Pincová*, 2002-VIII Eur. Ct. H.R. and *Zvolský*, 2002-IX Eur. Ct. H.R (both were unanimous judgments) and dissented in the Grand Chamber in *Jahn*, Appl. Nos. 46720/99, 72203/01, 72552/01 (Eur. Ct. H.R. June 30, 2005).

unfair on those who had complied with the socialist law and lost title as a result. This concern may also lie behind the reasoning in the *National & Provincial* case. Here, the British government claimed that the loophole was an unintended effect of a changeover to a new system for tracking the interest income of financial institutions. The changeover was intended to be neutral, but if the applicants' claims prevailed, they would have received a tax holiday that would have been denied to other financial institutions and their depositors.

The desire to address opportunism and inequality would be accepted as a valid public interest in support of the taking itself, but the real question is whether they justify the reduction or complete denial of compensation. Under the comparative theory of P1-1, it might be possible to construct an argument in support of the results in *National & Provincial* and *Jahn*, if one could say that there is no clear common standard in the member states in respect of these kinds of takings. However, this was not the approach taken: instead, the Court relied on the fair balance test.¹²⁰ Indeed, it is also apparent that the Court considered the impact of these takings on the applicants.

This goes back to Kades's comparison of 'risk' of receiving an unexpected windfall with the risk of an unexpected loss. In general, the taking of a windfall is not felt with the same intensity as the taking of an earned asset. This point is made in

¹²⁰ In any case, the Third Section in *Jahn*, Appl. No. 56679/00 (Eur. Ct. H.R. June 20, 2002), which took the legalist approach, did not suggest that there was an absence of common standards that might justify the denial of compensation.

National & Provincial,¹²¹ where the Court stated that taking steps to reverse the drafting defect, with retroactive effect, did not violate the fair balance:

There is in fact an obvious and compelling public interest to ensure that private entities do not enjoy the benefit of a windfall in a changeover to a new tax-payment regime and do not deny the Exchequer revenue simply on account of inadvertent defects in the enabling tax legislation, the more so when such entities have followed the debates on the original proposal in Parliament and, while disagreeing with that proposal, have clearly understood that it was Parliament's firm intention to incorporate it in legislation.¹²²

While this passage is framed in terms of the public interest, it also discloses a belief that the extinction of the restitution claims was not the loss that it appeared to be. In particular, the Court makes the point that the loophole was an unexpected result of an "inadvertent defects". Elsewhere, it emphasized the Government's statements that the tax would be retroactively validated, and hence that an expectation of retention should have been weak.¹²³

¹²¹ 1997-VII Eur. Ct. H.R. 2325. This puts the focus on the reasons for the takings, rather than their impact on the landlords. In other words, the Court did not say that the tenants' contributions to the upkeep somehow reduced the burden on the landlords. However, the suggestion was made that the landlords got something for nothing, and therefore have less reason to complain.

¹²² *National & Provincial*, 1997-VII Eur. Ct. H.R. at 2354.

¹²³ *Id.* at 2350, 2354.

These points would only be relevant under the social model of property. They do not arise under the legal model, because the asset in question took the form of claims for the restitution of amounts that had already been paid;¹²⁴ neither the manner in which the claims arose nor the reasons for the eventual extinction affected their status as property within the English legal system. Under the economic model, the degree of political risk of extinction of the outstanding restitution claims could have been significant, if it reduced their value. Of course, the claims would have had at least some value as long as the risk fell short of a certainty.¹²⁵ However, neither the Court nor the British

¹²⁴ The revenue authorities initially did not accept that the loophole even existed, and collected the money anyway.

¹²⁵ It is worth noting that the Grand Chamber made no attempt to assess the impact of uncertainty on the value of the property, as it might have done if it had applied the economic model of property. It has done so in other cases: in *Broniowski v. Poland*, 2004-V Eur. Ct. H.R. 1 (G.C.), for example, the risk that claims to land would not be satisfied by the state was sufficiently great that the Grand Chamber suggested that the claims could be extinguished, with compensation that reflected the degree of risk. This may have been behind the judgment of the Third Section in *Jahn*, Appl. Nos. 46720/99 (Eur. Ct. H.R. Jan. 22, 2004): that is, it may have concluded that the fair balance would be satisfied by compensation that would have reflected the degree of uncertainty. Indeed, there have been cases where the degree of uncertainty has been so great that the Court has held that the applicants do not hold possessions in any form. ALLEN, *supra* note 8 at 46-57. The Grand Chamber did not make that finding in *Jahn*.

government sought to justify the uncompensated extinction of the claims on this basis. The judgment follows the social model of property, as the emphasis on the unexpected and unearned nature of the tax benefit recognizes that there may be a stronger personal identification with assets that are earned than those obtained as a windfall. Consequently, the sense of loss that would follow from an uncompensated taking would often be less than it would with, for example, property that was earned or inherited from a close relative.¹²⁶

¹²⁶ Perhaps if the building societies had 'earned' the tax holiday by direct lobbying, the result would have been different. Indeed, the gain in *National & Provincial*, 1997-VII Eur. Ct. H.R., might be characterized in two ways, depending on whether one focuses on the the loophole produced by the initial error in statutory drafting or the subsequent judgment of the House of Lords that gave validity to the restitution claims. The loophole itself produced a true windfall. If the government had reversed it immediately, the impact on the building societies would have been minimal under the liberal model of property. However, the possibility that the British government would not retroactively impose the tax or extinguish the restitution claims was enough to induce the test case to go ahead, and from that investment, the social benefit of the clarification of the legal rules on restitution was obtained. In a sense, the British government acknowledged this point, as it accepted that it was bound by the test case and did not attempt to reverse its result by extinguishing the test case litigant's right to restitution. However, the Court observed that the applicants did not make a similar investment: Arguably, the litigants that did not join the test case did not make a similar investment;

The Court in *National & Provincial* also recognized that reliance that builds up over time. Owners often come to have a stronger personal identification with property the longer it is held, with the result that a taking that might have had a relatively slight impact could have a more severe impact if it is delayed. Hence, the Court also highlighted the Government's statements that it would reverse the defect. In those circumstances, no reliance could have arisen. Together, the cost-free acquisition of the asset and the relatively short duration of its possession, meant that the impact was not as great as it might have appeared.

The judgment in *Jahn* generally confirms the approach in *National & Provincial*. The case was initially heard by the Third Section of the Court,¹²⁷ which produced a

the judgment of the Court says only that the party in the test case had borne the costs and risks of litigation (*see id.* 2356-57). Consequently, the applicants could not claim to be in the same position as the test case litigant. See *Stere v. Romania*, Appl. No. 25632/02 (Eur. Ct. H.R. Feb. 23, 2006): the facts were similar to *National & Provincial*, 1997-VII Eur. Ct. H.R., except that the Romanian authorities allowed the case to proceed through to judgment, and paid the judgment debt, before seeking to extinguish it retroactively and recover the amounts repaid; the Court held that, having repaid the money, it would be unfair to recover it.

¹²⁷ Cases are initially heard by one of four Sections of the Court. The Grand Chamber of the Court is composed of seventeen judges, who include, as *ex officio* members, the President, the two Vice-Presidents and the two Section Presidents (two of

judgment that is noteworthy for its adherence to the legal model of property. For the Third Section, it was enough that the German courts held that the applicants held title before P1-1 was extended to the former GDR. The manner in which they had acquired the property was not important.¹²⁸ By contrast, the Grand Chamber noted that the

the Vice-Presidents also serve as Section Presidents). The state party may also elect one of the judges to both the Section and the Grand Chamber panels.

¹²⁸ *Jahn*, Appl. Nos. 46720/99, at para. 90 (Eur. Ct. H.R. Jan. 22, 2004) (Third Section) ("The Court cannot . . . agree with the Government's reasoning in the instant case regarding the concept of "illegitimate" ownership, which is an eminently political concept . . . regardless of the applicants' situation before the entry into force of the Modrow Law, there is no doubt that they legally acquired full ownership of their land when that Law came into force.") A related example where the question of equality and ethical basis of entitlements were raised is provided by the related cases *Draon v. France*, Appl. No. 1513/03 (Eur. Ct. H.R. June 10, 2005) (G.C.), *Maurice v. France*, Appl. No.11810/03 (June 10, 2005) (G.C.). Both dealt with French legislation that extinguished potential and pending tort claims for wrongful life/birth based on negligence in the pre-natal diagnosis of the child's disabilities. The French government argued that the legislation was necessary in the pursuit of justice, in order to ensure that all disabled children received the same degree of support (other factors were also cited, including the potential impact of negligence claims on the health service). Accordingly, the fair balance could be struck without providing compensation for those whose claims were still pending when the legislation took effect. *See Draon, id.* at para. 62-64 and *Maurice*,

applicants had "undeniably benefited" from a "windfall" as a result of the Modrow Law.

¹²⁹ Moreover, the burden of the taking had to be assessed in the light of the known risk that the Modrow Law would be repealed or amended: the transition to the re-unification of Germany was "inevitably marked by upheavals and uncertainties" and the Modrow Law itself was unclear in important respects.¹³⁰ The Grand Chamber also emphasized the lapse of time, as it stated that the legislature had acted "within a reasonable time" to plug the loophole in the Modrow Law.¹³¹ The suggestion is that inaction would have allowed the expectation of continued ownership to strengthen, with the result that compensation might have been required before title could be taken.

This review of the case law suggests that the Court has not always been fully committed to the integrated theory. Periodically, it does seem to make an attempt to resolve the tension between integrated and comparative theories, and between legal,

id., para. 75-77. The Court accepted that the legislation pursued a legitimate aim, but stated, with very little discussion, that there was no justification for extinguishing pending claims without compensation.

¹²⁹ *Jahn*, Appl. Nos. 46720/99, at para. 116 (Eur. Ct. H.R. June 30, 2005) (Grand Chamber). ("Given the 'windfall' from which the applicants undeniably benefited as a result of the Modrow Law under the rules applicable in the GDR to the heirs to land acquired under the land reform, the fact that this was done without paying any compensation was not disproportionate.")

¹³⁰ *Id.*

¹³¹ *Id.*

economic and social models. *Sporrong* and *Jahn* are two of the strongest examples. However, the balancing that supposedly occurs is in fact often done without any real attempt to assess how compensation affects the impact of the interference on the property owner, or whether the public interest outweighs the impact (whether or not the state pays full compensation).

III. VALUATION ISSUES AND THE SOCIAL MODEL OF PROPERTY

One might argue that the Court does accept the fair balance as a matter of principle, but applies the market standard in the belief that it is most likely to achieve justice in most cases. Above all, the Convention and its Protocols must be given effect, and the adoption of a relatively rigid standard may be more likely to secure the protection of human rights than the application of open-ended balancing tests.

Two practical points might be raised in defense of this position. To begin with, the social model may appear to set an impossible standard for the fair balance test: surely any workable balancing exercise involving property must exclude factors for which accurate valuation is either very difficult or impossible.¹³² The second concerns the burden of the ever-increasing workload faced by the Court. Property cases provide a significant number of these applications. The Court must find some means of providing justice in these cases. Arguably, it cannot do so in a timely fashion if it engages in the detailed, open-ended examination of the circumstances that the fair balance requires. Each of these points are considered and dismissed below.

¹³² See Ellickson, *supra* note 6 at 736 ("The imprecision of market values may also be tolerable because of the resulting savings in administrative costs.")

A. *The problem of subjective valuation*

As explained above, there are isolated cases in which the Court has put a monetary figure on subjective elements of the interference.¹³³ Moreover, the Court's own practice suggests that it does not regard the assessment of the subjective impact of an interference with property as an insurmountable problem. Where it has decided that the state has breached P1-1, the award of just satisfaction often includes an amount for non-pecuniary damages, which is intended to reflect the emotional suffering caused by the breach of human rights.¹³⁴ The amounts awarded are significant (but not overly generous).¹³⁵ Hence, the Court's own practice suggests that it can recognize aspects of

¹³³ *E.g. Lallement*, Appl. No. 46044/99 and *Chassagnou*, 1999-III Eur. Ct. H.R.

¹³⁴ DINAH SHELTON, *REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW*, 298, 307-310 (2005).

¹³⁵ For example, most of the landlords in the Italian eviction cases were awarded non-pecuniary damages for the distress and anguish arising from inability to recover possession for a prolonged period; amounts awarded were generally between about EUR 3,000-10,000. *See e.g.* *Massimo Rosa v. Italy*, Appl. No. 36249/97 (Eur. Ct. H.R. Apr. 17, 2003) (5,000 EUR); *Clucher v. Italy*, Appl. No. 36268/97 (Eur. Ct. H.R. Apr. 17, 2003) (3,000 EUR); *Pannocchia v. Italy*, Appl. No. 37008/97 (Eur. Ct. H.R. Apr. 17, 2003) (ITL 12,000,000 *i.e.* EUR 6,197.48); *Fegatelli v. Italy*, Appl. No. 39735/98 (Eur. Ct. H.R. Apr. 3, 2003) (10,000 EUR); *L.M. v. Italy*, Appl. No. 41610/98 (Eur. Ct. H.R. Apr. 3, 2003) 3,000 EUR; and *Malescia v. Italy*, Appl. No. 42343/98 (Eur. Ct. H.R. Apr. 3, 2003) (3,000 EUR).

subjective loss, despite the impossibility of precise quantification.¹³⁶ In any case, this objection mistakes the nature of the balancing test under the integrated theory. The function of compensation is not to eliminate the impact of a taking. Instead, it should bring the impact down to a level that it is not excessive, when set against the public interest served by the interference. But since the public interest itself is not necessarily measurable in monetary terms, it should follow that subjective elements of the interference need not be measurable in monetary terms in order to be recognized by the Court.

The Court's near-automatic conclusion that the payment of the market value is sufficient also ignores the potential flexibility of the fair balance. For example, with highly personal property, it could require the state to show that the interference was strictly necessary in order to achieve the public objective. Put differently, it would ask whether there were less intrusive means of achieving the same objective.¹³⁷ This test applies under the Convention rights that permit interferences where "necessary in a democratic society". If the Court had followed through with the integrated theory, it might have incorporated this aspect of the proportionality test into P1-1. That it did not do so may have reflected continuing unease over the risks of judicial activism in relation

¹³⁶ For example, in *Chassagnou*, 1999-III Eur. Ct. H.R., the Court did not make an award for pecuniary damage, but did award FRF 30,000 to each applicant for non-pecuniary damage.

¹³⁷ See *Sunday Times*, 30 Eur. Ct. H.R. (ser. A) at 38-42 and *Olsson*, 130 Eur. Ct. H.R. (ser. A) at 31.

to economic and social planning. In any case, the fair balance test under P1-1 does not require strict necessity. This follows from *James*, where the landlords argued that the injustice of the tenancy system could have been addressed by something less drastic than "extreme remedy of expropriation".¹³⁸ The Court did not agree:

This amounts to reading a test of strict necessity into the Article [P1-1], an interpretation which the Court does not find warranted. The availability of alternative solutions does not in itself render the leasehold reform legislation unjustified; it constitutes one factor, along with others, relevant for determining whether the means chosen could be regarded as reasonable and suited to achieving the legitimate aim being pursued, having regard to the need to strike a "fair balance". Provided the legislature remained within these bounds, it is not for the Court to say whether the legislation represented the best solution for dealing with the problem or whether the legislative discretion should have been exercised in another way.¹³⁹

The Court has generally followed this line in property cases¹⁴⁰ without making a distinction for highly personal property.¹⁴¹ In practical terms, strict necessity only

¹³⁸ *James*, 98 Eur. Ct. H.R. (ser. A) at 35.

¹³⁹ *Id.*

¹⁴⁰ See e.g., *Mellacher v. Austria*, 169 Eur. Ct. H.R. (ser. A) (1990); *Tre Traktörer Aktiebolag v. Sweden*, 159 Eur. Ct. H.R. (ser. A); *Smits, Kleyn, Mettler Toledo BV et al, Raymakers, Vereniging Landelijk Overleg Betuweroute and Van Helden v. The Netherlands*, Appl. Nos. 39032/97, 39343/98, 39651/98, 43147/98, 46664/99, 61707/00

(Eur. Ct. H.R. May 3, 2001); *cf.* *Rosenzweig and Bonded Warehouses Ltd. v. Poland*, Appl. No. 51728/99 (Eur. Ct. H.R. July 28, 2005) (at para. 56, the Court suggests that strict necessity is the test, but does not pursue the point in the rest of the judgment).

Strict necessity is generally required where the state argues that the pursuit of a legitimate aim justifies unlawful activity, in the sense that the Court is unwilling to accept that the aim could not have been pursued by lawful (i.e. less drastic) means. *See e.g.*, *Allard v. Sweden*, 2003-VII Eur. Ct. H.R. 207.

¹⁴¹ See, for example, *Gerasimova v. Russia*, Appl. No. 24077/02 (Eur. Ct. H.R. Mar. 25, 2004), where the applicant complained that the taking of her flat had a disproportionate impact on her because she would be forced to relocate a considerable distance from her community. The Court briefly considered the importance of her social ties in her old community, but only in relation to a separate claim under Article 8 (right to respect for the home); under P1-1, the Court held that it could not find in her favor because she had failed to adduce "any evidence, such as an independent expert evaluation, that would permit a comparison of the full market value of her old flat and that of the replacement flat." *Id.* at para. 3. In effect, the social relationships that the property had enabled her to form could be ignored when determining whether a fair balance had been struck under P1-1. (The applicant eventually succeeded in further proceedings regarding the failure of the authorities to transfer title to the replacement flat: *see* the judgment issued by the Court on July 21, 2005, Appl. No. 24077/02 (Eur. Ct. H.R. July 21, 2005).)

becomes relevant where the taking of property interferes with some other Convention right.¹⁴²

It is only in relation to assets used to earn a profit that the Court seems willing to adjust the balancing test to reflect the social function of property. In a number of cases, the Court has suggested that commercial property commands a lower level of protection than other types of property. In *Pine Valley Developments v. Ireland*, it stated that an owner of land held for commercial development should take the risk that planning regulations may make it impossible to earn anticipated profits.¹⁴³ Similarly, in *Gasus*, it held that the holder of a security interest should recognize that tax authorities may assert

¹⁴² For example, in a British case dealing with a trustee in bankruptcy's statutory power to seize and sell property of the bankrupt, the national court indicated that the power should be subject to safeguards for the protection of personal correspondence. *Haig v. Aitken*, [2001] Ch. 110 (Ch. D.). However, it was the Article 8 right to privacy, rather than P1-1, that was relevant. (even so, the discussion of Article 8 was not strictly necessary to the decision, although it was "at least strongly arguable" that a seizure and sale of the correspondence would infringe" article 8. *Haig*, [2001] Ch. at 118; *cf.* *Cork v. Rawlins*, [2001] Ch. 792 (C.A.) (proceeds of a permanent disablement insurance policy were not so peculiarly personal that they could not be taken on bankruptcy).

¹⁴³ 222 Eur. Ct. H.R. (ser. A) at 26. (The withdrawal of a prior provisional grant of planning consent caused the property's value to decline to about 10% of its previous value. However, a breach of the Article 14 non-discrimination right was found on other grounds).

a higher-ranking claim to the assets.¹⁴⁴ There was no factual basis on which it could be said that the owners should have expected these events, except in the most general sense. That is, nothing about the specific facts of either case would have suggested that there was a greater risk to these property owners than to any other person holding property for a commercial purpose.¹⁴⁵ In effect, commercial property is not protected as stringently as property used for other purposes. But even so, these cases cannot be taken too far. They concerned the enforcement of regulatory and taxing measures, rather than the deprivation of possessions, and so the payment of compensation and the loss of autonomy were not the central issues. In cases on valuation and compensation, the Court does not differentiate between types of property and types of property holders. In the vast majority of cases concerning compensation and the fair balance, the function of the property and its relationship to the personal interests of the applicant are given little weight.

¹⁴⁴ *Gasus*, 306-B Eur. Ct. H.R. (ser. A) at 52-53 (the property was rendered worthless); *see also* *Bäck v. Finland*, 2004-VIII Eur. Ct. H.R. 246 at 266.

¹⁴⁵ In both cases, the state action was unexpected; indeed, in *Gasus*, 306-B Eur. Ct. H.R. (ser. A), the holder of the security interest had no means of ascertaining the risk that the tax authorities would claim an interest in the assets. It would have been impossible to obtain information on the debtor's tax liabilities, and hence on the risk of seizure.

In conclusion, it does not appear that the Court adopted market standard over concerns regarding the difficulty of valuation, and in any case, the fair balance test should be flexible enough to resolve any concerns where valuation is difficult.

B. The market standard as the best approximation of fairness

The Court's concern with its capacity to manage the growth in its workload is most obvious where it deals with large numbers of similar claims. In these situations, the Court has indicated that rigid standards may be preferable to open-ended balancing tests. For example, in *Lithgow v. United Kingdom*, which concerned the valuation of the shares of companies that were taken in the nationalization of the aircraft and shipbuilding industries, the Court allowed the United Kingdom to ignore the book values of the assets of companies in order to simplify the process and avoid delays.¹⁴⁶ In *James*, the Court accepted that the legislation would produce "anomalies" and "windfall profits" for some tenants, but stated that "the uncertainty, litigation, expense and delay that would inevitably be caused for both tenants and landlords under a scheme of individual examination of each of many thousands of cases" meant that the scheme as a whole was not unreasonable.¹⁴⁷

¹⁴⁶ 102 Eur. Ct. H.R. (ser. A) at 52-54.

¹⁴⁷ The applicants raised the example of tenants who bought end-of-term leases before the legislation came into effect, because they would not have paid towards the maintenance of the buildings, and yet that was the justification for allowing them to buy the leasehold without consideration for the value of the buildings. (*James*, 98 Eur. Ct. H.R. (ser. A) at 42.)

In *Lithgow* and *James*, it was the state that argued that rigid rules would achieve justice. Often, it is the Court that advances a rigid test, as the choice between the open-ended balancing test and fixed rules is dictated by the Court's perception of its ability to manage its case load.¹⁴⁸ Once it sees that a particular type of case is likely to recur, it tends to adopt very rigid rules that exclude a broader investigation into the facts.¹⁴⁹ It is only in cases that raise issues that seem unlikely to come back before the Court that it emphasizes the open-ended nature of the fair balance.

This is most clearly illustrated by a series of Italian cases on the delays faced by landlords who wished to execute eviction orders against tenants.¹⁵⁰ At first, the Court held that an excessive delay could upset the fair balance, but it was necessary to take into account a variety of factors before reaching a conclusion. For example, in *Spadea and Scalabrino v. Italy*¹⁵¹ and *Scollo v. Italy*,¹⁵² the Court balanced the personal situation of

¹⁴⁸ See e.g. *Broniowski*, 2004-V Eur. Ct. H.R. at 76-77.

¹⁴⁹ It cannot restrict access by declaring cases inadmissible; as Luzius Wildhaber, the President of the Court, has noted, it is "manifestly well-founded applications" that are the issue. Luzius Wildhaber, *A Constitutional Future for the European Court of Human Rights*, 23 HUMAN RIGHTS L.J. 161 at 163 (2002).

¹⁵⁰ Under Italian law, a landlord must obtain police assistance to enforce an eviction order against a residential tenant. In these cases, the police refused to provide assistance, despite requests from the landlord.

¹⁵¹ 315-B Eur. Ct. H.R. (ser. A) (1996).

¹⁵² 315-C Eur. Ct. H.R. (ser. A) (1996).

the tenants against the landlords' need for repossession. In both cases, the delays in obtaining possession were lengthy (six years in *Spadea* and ten in *Scollo*), but only in *Scollo* did the Court find that landlord's need outweighed the state's interest in protecting the tenant.

At this point, the Court may have thought that it had given the Italian government sufficient guidance to determine similar disputes on their own. If the Italians had set up a system for balancing interests in individual cases, it is likely that it would have discharged its obligations under P1-1.¹⁵³ However, this did not happen, and the Court was soon faced with a flood of similar claims from landlords. It would have been impossible to engage in the careful balancing of *Spadea* and *Scollo* and still deal with all of them within a reasonable time, and the Court soon adopted a more rigid approach. It is now quite clear that delaying possession by more than four years violates P1-1, but anything less does not.¹⁵⁴ The Court no longer engages in the careful balancing of interests that characterized *Spadea* and *Scollo*. Plainly, the Court has sought to manage the flood of cases, but it has only done so by ignoring the very factors that it had already said were essential to the balancing process.

¹⁵³ See, e.g., *Bäck*, 2004-VIII Eur. Ct. H.R. (debt adjustment).

¹⁵⁴ See, e.g., *Sorrentino Prota v. Italy*, Appl. No. 40465/98 (Eur. Ct. H.R. Jan. 29, 2004) (delays just over four years were violations, *id.* at para. [70]-[71], but a delay that "could have lasted for a period of time between three years and two months and four years and one month" was not, *id.* at para. [59]-[61]).

It may be the case that the same concern underpins the approach to the market rule. That is, it does not necessarily represent an abandonment of the integrated theory, or indeed of the fair balance and the social model of property, but only a realistic appraisal of the likelihood that justice can be provided in every case without unreasonable delay. Perhaps the Court adopted the market value compensation for the same reason as the four-year rule in the Italian eviction cases: it believed that it is simpler to apply and probably provides a reasonable approximation of the just outcome in most cases.¹⁵⁵ However, the problems concerning the Court's workload have been caused by delays in the execution of judgments, rather than the complexities of the fair balance test or the social model of property.¹⁵⁶ With the Italian repossession cases, the central problem has been the continuing failure of the Italian government to address systemic problems in the administration of the law. There was no suggestion that implementing a system that reflected the balancing test of *Scollo* and *Spadea* was beyond the capacity of the Italian civil service or courts; rather, they simply failed to make the changes that were required.

¹⁵⁵ Thomas J. Miceli and Kathleen Segerson, *Takings*, in 2 ENCYCLOPEDIA OF LAW AND ECONOMICS 328 at 332 (Boudewijn Bouckaert and Gerrit De Geest, eds., 2000) available at <http://encyclo.findlaw.com/6200book.pdf> and <http://users.ugent.be/~gdegeest/6200book.pdf> ("Thus, taking measurement costs into account, fair market value may be the best proxy for just compensation.").

¹⁵⁶ Wildhaber, *supra* note 149.

While there is no doubt that delays in the execution of judgments do represent a real challenge to the effectiveness of the Convention system, the dilution of the substantive content of human rights is not the appropriate method of resolving these issues. They should be addressed directly, through remedial law or non-judicial measures of the other organs of the Council of Europe.¹⁵⁷ In any case, the Court is inconsistent on the use of rigid rules. There are a number of cases in which the Court has found that national rules on expropriation and compensation are insufficiently flexible. For example, a series of cases have dealt with Greek rules that allowed public authorities to take offsetting benefits into account when expropriating part of a plot of land for road construction.¹⁵⁸ While the Court accepted that the principle that offsetting benefits could be relevant, it held that it should be open to challenge in specific cases. The Greek law did not allow this, and hence there was a breach of P1-1, despite the saving in administrative costs that would be lost. *Lallement* also demonstrates that the

¹⁵⁷ Recently, the Court began to hand down "pilot judgments": *see e.g.*, *Broniowski*, 2004-V Eur. Ct. H.R., and *Hutten-Czapska*, Appl. No. 35014/97. Nevertheless, it is apparent that governments are very slow in making systemic changes where it is clear that this is required in order to avoid future breaches of P1-1 or other Convention rights. For example, the Court is still dealing with numerous applications from Italian landlords on essentially the same matters that were raised in *Scollo*, 315-C Eur. Ct. H.R. (ser. A) and *Spadea*, 315-B Eur. Ct. H.R. (ser. A).

¹⁵⁸ *Katikaridis*, 1996-V Eur. Ct. H.R.; *Tsomtsos*, 1996-V Eur. Ct. H.R.; 1699; *Papachelas*, 1999-II Eur. Ct. H.R.; *Efstathiou*, 2003-IX Eur. Ct. H.R.

determination of the loss cannot always be resolved by simple formulae, even where it would reduce the administrative expense and perhaps provide satisfactory justice in the majority of cases.¹⁵⁹ Even if the market value standard could be defended as the best approximation of what the fair balance and social model of property would require in most cases, the Court has neither presented nor applied it in that way.

In conclusion, the objection that the Court has adopted market value as the best approximation of the outcome that would be reached by open-ended balancing tests is not well-founded. It may well approximate the outcomes in many cases, but it is doubtful that this is the Court's reason for adopting it. It is far more plausible that the market value was adopted out of judicial habit, borrowed from national law and customary international law. In other words, it is the comparative method that has been applied, and the integrated theory of *Sporrong* is only followed occasionally and inconsistently.

CONCLUSIONS

In *Sporrong*, it was said that the fair balance provides the basis of substantive justice under P1-1. While the Court has never suggested that human rights do not strike a balance between public and private interests, the real question is the centrality of its own balancing process in the resolution of issues of substantive justice. *Sporrong* suggested that the Court ought to decide whether the balance had been struck according to general Convention principles. Moreover, the fair balance test itself is open-ended and vague, but this only serves to make relevant the social context in which property rights are allocated and exercised. Hence, the market value of the property is relevant to the

¹⁵⁹ Appl. No. 46044/99 (Eur. Ct. H.R. April 11, 2002).

balancing process, as it indicates the value that the community attach to the property in ordinary private transactions; however, it is not conclusive. It excludes personal preferences that should be relevant, as well as general social conditions that justify a re-shaping of the boundaries of property. Instead, we find that the Court has often turned away from full implications of the integrated theory of *Sporrong*, in favor of a comparative legal method that abstracts both property from social context and the principles of a human right to property from those of other human rights.