Commons as possessions: The path to protection of the commons in the ECHR system

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Abstract

The 'commons' is not mentioned in the texts of the European Convention on Human Rights (ECHR) or Article 1 of Protocol No. 1 (P-1). This essay argues that 'possessions' — which does appear in the latter — should be interpreted by the European Court of Human Rights (ECtHR) to protect commons against national governments' undue interferences. The argument comprises two parts. First, we analyse the polysemic term 'possessions' to show how the current understanding of this category is marred by flawed assumptions and by false dichotomies. Then, we propose an 'ecological' construction of legal relationships between subjects and objects. We find support in the ECtHR case law on Article 8. We argue this approach should be extended to Article 1 P-1: once disentangled from possessive individualism and market paradigms, 'possessions' encompass the commons and the category offers a solid legal basis toward the justiciability in Strasbourg of privatisations.

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

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

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

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1 INTRODUCTION

The aim of this essay is to acknowledge the legal relevance of the commons within the European Convention on Human Rights (ECHR) framework. In particular, we show how commons exist as possessions, whose protection is granted under Article 1 P-1 cited above. We have divided our essay into a first pars destruens and a second pars construens.

The first part consists of Sections 2, 3 and 4. In the first two of these sections, we investigate the complex category of ‘possessions’ (‘biens’ in the French version of the ECHR), which is at the core of the conventional system of protection of private property. We illuminate through analysis of the preparatory works the historical roots of the main theoretical contradictions we observe today with regard to the autonomous interpretation of Art. 1 P-1 established by the Court of Strasbourg.

Such foundational analysis allows us to progress from the domain of things to the domain of subjects. In Section 4, we show how a certain notion of ‘possessions’ seems deeply connected to a corresponding conception of ‘subject’. In this regard, within the case law developed by the European Court of Human Rights (ECtHR), we see at work a theoretical construction of the subject inspired by the protoliberal equivalence between private property and liberty, as well as by mutually exclusive relationships between subjects and objects.

Such an approach is not the only one available. Even within the current conventional system, as interpreted by the Court of Strasbourg, it is possible to observe a more circular and ecological construction of the relationships between subjects (i.e. legal entitlements) and objects (i.e. utilities and resources offered by the world of things). The second part of the essay builds on this critical methodology.

In Section 5, we observe how this different theoretical framework emerges from recent case law established by the ECtHR with regard to Article 8 of the ECHR, dedicated to the ‘[r]ight to respect for private and family life’. This shift is paramount because it overcomes the a priori individualistic conception of the subject as a legal category. The same approach can be extended to Article 1.

Finally, in Section 6, we argue that the commons constitute ‘possessions/biens’ under Art. 1 P-1, once the different theoretical approach is adopted to emancipate the notion from the perspective inspired by possessive individualism (according to which possession is synonymous with economic value/asset). Such recognition of the commons as

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3Although the Commons is an institution and concept with a long historical pedigree—Carta de Foresta, widely recognised as the first constitutional document granting legal recognition to the Commons, recently turned 800 years old—it is nascent as a field of thought and study. The term (without recognised legal definition, neither private nor public, and used interchangeably in singular and plural forms) is understood not as territorial organisation(s) but rather as resources and systems possessed by society as a whole; to expand this concept environmentally, Commons are commonly possessed resources and systems that together constitute the ecosystem within which humankind, all other forms of life, and the material world coexist. See, e.g., F. Capra and U. Mattei, The Ecology of Law: Toward a Legal System in Tune with Nature and Community (Berrett-Koehler, 2015). The Commons is a social, political, economic and intellectual concept; it is not about a piece of territory bordered politically or a pasture at the centre of a village, although, historically, it derives from them. See B. Coriat et al., Le retour des communs: La crise de l'idéologie propriétaire (Éditions les Liens qui libèrent, 2015). See, also, U. Mattei and M. Mancall, ‘Communology: The Emergence of a Social Theory of the Commons’, South Atlantic Quarterly, forthcoming.

4The authors acknowledge that the unambiguous equivalency of possessions and biens is not embraced universally. For example, in fn 8 to his dissenting opinion in Marckx v. Belgium delivered by the European Court of Human Rights on 13 June 1979, Judge Sir Gerald Fitzmaurice observes:

The apparent interchangeableability of the terms ‘possessions’, ‘property’, ‘biens’ and ‘propriété’ in different contexts and without evident reason is confusing. The French ‘biens’ is best translated into English by ‘assets’ not ‘possessions’. But the best French rendering of the English ‘assets’ is ‘avoirs’. In addition, there is no really satisfactory French equivalent of ‘possessions’ as such, and in the plural.

Marckx v. Belgium (European Court of Human Rights 1979), https://bit.ly/2RlXhoa (last accessed 13 January 2019). The authors of this paper, however, are concerned mainly with legal, social, political, and economic issues rather than linguistic ones. Furthermore, as argued topically by Egon Schwebel:

The second sentence of the French text does not repeat the term ‘biens,’ but speaks of ‘propriété’ instead. While the English text of the first paragraph uses twice the term ‘possessions,’ the second paragraph speaks of controlling ‘the use of property.’ The French text renders this by ‘réglementer l’usage des biens.’ ... The only reasonable conclusion which can be drawn from this lack of terminological symmetry and consistency [in the equally authentic English and French texts of the comparatively short treaty provision of Article 1] is that for the purposes of the Protocol all the terms employed in Article 1 mean the same, namely ‘property,’ ‘propriété,’ and that the use of different expressions is legally irrelevant.

protected possessions permits steps towards the justiciability of government decisions on privatisation, an issue long overdue in Western constitutional democracies.

2 | ‘POSSESSION’: AT THE ORIGINS OF ARTICLE 1 P-1

The term ‘possession’ is polysemic across the legal tradition. What is less known is its serendipitous introduction into the text of the ECHR Article dedicated to the ‘protection of property’. Possession appears in the debate on 17 August 1950, within a Draft Motion of the Committee on Legal and Administrative Questions of the Consultative Assembly. The expression ‘peaceful enjoyment of his possessions’ reflects Rapporteur Pierre-Henri Teitgen’s attempt to overcome a contemporaneous political and legal deadlock.

The Council of Europe (created in May 1949) and the ECHR (signed on 4 November 1950) are the products of efforts in the aftermath of World War II by the European Movement. After creation of the Council of Europe, the European Movement exerted its political influence by proposing the ambitious target of achieving a European instrument for protection of human rights as an early warning signal against totalitarianism. Several bodies inscribed in the Council of Europe—namely the Consultative Assembly, the Committee on Legal and Administrative Questions, and the Committee of Ministers—engaged in the negotiations that led to the signing of the ECHR.

The draft convention proposed by the European Movement, the starting point of the debates, addressed the issue of property in Art. 1(1k) referring to ‘freedom from arbitrary deprivation of property’. The rationale for such minimalist proposal is intuitive. At the end of the 1940s, Europe was facing reconstruction after World War II and the Cold War had begun. During the previous 20 years, Europe observed the most tragic aberrations of positive law passed by the will of some of the legislators of the nationalist States. Nazi fascist laws undermined or denied any sort of legal protection to entire categories of subjects. There had ensued confiscations of property, homes, companies, as well as

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7This peculiar lobbying association composed of statesmen, representatives of governments, and notables was founded on 25 October 1948, and replaced the Joint International Committee for European Unity (created one year before as the outcome of the congress of The Committee for the Co-ordination of the European Movements, with the aim of promoting any possible process of European integration). The European Movements gathered in the congress celebrated in 1947 in Paris were: the Anglo-French United European Movement; Ligue Européenne de Coopération Economique (LECÉ); Union européenne des Fédéralistes (UEF); and Union parlementaire européenne (UPE).
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massive imprisonments, deportations and genocide. Such measures were put in place by public authorities and administrative bodies—by totalitarian regimes—in a completely ‘legal’ manner.11

In the wake of such inhumane statutory law, a Natural Law-oriented approach and paradigm of individual rights emerged within the Council of Europe. The preparatory works leading to the ECHR were influenced by The Universal Declaration of Human Rights adopted within the United Nations on 10 December 1948.12 Considering that among the founding Member States some countries—such as Italy, France and the United Kingdom—were witnessing the emergence of communist and socialist parties and trade unions, a further reason to adopt the individualistic methodology was anti-communism, with its perception of Soviet and socialist law as fatal threats to a free future for Europe and European unification.13

There is a more theoretical and institutional explanation for the centrality of the debate about property within the ECHR system: a conception of private property being at the very core of Western modern liberal tradition and the related consensus on the need for a conventional protection of property against arbitrary and discriminatory deprivations. The passionate discussions among representatives of Member States indicate the problem was not solely the lack of a shared technical notion of private property. The difference between the common law of property and the variegated civil models was, and remains, an obvious factor to be considered.14

The main problem for the participants in the debate concerned an institutional perspective focused on the vertical axis of legal relationships between the individual citizen and the sovereign Leviathan.15 It was difficult to reach consensus on a conventional protection of private property because it was hard to agree on the extent of constitutional protection of private property. The envisaged enforceability of conventional human rights before a Court implied the need for the most accurate definition of any measure of constitutional protection. In such context, different political and cultural worldviews emerged quickly in the technical discussion about drafting the future Article 1 P-1.

British representatives were then the most engaged sponsors of a progressive conception of private property. This is not surprising: in 1949, Labour was the governing party and the United Kingdom was characterised by strong progressive social policies, such as nationalisations of strategic industries and services and public interventions on the regime of property.16

The influence of progressive political worldviews was evident during the first session of the Consultative Assembly in late summer 1949. Many of the participants had no difficulty defining private property as a ‘social’ right (rather than an absolute human right) or deducing from such definition a critique against the insertion of a strong protection of property in the text of the Convention. More specifically, many contributions were aimed at clarifying that not every form of private property should be the object of protection granted by the ECHR. On the contrary, there were explicit references to the socialist concept of ‘personal property’ as recognised by Article 10 of the 1936 Soviet Constitution.17 For

11See U. Mattei, T. Ruskala and A. Gidi (eds.), Schlesinger’s Comparative Law (Foundation Press, 7th edn, 2009), 113ff. As Lyon local Henri Variot—describing the German military administration headquartered in Hôtel Terminus during its occupation of France—recalls, ‘[T]hey had tried to come across as people who were ... civilized, then in ‘44 we realized that the “civilized” had behaved like “barbarians.”’ M. Ophuls, J.S. Friedman and H. Fish, Hôtel Terminus: The Life and Times of Klaus Barbie (1988), at approximately 5 minutes.


17According to this article, ‘the right of citizens to personal ownership of their incomes from work and of their savings, of their dwelling houses and subsidiary household economy, their household furniture and utensils and articles of personal use and convenience, as well as the right of inheritance of personal property of citizens, is protected by law’.


example, according to French representative André Philip, private property was ‘the right for each one of us to own as property for the owner’s personal use—truly the projection of his person—those belongings which are tied to his being.’\(^{18}\)

The significance of such theoretical conceptions is evident. The socialist notion of ‘personal property’ can be appreciated in its capacity to take into account the mutual implication between human needs and the emergence of subjective interests, on the one hand, and the utilities things can offer and the legal construction and qualification of goods, on the other hand. Therefore, the notion of personal property has something to do with a circular relationship between persons and goods: the centrality of the use value, instead of the exchange value produced in and by the market, can be seen as evidence of the functioning of such a different methodological and legal framework.\(^{19}\)

As a result of this approach, and with regard to things that can offer mostly rival utilities, private property can be an efficient legal instrument to grant certain usages connected to the acknowledgment and protection of the personal, intimate, subjective sphere. Such a technical solution can be desirable even from an axiological and constitutional perspective: this is the argument by which many representatives active in the preparatory works for the ECHR were inspired when making their proposals about private property. According to this theoretical framework, a broader constitutional protection of private property is bound to be affected by deep ambiguities, because property is first a social and economic right that must be balanced with other conflicting rights. A major critique of the insertion of the protection of property in the Convention concerned precisely this point: it should not be possible to protect private property without granting the same constitutional guarantee to similar economic rights (e.g., the right to work).

Nevertheless, British Labour’s was not the only worldview among the delegations called upon to define the contents of the ECHR. Irish representatives, for example, were passionate in defending a pure protoliberal and Natural Law-oriented approach. Seán MacEntee proposed a Motion for a Resolution to the Committee on Legal and Administrative Questions calling for the Consultative Assembly to express ‘its regret that the draft Convention in question does not include any declaration of the inherent natural right of man to own property and to use it with such limitations in the interests of the common good and of social justice as may be prescribed by law.’\(^{20}\)

Hence, even if there were no actual debate about the more technical and legal profiles of property law, the term ‘property’ was a battlefield within the preparatory works for the ECHR. The above quoted Motion was proposed on 16 August 1950: the precise date the term ‘possession’ made its first appearance in the draft of the future Article 1 P-1. It is easy to see how the word possession was brought into the discussion in order to function as a pragmatic expedient: if any sort of agreement upon property were not possible, the quick solution should have been the elimination of the category itself from the draft.

This attempt to bypass the contradictions between different constitutional policies about private property eventually ushered in an open debate within the Committee on Legal and Administrative Questions. Two core issues were focused from both political and legal points of view. First, the enforceability of the protection of private property before an international Court was reputed to be problematic, because a margin of sovereign decision belonged to national States in matters of public policies and social rights. In other words, some of the representatives could argue—and they were eventually proved right—that severe threats to national policies having impacts on the regulation and use of private property could derive from the future jurisdiction of a Court acting at the European level and disconnected from national contexts. In this respect, there was a prophetic concern with regard to the extent of the jurisdiction of the European Court, relating to the definition and contents of the notion of ‘arbitrary confiscation’ (i.e., a taking of and/or interference with private property in violation of the conventional legal system).

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The signing of the ECHR was characterised by some polemics because of the well-known decision to postpone the acknowledgment of a conventional protection of private property. An additional Protocol was envisaged in order to face other severe critiques.21

Moreover, the debate that led to the adoption of Protocol 1 was no less passionate or conflicting than the one that took place during 1949 and 1950. In February 1951, for example, the issue of compensation in case of lawful takings arose in the discussion within a committee of experts on human rights. In May 1951, it was expressly recognised within the Consultative Assembly that the definition of the right to own property concerned ‘essentially matters of a political character’.22 It was exactly in this respect that an agreement on the current formulation of Article 1 P-1 eventually emerged during the last months of 1951. There had been meaningful historical reasons behind such a consensus on a technical formulation: after the 1950 British general elections, the Labour Party was barely able to form a fragile government. A political crisis ensued and in October 1951 the Tories won the general election and inaugurated a different political phase.

In such a changed political climate, major legal questions were deferred. Among the most politically charged of these were: Isn’t the protection of personal properties enough? Isn’t private property a social right? What is the distinction between an arbitrary confiscation and a lawful control of the use of things and properties? What role should a European Court assume? What about the supposed need for compensation and what about its fairness?

A consequence of this confused scenario is the current formulation of Article 1 P-1 based on the notion of ‘possession[s]’, on the concept of ‘depriv[ation]’, and on the second paragraph clause allowing to ‘control the use of property in accordance with the general interest’.23 No reference to ‘personal property’ survived. At the same time, delegates agreed on the introduction of two evocative expressions in order to provide the Article with two specific legal features: on the one hand, the mention of ‘the conditions provided for by law’ as an implicit recall to the principle of compensation in case of taking of property; on the other hand, the reference to ‘the general principles of international law’ to ascribe to the States the obligation to pay compensation to foreign subjects in cases of expropriation, even in the absence of any compensation to nationals.

The foregoing historical contextualisation demonstrates it is possible to agree with an influential opinion that considers the text of Article 1 P-1 the product of a conservative and minimalist agreement.24

3 | POSSESSIONS ACCORDING TO THE COURT OF STRASBOURG: THE RELEVANCE OF AN AUTONOMOUS NOTION

It is beyond the purpose of this paper to detail the evolution of the interpretative policies adopted by the Court of Strasbourg. Nevertheless, it is important to remark how concern about the risks related to the lack of a commonly accepted content for the category of ‘possessions’ proved well grounded. As we will see, the choice of entrusting to the ECtHR the task of definition of this concept has produced deep aberrations.25

A first phase was dominated by the centrality of the European Commission on Human Rights and therefore by approaches that were respectful of the margins of sovereign decisions of Member States and public authorities.26

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21Here it is sufficient to recall the minutes of the first Meeting of the Committee of Ministers, held in Rome on 3 November 1950: see Council of Europe, Collected Edition of the ‘Travaux Préparatoires’ of the European Convention on Human Rights, Vol. 7 (Martinus Nijhoff, 1985), 22–34.
22This acknowledgment is contained in a motion proposed by Belgian representative Henri Rolin and some of his colleagues: in this regard, see Council of Europe, ibid., 268.
23See above, n 1.
26The Commission is no longer a body inscribed in the conventional system since 1 November 1998, when Protocol no. 11 to the ECHR (signed on 11 May 1994, and ‘restructuring the control machinery established’ by the Convention) came into force.
In other words, until the end of the 1970s, Article 1 P-1 was the object of an *interpretatio abrogans*, according to which any sort of regulatory definition of the regimes of private properties—even in arbitrary situations, as well as in cases of negligence of the public sector—was considered lawful within the ECHR system. Such lawfulness was consistently restated provided the measures adopted by Member States did not result in a formal expropriation of the proprietary entitlement.27

However, this interpretative framework was radically broken at the inauguration of the neoliberal era on 23 September 1982, with the judgment given by the Court of Strasbourg in *Sporrong and Lönnroth v. Sweden*.28 In Stockholm, properties owned by the plaintiffs were constrained for many years—more than 20 for Sporrong, more than 10 for Lönnroth—by measures of urban planning prohibiting private building developments. Although envisaged by such measures, no formal expropriation of the plaintiffs’ land was decided by public authorities: on the contrary, the prohibition to build was in place without any compensation for the owners whose proprietary enjoyment was deeply affected. Thus *Sporrong and Lönnroth v. Sweden* could be considered a typical situation in which it is not clear whether policies adopted in the name of general interest are either a legitimate control of the use of things or a regulatory taking (i.e., deprivation of possessions relevant to Article 1 P-1).

Given such fact pattern, the judgment of the ECtHR became a landmark for at least two reasons. First, *Sporrong* represents the inauguration of the systematic interpretation of Article 1 P-1 that is strongly established today. Since 1982, the respect of peaceful enjoyment of possessions, that is to say the protection of individual private property, became the general principle observed within the interpretative discourse made by the Court of Strasbourg. Regarding such a default rule, the provisions allowing deprivations of possessions and control of use are exceptions to a rule of private sovereignty and therefore play a subordinated role from both a normative and axiological perspective.

Second, it is with *Sporrong* that the *fair balance doctrine* made its first appearance within the conventional case law. As a consequence, while maintaining a formal deference towards the sovereign margin of appreciation of the Member States, the ECtHR started to impose indirect control over the very contents of national policies they developed. Such a control—a real subversion of an entire institutional equilibrium—has been presented as a proportionality test concerning the fairness of the balance operated by national legislators and authorities, between public interests

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27The turning point for the understanding of the legal contents of Article 1 P-1 was the judgment in Marckx v. Belgium, delivered by the ECtHR on 13 June 1979, with which the Court paved the way for the establishment of the orientations contained in 1982 in *Sporrong and Lönnroth v. Sweden*. In this respect, in Marckx the Court stated clearly for the first time (paras. 63 and 64 of the judgment) that:

> Indeed, the right to dispose of one's property constitutes a traditional and fundamental aspect of the right of property... The second paragraph of Article 1 (P1–1) nevertheless authorises a Contracting State to 'enforce such laws as it deems necessary to control the use of property in accordance with the general interest'. This paragraph thus sets the Contracting States up as sole judges of the 'necessity' for such a law... As regards 'the general interest', it may in certain cases induce a legislature to 'control the use of property' in the area of dispositions inter vivos or by will. In consequence, the limitation complained of by the first applicant is not of itself in conflict with Protocol No. 1.

It is worth comparing such emphasis to the critique contained in para. 20 of the dissenting opinion delivered in the same case by Judge Sir Gerald Fitzmaurice:

> The truth of the matter—as would be obvious to anyone not intent on this scope-extending process—is that the chief, if not the sole object of Article 1 of the Protocol (P1–1) was to prevent the arbitrary seizures, confiscations, expropriations, extortions, or other capricious interferences with peaceful possession that many governments are—or frequently have been—all too prone to resort to. To metamorphose it into a vehicle for the conveyance of rights that go far beyond the notion of the peaceful enjoyment of possessions, even if they are connected with property, is to inflate it altogether beyond its true proportions. This is not a worthy or becoming basis on which to find a Government guilty of a violation of the Convention.

That said, by looking back to the 1960s, it is possible to remark the quite ‘minimalist’ approach adopted by the Commission for the reading of Article 1 P-1. In a decision delivered on 2 April 1960, the Commission denied the existence of any property right over an unlawful building that was destined for demolition. In a decision of 8 April 1967, the Commission did not find a violation of Article 1 P-1 even though the case submitted seemed to be about a regulatory taking of a private possession. With a further decision of 29 May of the same year, the Commission appeared to take an opposite view, by qualifying a credit as a possession protected under Article 1 P-1: however, no violation of the conventional provision was recognised. For comments about the orientations of the Commission, see Condorelli, above, n. 24, 184–189.

28The judgment in *Sporrong and Lönnroth v. Sweden* can be read, as can all legal decisions mentioned in this article, on the HUDOC database available on the official website of the European Court of Human Rights: https://bit.ly/2soxxHS (last accessed 4 March 2019).
and the new general principle of protection of private property. In this sense and with regard to the much discussed issue of compensation—as we noted above, Article 1 P-1 does not contain textual references to the duty of compensation imposed on the States—in Sporrong the Court of Strasbourg stated that Sweden could have maintained fairness by compensating for the delays in the process. This opened the door to a more general compensation requirement.29

The main sources of concern among the fathers of the ECHR became a reality with Sporrong. In fact, from both theoretical and political-institutional perspectives, starting from the mid-1980s, the extent of the jurisdiction of the Court of Strasbourg in the matter of property became quite problematic, but the premises for the current aggressive neoliberal interpretation were firmly in place even in the years of the preparatory works.

The legal category used to establish the legitimacy of such a spectacular judicial activism is precisely the one of ‘possession’. The ECtHR has defined a recurrent and standardised formula, according to which:

\[ \text{The concept of ‘possessions’ in the first part of Article 1 has an autonomous meaning which is not limited to ownership of physical goods and is independent from the formal classification in domestic law: certain other rights and interests constituting assets can also be regarded as ‘property rights’, and thus as ‘possessions’ for the purposes of this provision.} \] 30

In other words, the proclaimed autonomy of the concept of possession has emancipated the interpretative capacity of the Court of Strasbourg from any sort of boundary, such as comparative issues, historical and political aspects, constitutional and technical legal traditions at work throughout Europe. In this framework, it has been possible to put in place a completely new interpretative policy, developed by the sole legitimate interpreter of the conventional system: the ECtHR. As a result, the notion of possession has become more and more abstract: an ‘empty signifier’ deployed to support a tremendous enlargement of the proprietary protection of individuals.31

The supposed autonomy of such legal outcomes as well as the peculiarity of the above-envisioned institutional mechanism can be traced to the hegemonic influence of the American legal and constitutional discourse.32 First, the idea of possession as idiosyncratic and exclusive asset goes hand in hand with the traditional conception of private property as the basis for and guardian of any other right.33 Second, it would be impossible adequately to appreciate the institutional role assumed by the Court of Strasbourg without keeping in mind that the US Supreme Court had been first to claim a strong and independent judicial authority against the other constitutional powers.34


30The quoted formula is contained in para. 100 of the judgment delivered in Beyeler v. Italy. Such lawsuit was brought before the ECtHR by Mr Beyeler, a Swiss gallerist who alleged the unlawfulness of the Italian rules about the cross-border trading of artworks and cultural goods. In particular, Mr Beyeler claimed that the Italian public authorities had unlawfully exerted their preemption rights with regard to the commerce of a painting by Vincent Van Gogh, which had been anonymously purchased in Italy by the gallerist in 1977 and resold to an American company (aiming at placing the masterpiece in Venice) in 1988. According to Italian laws (particularly because of the lack of information in 1977 about the identity of the first buyer), regardless of the American company’s position, public authorities had been able in 1988 forcibly to acquire from Mr Beyeler the property of the painting by just matching the price paid for the 1977 sale. In light of such circumstances, Mr Beyeler complained he had suffered a deprivation of property in violation of Article 1 P-1. See, also, para. 86 of the final judgment dated 10 August 2018 in O’Sullivan McCarthy Mussel Development Ltd v. Ireland.


From such a broader perspective, it is especially noteworthy that the Court of Strasbourg has moved through and beyond some important legal approaches—such as the theory of new properties or the French legal notion of ‘bien’—that are far less connected to a ‘physicalist’ construction of the object of property rights than the German or Italian private law traditions.\(^{35}\) In this regard, thanks to the ECtHR, the vertical and ‘constitutional’ axis of legal relationships between individuals and the Leviathan has been more and more characterised by a powerful protection of individual possessions, although these ‘properties’ are currently identified with intangible goods, credits or even legitimate expectations. They are synonymous of mere economic values that can be referred to an individual (natural or legal person). Moreover, this interpretative outcome goes hand in hand with the established default rule according to which Member States have the obligation of compensation at fair market value—no matter what such a concept is—in case of measures that the judges of Strasbourg define as deprivation of property.

The general framework just described presents a few exceptions that seem to be envisaged for pragmatic reasons: two examples should suffice. With regard to the issue of compensation, *Scordino v. Italy*, decided by the Grand Chamber of the ECtHR in 2006, can be seen as the systematic establishment of the doctrine concerning the distinction between ‘single out’ expropriations, on the one hand, and socioeconomic reforms, on the other hand. According to this interpretation,

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\text{[W]ithout payment of an amount reasonably related to its value, a deprivation of property would normally constitute a disproportionate interference which could not be considered justifiable under Article 1 of Protocol No. 1 (...). However, legitimate objectives of ‘public interest’, such as those pursued by measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value.}\(^{36}\)
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With respect to a broader construction of the protection of private property within the conventional system, we point to *J.A. Pye (Oxford) Ltd and J.A. Pye (Oxford) Land Ltd v. the United Kingdom*.\(^{37}\) The facts at issue relate to litigation between the mentioned companies and Mr and Mrs Graham before the British courts. The Grahams occupied 23 hectares of agricultural land owned by the private companies under a grazing agreement in force until 31 December 1983. After expiration of the agreement, notwithstanding the requirement to vacate the land, the Grahams remained in occupation and continued to use it for farming. The owner companies neither delivered requests to vacate the land nor demanded payment for the ongoing grazing. From September 1984 until 1999, the Grahams continued to use the disputed land for farming without permission by the owners; in 1997, the Grahams sought acknowledgment of their acquisition of the property via a twelve-years’ adverse possession. In 1999, the private companies brought lawsuits against the squatters in order to repossess the disputed land. At the domestic level, the House of Lords gave the final judgment in 2002 in favour of the Grahams. The fact pattern was deemed not to fall under the scope of Article 1 P-1, as operating within the British legal framework through the Human Rights Act of 1998; in application of section 15 of the Limitation Act of 1980, a legitimate adverse possession was ascertained in favour of the Grahams.\(^{38}\)

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\(^{35}\)With regard to the ‘new properties’ theory, see C.A. Reich, *The New Property* (1964) 73(5) The Yale Law Journal, 733. For general insights about the object of property within different legal traditions, see Candian et al., above, n. 14, as well as Mattei, above, n. 14. For a discussion of the two elements—physicalist (‘that required some “external thing” to serve as the object of property rights’) and absolutist (‘which gave the owner “sole and despotic dominion” over the thing’)—of Sir William Blackstone’s definition of property in 1765, see K.J. Vandevelde, ‘The New Property of the Nineteenth Century: The Development of the Modern Concept of Property’ (1980) 29 Buffalo Law Review, 325, 331–333.

\(^{36}\)Paragraph 256 of the judgment given on 29 March 2006 by the Grand Chamber of the Court of Strasbourg in *Scordino v. Italy*. It is noteworthy how the Court connects the discussion about the ‘fair’ amount of compensation with the fair balance doctrine and the proportionality test. In particular, this argumentative strategy is established in the absence of any textual reference in Article 1 P-1 to the compensation and to the criteria to be adopted in calculating its amount.

\(^{37}\)Pye was decided by the Fourth Section of the ECtHR on 15 November 2005. The final decision in Pye was delivered by the Grand Chamber of the Court of Strasbourg on 30 August 2007.

\(^{38}\)According to section 15 of the Limitation Act of 1980, ‘[1] No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person ...’.
In light of such domestic legal outcomes, also by referring to the rationale of the 2002 Land Registration Act, the claimant companies challenged before the ECtHR the mechanism of the adverse possession and claimed liability of the United Kingdom under Article 1 P-1. The fourth Section of the Court of Strasbourg stated the plaintiffs were right and the pre-2002 functioning of adverse possession was a breach of the ECHR. According to the Court, it was possible to ascertain a violation of Article 1 P-1 because the 'unfairness of the old regime which this case has demonstrated lies not in the absence of compensation, although that is an important factor, but in the lack of safeguards against oversight or inadvertence on the part of the registered proprietor'.

This astonishing decision was overruled in 2007 by the intervention of the Grand Chamber. In such second judgment, the applicant companies were deemed affected 'not by a “deprivation of possessions” within the meaning of the second sentence of the first paragraph of Article 1, but rather by a “control of use” of land within the meaning of the second paragraph of the provision'.

The 2007 decision of the Grand Chamber in Pye is quite important. It traces the functioning of adverse possession as a legal institution to the sphere of the ‘control of use’ of properties. In so doing, it applies meaningfully this specific legal clause and enhances its systemic relevance far beyond the ‘traditional’ hierarchical interpretation of Article 1 P-1 (according to which the protection of private possession is the general rule and the control of use is a narrow exception). Lastly—and most importantly—such an important decision was given in order to solve an issue relevant to the horizontal axis of legal relationships among privates, rather than a question falling into the traditional vertical axis of the relationship between the individual owner/citizen and the sovereign public authority.

Unfortunately, such a sophisticated ruling remained a significant and noteworthy exception to the established interpretative policy of the ECtHR. In this respect, we already referred to Beyeler v. Italy, decided in 2000: with this judgment, the Court of Strasbourg argued that a ‘legitimate expectation’ can, under certain circumstances, be considered a possession relevant to Article 1 P-1. A significant application of this statement is observable in Valle Pierimpiè Società Agricola S.p.a. v. Italy, decided in 2014. Although available only in French, the case is famous because it embodies a deep interpretative conflict between the Italian Corte di Cassazione and the ECtHR.

The facts at issue in Valle Pierimpiè concern the attribution of property rights upon specific parts of the Venice Lagoon called valli da pesca (fishing valleys). Many fishing companies had been bringing lawsuits before Italian Courts: they claimed for the acknowledgement of their private property over the valleys, based on ancient contractual documents and by virtue of long-term factual possessions. The United Sections of the Italian Cassazione rejected plaintiffs' arguments for two main reasons. On the one hand, considering the Italian taxonomy of goods, it was underscored that the fishing valleys formally fall into the category of demanio pubblico (public domain), with the

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39The 2002 Land Registration Act has entailed a significant reduction in the possible legal functioning of adverse possession, because of the unprecedented role conferred to the registration system within English property law. For this reason, the establishment of a new (and negative) legal order has been noted by L. Fox O'Mahony and N.A. Cobb, ‘Taxonomies of Squatting: Unlawful Occupation in a New Legal Order’ (2008) 71(6) Modern Law Review:

"In order for a squatter to obtain title to registered land, the squatter may, after being in adverse possession for ten years, apply to the Land Registry to be registered as proprietor. Crucially, however, the squatter has no entitlement to be registered at this stage. The Land Registry must then respond by sending a notice to the registered proprietor (and others with registered interests in the land), informing them that an application has been made by the squatter. Recipients of such a notice are given 45 business days in which to object to registration of the squatter as proprietor, and it is, generally, only if there are no objections that the squatter will be registered with title to the land at this stage (at 891; footnotes omitted)."


40The quotation is from para. 21 of the fourth Section’s judgment: the Court of Strasbourg cites here the domestic judgment of Lord Hope of Craighead.

41Paragraph 66 of the 2007 judgment delivered by the Grand Chamber.

42The notion of ‘legitimate expectation’ can be defined as the core of the proprietary construction established by the ECtHR. Far from the simplistic conception of property as the actual entitlement concerning physical goods, such a notion has shown that:

"Certain other rights and interests constituting assets can also be regarded as ‘property rights’, and thus as ‘possessions’ for the purposes of this provision .... The issue that needs to be examined is whether the circumstances of the case, considered as a whole, conferred on the applicant title to a substantive interest protected by Article 1 of Protocol No. 1."

(as the Court stated in the already cited para. 100 of the judgment in Beyeler; emphasis added).
consequences of the invalidity of any contract and of the impossibility to acquire private property via usucapione (the functional equivalent of adverse possession in the Italian legal system). On the other hand, through the direct application of some Articles of the Italian Constitution as well as the enhancement of the functional role of the utilities offered by the valleys, the Cassazione was able to define the valli da pesca as commons (beni comuni) and thereby introduce this category into Italian case law.43

Having regard to such an influential interpretation, established by the apex of the Italian judiciary, the judgment delivered by the second Section of the Court of Strasbourg is particularly astonishing. In its decision, the ECtHR first proclaims its own full respect for the above-mentioned national legal framework, centred on the Italian Constitution and on Article 823 of the civil code.44 In this sense, the case could be considered resolved even by recognising the unsatisfactory character of Italian positive law, which allows public authorities to ‘abandon’ for a long time public goods and then to claim for the repossession against privates that have been taking care of them for a long time.45

That being said, the judges of Strasbourg affirm the necessity to protect under Article 1 P-1 the applicant company. In particular, no matter what the national legal framework formally provides, the Court emphasises factual circumstances, such as the payment of taxes by the plaintiff and the crucial importance of the valley as an ‘asset’ of the plaintiff’s economic organisation. In light of these factual aspects, the ECtHR was able to put aside the relevance of the valley as a physical good and to develop a legal abstraction, according to which the applicant company owns a private property relevant to Article 1 P-1. Such a property namely relates to the possibility to have:

un «bien» au sens de cette disposition même en cas de révocation d’un titre de propriété, à condition que la situation de fait et de droit antérieure à cette révocation ait conféré au requérant une espérance légitime, rattachée à des intérêts patrimoniaux, suffisamment importante pour constituer un intérêt substantiel protégé par la Convention.46

Without considering the difficulty to conceive of a legitimate expectation related to the private property over a thing falling into the public domain, the acknowledgement of the existence of a ‘possession’ under the conventional system brings the Court through the usual reference to the rule of law and towards the proportionality test. In other words, if the company owns a possession consisting of the legitimate expectation about the supposed certainty of its private property over the valley, the issue to be solved concerns the fairness of the ‘deprivation of property’ put in place by virtue of the Italian law on public domain. In this regard, although the national framework relevant to the case has nothing to do with compensation, the role of the latter arises among the arguments deployed by the Court. The

43 In particular, the United Sections of the Cassazione made reference to Articles 2 (concerning the inviolable right as well as the binding obligations of solidarity), 9 (whose second paragraph deals with the protection of landscape and cultural heritage), and 42 (establishing constitutional regime of property, including the social function of private property) of the Italian Constitution. Among several twin judgments delivered in February 2011 about the fishing valleys is decision no. 3665, which is the object of a useful comment by E. Pellecchia, ‘Valori costituzionali e nuova tassonomia dei beni: dal bene pubblico al bene comune,’ (2012) Il Foro Italiano, 573.

44 Article 823 of the Italian civil code reads:

[T]he goods falling into the public domain are inalienable and they cannot be the object of any rights in favour of other subjects, except for the modes and extents provided for by the Laws involving them. The protection of the goods that are part of the public domain is the task of the administrative authority. The authority has the power to act through administrative procedures as well as to activate the ordinary remedies established by this code for the protection of property and possession. (our translation).

45 The burgeoning theories about the commons are deeply linked to the inadequacies revealed by the public sector (State, Sovereign, Leviathan) in fulfilling the task of protecting commons from privatisations and depletion. By building on such a remark it has been possible to stress the distinction between inclusive commoning and exclusive property as well as to renovate the critique that enhances the genealogical identity between public sovereignty and private property. In this regard, see R.A. Albanese, ‘L’uso pubblico e il diritto privato. Una relazione da ripensare,’ in Mattei et al., above, n. 31, 549–566; A. Quarta, ‘Towards an Access-Based Paradigm of Ownership: A Plea for Inclusion in Property Law,’ in B. Hoops, L. Rostill and R. Loolhoven (eds.), Property Law Perspectives V (Eleven International Publishing, 2017), 191–208. It is worth underscoring how an overall ecobleal perspective is now emerging in the field of private law. See U. Mattei and A. Quarta, The Turning Point in Private Law: Ecology, Technology and the Commons (Edward Elgar, 2018); Capra and Mattei, above, n. 3.

46 The quotation is from para. 46 of the judgment, which recognises the possibility to conceive a ‘possession’ according to this provision [Art. 1 P-1] even in case of revocation of a proprietary entitlement, provided that the factual and legal situation before such a revocation has resulted for the plaintiff in a legitimate expectation, connected to some economic interests important enough to constitute a substantial interest protected by the Convention.'
ECHIR eventually states (para. 76 of the judgment) that the deprivation of a legitimate expectation is disproportio-
ate, in the absence of any compensation and with the imposition of fees for the occupation of the public domain.

Valle Pierimpiè presents a spectacular application of the fair balance doctrine, in combination with the stressed
autonomy of the category of ‘possessions’. Our question is: how has such a tremendous enlargement of the propri-
etary protection of privates been possible?

4 | THE CONSTRUCTION OF THE SUBJECT UNDER ARTICLE 1 P-1

The Italian translation of the judgment delivered by the Court of Strasbourg in Valle Pierimpiè may be useful in order
to answer our question. Indeed, it contains a significant lapse in para. 71, regarding the amount of compensation and
its proportionate character. In French, the Court states ‘[s]ans le versement d’une somme raisonnablement en rapport
avec la valeur du bien, une privation de propriété constitue normalement une atteinte excessive’.47 This sentence is
not at all astonishing: we saw that within the conventional system the default rule implies the obligation to compen-
sate a private subject at the market value for a deprivation of property. This sentence, however, is different in Italian:
‘[s]enza il versamento di una somma ragionevolmente rapportata al valore del bene, una privazione della libertà
costituisce normalmente un pregiudizio eccessivo’.48 In our opinion, it is not an accident that—with regard to the pro-
portionality of the compensation—the Italian word libertà (liberty, freedom) is synonymous with or the equivalent of
the French propriété (property). This overlap is not only a matter of legal translation: it also refers to the protoliberal
theoretical connection between property and liberty.49

We are not denying the important role played by the Court of Strasbourg in censuring and limiting several arbi-
trary policies adopted by national States: the Italian example of ‘constructive expropriation’ (occupazione acquisi-
tiva) is clear in this respect.50 Still, we argue that the overprotection of private property promoted by the ECtHR is the very
product of a theoretical sub-tradition that concerns the legal construction of the subject and operates ‘behind’ the
interpretation of Article 1 P-1. After all, in Section 2 we observed how Natural Law-oriented approaches were rooted
among the delegates active during the preparatory works for the Convention. It is therefore possible to affirm that
the Court of Strasbourg has adopted such a philosophical and political sub-tradition to ground its interpretative
and argumentative strategies.51

The category of ‘possessions’ has been interpreted as an autonomous one because the legal construction of the
object of property—namely ‘possessions/biens’ under Article 1 P-1—always alludes to the conception of the subject that
defines property as a legal and political institution of liberalism. According to the case law established by the ECIHR, the

47Emphasis added.
48Emphasis added.
50The notion of constructive expropriation (occupazione acquisitiva, close to the French theory about ouvrages publique) had been defined by the Italian judiciary. It has been the source of huge disputes in Italy, among scholars and courts, as well as between Italian authorities and the Court of Strasbourg. The ECIHR censured the Italian orientation with two judgments delivered on 30 May 2000 in Belvedere Alberghiera S.r.l. v. Italy and in Carbonara and Ventura v. Italy. According to the rule established by the United Sections of the Corte di Cassazione with judgment no. 1464 of 1983:

[The public authorities acquire title to the land from the outset before formal expropriation if, after taking possession of the land and irrespective of whether such possession is lawful, the works in the public interest are performed. If, initially, the land is possessed without authority, the transfer of property takes place when the works in the public interest are completed. If the taking of possession was authorised from the outset, property is transferred on the expiry of the authorised period of possession. In the same judgment, the Court of Cassation stated that, on a constructive expropriation, the owner is entitled to compensation in full as the acquisition of the land has taken place without title (sine titulo). However, compensation is not paid automatically: the owner must lodge a claim for damages. (Belvedere Alberghiera, para. 26). However, the case law coming from Strasbourg has ‘forced’ the Italian judiciary to overrule its previous orientations: with judgment no. 735 of 2015 the United Sections of the Cassazione have de facto put constructive expropriation out of the Italian law in action.

51Antonio Gambato has built on the concept of sub-traditions—technical, theoretical, philosophical-political—in order to develop an influential and method-
notion of possession is so enlarged because it reflects private property as essential to grant individual liberty. The Court of Strasbourg therefore uses Article 1 P-1 to put in place a concrete development of an entire epistemological framework. The subject—the ‘natural or legal person’—is the individual of the protoliberal tradition: it is isolated because of an atomistic conception of societal relationships; it is theoretically constructed as an a priori notion.

Within this framework, private property is not just the ‘absolute subjective right’, i.e. the product of the ‘empire of will’ on a specific material object, as has been technically constructed by the legal tradition of continental Europe. Private property is rather conceived—from a far less technical perspective—as the very genuine expression of individual liberty: in other words, individualistic proprietary exclusivity seems to be the basic criterion in order to theorise human rights.

Therefore, possessions are mostly projections of the individual subject’s liberty, which must be protected against the Leviathan. The relationship between subjects and objects—that is to say, the parallel emergence of legal entitlements and of the relevance of certain utilities offered by things—is not dynamic nor problematised in the light of any axiological and constitutional pluralism. On the contrary, under Article 1 P-1, the sole general principle at work seems to be the protection of private property as synonymous with liberty, being the clauses concerning public interest and general interest (namely the bases for deprivations of property and control of use of things), mere exceptions to be strictly interpreted.

It is within such a framework that we can appreciate two of the main characters of the conventional system of protection of private property, as it has been established by the ECtHR. On the one hand, the enlargement and the dematerialisation of the notion of possession seem the product of very little importance conferred to the specific kind of utilities offered by different typologies of goods and functional evaluations. If the world of things is reduced to the passive side of individual liberty, everything can become the object of property: no matter the possibility to protect certain situations of life by virtue of legal features other than the individualistic proprietary discourse.

On the other hand, this subjectivism cannot but imply a contradiction in the references to the rule of law as well as a structural asymmetry within the fair balance doctrine. Indeed, as we note below with respect to the case **Sud Fondi S.r.l. and others v. Italy**, the rule of law is always employed by the Court of Strasbourg in order to underscore the crucial role of ‘accessibility’ and ‘predictability’ of law for private individuals. That being said, it is also necessary to remark how the ECtHR itself has been one of the main sources of uncertainty in the so-called multi-level system of protection of rights. The protection of private property has been continuously enlarged without being supported by the establishment of credible sets of arguments and interpretations such as those provided by the tradition of different Member States. **Pye and Valle Pierimpié** seem meaningful examples in this regard: claims of authority, rather than principled discussion. Ultimately, this is the consequence of the idea of the complete autonomy of the meaning of the terms ‘possessions’ and ‘biens’.

In particular, the casuistic approach of the Court of Strasbourg seems deeply undermined by the employment of ‘usual sentences’ about the notion of possessions and the proclaimed respect of the margin of appreciation owned by the States. In fact, such sentences are contradictory and/or lacking in reasonable legal content. In this sense, it is not surprising that the proportionality test generally results in a form of overprotection of private property and it is correct to note that the ECtHR ‘failed, however, to develop a coherent and defensible jurisprudence on fair balance. It is not possible, on the basis of its case law, to draw precise guidelines to assess whether national authorities succeed in striking a fair balance between private interests and the general interest.’


This sort of ‘asymmetric proportionality’ established in the application of Article 1 P-1 seems aimed at providing the \textit{homo oeconomicus} and its economic assets with protection as strong as possible. Such a legal outcome is politically conservative, from the point of view of social justice. Moreover, and more importantly, the theoretical framework promoted by the ECtHR in order to grant constitutional protection to private property seems overly simplistic, inspired mostly by subjectivism and uniquely devoted to the vertical axis of legal relationships. This framework appears to be the basis for an impoverishment of the role of property as legal institution and of the possible contribution of European private law in dealing with some of the core issues in common life.

\section{AN ECOLOGICAL FRAMEWORK: SUBJECTS, OBJECTS AND ARTICLE 8 ECHR}

Is the framework of unrestricted subjective liberty the sole possibility to interpret the relationships between the world of subjects and the world of things within the conventional system? We do not think so.

Paradoxically, it is the same case law established by the ECtHR that evidences the existence of alternatives. Consider \textit{Yordanova and others v. Bulgaria}, decided in 2012; \textit{Winterstein and others v. France}, decided in 2013; and \textit{Ivanova and Cherkezov v. Bulgaria}, decided in 2016. These judgments constitute three recent examples of case law concerning Article 8 ECHR, dedicated to the ‘Right to respect for private and family life’ as applied to homes.\footnote{\textit{Öneryıldız v. Türkie}, decided in 2003 by the ECtHR, addressed a similar factual issue. However, in that case the Court judged to apply Article 1 P-1 instead of Article 8 ECHR in favour of the applicant.} Although occurring in very different factual and legal contexts, they share much in common. They all relate to applicants—in the first two cases, components of Roma communities; in the last, a Bulgarian couple—bringing suit before the ECtHR because they were at risk of eviction and demolition of dwellings built and inhabited by them against national laws on urban planning and housing. The Court of Strasbourg eventually had to approach under Article 8 ECHR the relationships between subjects and ‘homes’, objects that were ‘illegal’ as contrary to formal positive laws.\footnote{Such assumption is inscribed within the traditional—more and more challenged—construction of social rights. According to this approach, social rights can solely be claimed toward the State and the public sector. Given such a legal relevance on the vertical axis, no relevance is imagined for social rights on the horizontal axis of legal relationships.}

Concerning the interpretative strategies pursued by the Court, one finds the usual language of the respect towards the margin of appreciation of the States, as well as the usual argumentative centrality of the proportionality scrutiny. Moreover, the Court seems to pay tribute to the well-established interpretation of Article 8 ECHR, according to which no positive obligation of the States to provide all the vulnerable subjects with a dwelling is conceivable.\footnote{\textit{Winterstein}, para. 167.}

Nevertheless, in \textit{Winterstein}, the Court rules:

\begin{quote}
\textit{[I]n respect of all the applicants, there has been a violation of Article 8 of the Convention since they did not have the benefit, in the context of the eviction proceedings, of an examination of the proportionality of the interference in accordance with the requirements of that Article. In addition, [the Court] finds that there has also been a violation of Article 8 in respect of those of the applicants who applied for relocation to family plots, on account of the failure to give sufficient consideration to their needs.}\footnote{\textit{Winterstein}, para. 167.}
\end{quote}

In other words, even with regard to Article 8 ECHR, the fair balance doctrine is at work. In this respect, as we saw above for Article 1 P-1, in interpreting Article 8 the Court of Strasbourg claims the power to put aside formalism and positivism in order to adopt approaches inspired more by the roles of factuality and of effectiveness. The notion
of ‘home’ usually proposed by the ECtHR within the conventional system is significantly autonomous – just like the one of ‘possession’ – and it presents clear evidence of such a methodological framework.\footnote{See, for example, Winterstein, para. 69:}

It is crucial to remark that the difference between the legal interpretation of Article 8 ECHR and the above-discussed construction of private property under Article 1 P-1 seems to reside in the proportionality test. According to the arguments pointed out by the Court of Strasbourg:

\[\text{[T]he margin of appreciation left to the authorities will tend to be narrower where the right at stake is crucial to the individual’s effective enjoyment of fundamental or ‘intimate’ rights. This is the case in particular for Article 8 rights, which are rights of central importance to the individual’s identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community.}\footnote{Winterstein, para. 148 (emphasis added). The orientation established by the Court of Strasbourg is meaningful because it represents a development of the doctrines envisaged with the so-called gypsy cases. Connors v. the United Kingdom (decided on 27 May 2004 by ascertaining a violation of Art. 8 ECHR) and Buckley v. the United Kingdom (delivered on 29 September 1996 by denying that any violation of Art. 8 ECHR occurred in the case at issue) are part of the case law at the basis of the judgments mentioned in this Section.}\]

The references to identity and intimacy, as well as to the dynamic field of relationships, must be underscored because these legal elements are crucial to guide the fairness test conducted by the ECtHR. But what is most important is the emergence of the role of use value within the interpretative construction of Article 8 ECHR. In other words, behind the proportionality tests carried out in the light of Article 8 we find at work a different notion of subjects and, in parallel, a different conception of objects.

Not every dwelling constitutes a home: a dwelling becomes a ‘home’ because of the ‘intimate’ use made of it by its resident[s]. In this respect, the legal relevance of a dynamic relationship of use emerges. Certain uses, even ‘illegal’ and not connected to formal entitlements, can be sources both of a legal entitlement of the subject—such as the right protected by Article 8 ECHR—and of a legal and functional regime of a thing, namely the ‘home’. These factors are taken into account when the judge deals with the conflict with other important interests envisaged by Article 8 ECHR, such as those connected to urban planning and housing laws.

The relevance of the category of use (legally meaningful as component of the use value) seems to allow the emergence or even the acknowledgement of a circular and ecological legal construction of the subjects and the goods.\footnote{This is arguably a manifestation of Marx’s philosophy of internal relations and illustrates several of the principles of his dialectic method: constitution of elements or ‘things’ out of processes and relations within bounded systems or wholes, internal contradictions of ‘things’ by virtue of such constitution, and interchangeability of subject and object and of cause and effect; see, especially, B. Ollman, Dance of the Dialectic: Steps in Marx’s Method (University of Illinois Press, 2003) and D. Harvey, ‘The Principles of Dialectics’, in W.K. Carroll (ed.), Critical Strategies for Social Research (Canadian Scholars, 2004), 125–132.} In other words, from such a perspective, subjects are not conceived as \textit{a priori} and objects are not the passive projection of subjective ‘proprietary’ liberty. If subjects and objects cease to be separated and isolated notions and become the ‘results’ of a dynamic relationship of use,\footnote{See the references at n. 45 above.} we must underscore a paradigm shift that seems to be inadvertently promoted by the Court of Strasbourg in application of Article 8 ECHR.

Within the conventional system of protection of rights, the overcoming of \textit{a priori} conceptions of the subject implies some significant consequences, such as a complexification of the field of sources of law and a more detailed and predictable scrutiny about proportionality. In particular, when the relationship of use between some
persons and a home is at issue under Article 8 ECHR, the comparison between the need for protection of individuals and the prevalence of measures put in place by public authorities in the name of general interest does not seem to be affected by the prejudices discussed in Section 4. In this regard, according to the Court of Strasbourg, ‘Proportionality in cases such as the present one is inextricably linked to the use for which the authorities seek to recover the land.’

6 | ECOLOGICAL METHODOLOGY AND THE COMMONS: COMMONS AS POSSESSIONS

We have shown, at least with regard to the interpretation of Article 8 ECHR, that the relationship of use and the use value support a different legal construction of the categories of subjective right—that is to say, of ‘subject’—and of that peculiar ‘object’ called home. We have been able to detect a paradigm shift. In this respect, it is worth exploring the full potential of an autonomous reading of the term ‘possessions’ in Article 1 P-1, within the mentioned paradigm shift introduced by the ecological reading of Article 8 ECHR. Through adoption of this new theoretical approach, we find it possible to recognise the legal protection of the commons within the conventional system.

The commons are topical among social movements as well as scholars in every social science whose interest has been piqued by the perfect storm of neoliberalism, the 2008 financial crisis, authoritarian capitalism after the fall of Eastern European communism, and a related decline of popular confidence in political institutions: the commons could constitute a counter-hegemonic institution.

As Margaret Davies—who embraces the view that property is a compromise between the perpetually competing interests of private individuals and the community—observes:

*Numerous property law scholars over the past decade have turned their attention to urban, rural and global commons, to the public intellectual domain, and to the environment ... This interest has resulted in contemporary notions of property in which individual rights and private sphere interests are only part of a more complex picture where the interests of a multitude of communities as well as social obligations and environmental imperatives are part of the discourse relating to all types of resource ...* 

[W]e are moving away from an imaginary based on boundaries, self-containment and control, to a consciousness which is relational, contextual, and deeply social. The strong nexus between persons and property must now be seen as mediated by values associated with the commons, the public domain, and the numerous communities within which we find ourselves.

From a legal perspective, commons are deeply connected to the theoretical ecological construction of subjects and objects. In other words, the discourse about commons is beyond subjectivism and—above all—beyond the individualistic approach that we saw at work in the interpretation of Article 1 P-1.

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64The quotation is from Yordanova, para. 127; emphasis added.


With regard to commons, individuals emerge in their subjectivity through circular and horizontal relationships with the common utilities offered by things and with the subjectivity of other persons. In parallel, a thing can become a common because it offers certain fundamental utilities to subjects and communities, and by virtue of the peculiar collective use made of it. Such a dynamic paradigm enhances the crucial role of the use value. In this sense, commons are a legal device that is out of the institutional framework established by the Western legal tradition of modernity: commons function with a logic other than the rigid and binary one of market, individualistic private property and State sovereignty.\footnote{See the previous note.}

In the more precise perspective necessary for private law, it is possible to observe that the legal entitlements concerning the commons are concurrently individual and collective. Even on technical legal grounds, a single person finds her individuality when she understands herself as part of a community. Symmetrically, a community is not based on the individualistic model because what is crucial is that it takes shape around the utilities offered by the common. Moreover, a community can be able to reproduce itself through the practice of ‘commoning’: by taking care of the reproduction of shared utilities as well as of the (as open as possible) collective access to them.\footnote{For a thorough contribution towards an access-based model of property, see, in Italian, A. Quarta, Non-proprietà. Teoria e prassi dell’accesso ai beni (ESI, 2016).}

On such a theoretical base, we can affirm that commons are ‘priceless.’ Beyond the axiological and symbolic value, the ascertainment of exchange value is quite difficult for commons. In fact, individual legal prerogatives that should be related to commons have to do with collective and shared use rather than with exclusivity. As a consequence of such a ‘diffusion’ of entitlements and connected remedies, from a legal and institutional point of view, it becomes almost impossible to construct a mechanism of market exchange of exclusive property rights (one of the pillars of the emergence of prices).\footnote{In this regard, Yan Thomas’s contribution has already been recalled at n. 19 above. For a recent and inspiring discussion about the dialectic between law and economics, see G. Calabresi, The Future of Law & Economics: Essays in Reform and Recollection (Yale University Press, 2016).}

So the question is whether and how commons can enter the conventional system and become relevant to the interpretation of the ECHR.

A first hypothesis is currently at issue before the Court of Strasbourg in Ahunbay and Others v. Turkey, Austria and Germany.\footnote{The case is pending before the Court. Related materials are available only in French.} In this case, the applicants are challenging the construction of a big dam over the River Tigris, in the southern-eastern Turkish territory. They are especially trying to defend the unique historical and archaeological site of Hasankeyf from public projects that will be able to harm and/or destroy the existent heritage, as well as to prevent any further archaeological campaign in the area.\footnote{Having been an important stage along the ‘Silk Road,’ Hasankeyf is exceptional because of the extremely rich presence of findings and monuments, the most ancient of which are more than 6,000 years old.} In this respect, it is easy to acknowledge that the plaintiffs are individually bringing actions before national and international Courts in order to protect the commons identifiable in the archaeological site of Hasankeyf, considered as a whole in its immeasurable cultural and historical value. The Court of Strasbourg has not commented yet on the merits of the case: on the contrary, in 2016, it delivered a partial judgment on admissibility and decided to ask the Turkish Government some questions in order better to deal with the claims at issue.\footnote{The questions have been posed by the ECtHR in application of article 54 § 3(b) of its regulation.}

Nevertheless, Ahunbay is already meaningful because of the originality of the statements of the ECtHR. On the one hand, the Court pointed out a deep analysis of the international legal framework relevant to the protection of cultural and archaeological heritage. Among these references, it is important to underscore (paras. 74 and 75 of the partial judgment) the 2005 Faro Convention on the Value of Cultural Heritage for Society, whose Article 2...
contains innovative and ‘commons-oriented’ definitions of ‘cultural heritage’ and ‘heritage community’. On the other hand, the Court decided to refer the plaintiffs’ claims to Articles 8 and 10 of ECHR (paras. 95 and 96 of the partial judgment). Therefore, for the first time, the judges of Strasbourg are technically constructing the possibility to protect (cultural) commons as an individual (as well as collective) entitlement relevant to Article 8 of the Convention—or so it seems from reading the questions posed to the Turkish government. In this regard, it is particularly important to remark how the Court addresses the issue of proportionality in Ahunbay. Indeed, the fifth of its questions of law alludes to a balance test involving not the individualistic sphere and the public interest, but, on the contrary, ‘l'intérêt public que lesdits travaux représenteraient pour la Turquie et l'intérêt général des générations actuelles et futures à jouir du patrimoine cultuel et historique’. It is possible to see in this point a move from the vertical and binary axis of legal relationships toward the horizontal and more pluralistic one.

In comparison with the above-discussed paradigm shift in the reading of Article 8 ECHR, Ahunbay is obviously relevant: in this respect, future decisions of the Court of Strasbourg might allow the emergence of an advanced interpretation of the conventional system.

A real step forward would be not only to enhance the ‘progressive’ interpretation of Article 8, but also to re-interpret Article 1 P-1 in the light of this holistic shift (indeed, as the former provision is about the ‘right to respect for private and family life’). While an ecological reading of Article 8 ECHR is justifiable and welcome when issues concerning homes are at stake, one can doubt whether the application of this Article is consistent with the objective to protect a cultural commons such as the Hasankeyf site. More broadly, being about the ‘protection of property’, Article 1 P-1 seems the correct sedes materiarum in order to provide commons with a conventional protection. In other words, Article 1 P-1 itself can be interpreted in a circular perspective, beyond subjectivism and the reductionist alliance between individual exclusive private property and personal liberty. By adopting such a new epistemological framework, it should be easily recognised—without stretching the textual provision of Article 8—that commons can be included in the conventional system as ‘possessions’ and therefore constitutionally protected against privatisations and other threats (such as the ones that Turkish authorities seemingly put in place) happening outside a fair balancing proportionality test.

This outcome supplements the individual-based approach established by the ECtHR. It builds on the above-discussed new and ‘ecological’ construction both of subjects and of objects, recognising subjectivity as part of a community in a concrete and not a priori manner, being the relationship of use with commons. At the same time, when collective interests to access commons are at stake, the term ‘possessions’ protects a different ‘substantial interest’ than the mere economic value and simple passive projection of the individualistic proprietary liberty. The relevance of commons to Article 1 P-1 is the result of a re-conquered importance of the theoretical role of non-exclusive utilities offered by things, as well as of the connection between such utilities and an axiological framework more pluralistic than the one adopted heretofore.

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73 Article 2 of the Faro Convention reads as follows:

_for the purposes of this Convention,

a) cultural heritage is a group of resources inherited from the past which people identify, independently of ownership, as a reflection and expression of their constantly evolving values, beliefs, knowledge and traditions. It includes all aspects of the environment resulting from the interaction between people and places through time;

b) a heritage community consists of people who value specific aspects of cultural heritage which they wish, within the framework of public action, to sustain and transmit to future generations.

The Faro Convention is available at https://bit.ly/2CeXgbm (last accessed 11 January 2019). The emergence of the use value and the mutual implication between the pole of subjects—individuals and communities—and the pole of objects seem evident within the approach of the Convention, as the ECtHR underscores its partial decision in Ahunbay.

74 Such remarks are eventually crucial, compared to the rather traditional approach adopted by the ECtHR even when the judges convincingly address delicate issues such as the protection under Article 8 of the environment and people’s health from nuisances and pollution. In this respect, see the recent decision (24 January 2019) by the Court in Cordella and Others v. Italy, regarding the sadly notorious issue of the polluting activities conducted by Ilica S.p.A. and their devastating impact on the population of the city of Taranto. With this judgment the ECtHR confirms its vertical approach and unanimously holds that Italian public authorities are accountable for a prolonged violation of Article 8 ECHR for having ‘omis de prendre toutes les mesures nécessaires pour assurer la protection effective du droit des intéressés au respect de leur vie privée’ (para. 173).

75 See Mattei and Quarta, above, n. 45.
This reading presents interesting implications, both theoretical and practical. In particular, the relevance of commons can emancipate the interpretation of Article 1 P-1 from the vertical and binary methodology, according to which only the individualistic subject and the sovereign Leviathan are legal actors in the domain of property. Commons allow an institutional complexification that is precious because of its capacity to confer centrality to horizontal legal relationships governed by private law, including those (always flexible) between formal ownership and factual possession.

In this respect, a brief examination of *Sud Fondi S.r.l. and others v. Italy*, decided in 2009, sheds some light. With its judgment, the Court of Strasbourg made an astonishing intervention in the Italian issue of 'Punta Perotti', a building in Bari unlawfully placed on a piece of land protected because of its naturalistic relevance. For this reason, the building was publicly declared an 'eco-monster' and eventually demolished in execution of a judgment given by national Courts. Such a demolition was entirely in accordance with Italian law, which considers unlawful land developments as crimes, even providing the peculiar administrative sanction of the confiscation of the properties involved in criminal activities. Commons like the environment and the landscape of Bari have been harmed for far, far too long by the unholy alliance of ownership and sovereignty. Paradoxically, one of the two poles of the zero-sum game, namely private property liable for such a damage of the commons, received a rich (and publicly funded!) compensation for an activity that was ultimately unlawful.

The legal bases for such decision comprised four major arguments. First, the ECtHR considered the confiscation of property not an administrative sanction but rather a criminal sanction falling under Article 7 ECHR, which establishes the rule ‘no punishment without law’ (paras. 4 and 85 of *Sud Fondi*, referring to the preliminary decision given by the ECtHR in 2007). On a different ground, the Court stressed that the confiscation was the final product of a criminal trial, even though the accused private subjects were not convicted because of the absence of mens rea: indeed, Italian public authorities had initially—and unlawfully—provided them with all authorisations. According to the Court’s assessment, the consequence of such facts at issue was that the concrete functioning of Italian provisions about landscape and unlawful land developments could not be considered respectful of the rule of law, which requires certainty and predictability (paras. 114–118 of *Sud Fondi*). In light of this specific legal framework, the Court was eventually able to recognise a violation of Article 1 P-1 in a confiscation of private property and in its transfer to the same public body liable for having granted unlawful authorisations (paras. 136–142 of *Sud Fondi*).

The outcome of the *Punta Perotti* case could have been quite different if the legal relevance of commons had been embraced. Indeed, the above-mentioned facts constitute important evidence of the insufficiency of an institutional framework merely characterised by the vertical axis of legal relationships between two legal figures of ‘concentrated power’, such as the individual owner and the sovereign State. Commons like the environment and the landscape of Bari have been harmed for far, far too long by the unholy alliance of ownership and sovereignty. Paradoxically, one of the two poles of the zero-sum game, namely private property liable for such a damage of the commons, received a rich (and publicly funded!) compensation for an activity that was ultimately unlawful.

The legal acknowledgement of the commons as a possession worthy of autonomous protection might have directed the blame to where it should be in both the private and public sectors’ unlawful conduct. Even at the Italian national level, an institution of the commons on the model of the Rodotà Commission would have made it possible to challenge, through forms of injunction similar to the Roman law model of the *actio popularis*, the authorisations granted by the municipality of Bari and the consequent threats against Punta Perotti. Such a remedy, operating within a more horizontal and decentred axis of legal relationships and available for every ‘commoner’ deemed in...

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76Such confiscation was provided by Articles 19 and 20 Law no. 47/1985. Currently, the Italian legal system regulates the confiscation of properties in the event of unlawful land developments with Article 44 Decree of the President of the Republic no. 380/2001.


78The commission chaired by the Italian Master Stefano Rodotà was appointed in 2007 by the Minister for Justice to elaborate proposals for the revision of the Articles of the Italian civil code dedicated to public goods and public domain. The commission did its work rather beyond the formal appointment, by advancing a sophisticated and thorough reform proposal containing, among other important matters, the acknowledgment of the commons. For further information, see U. Mattei, E. Reviglio and S. Rodotà (eds.), *Invertire la Rotta: idee per una Riforma della Proprietà Pubblica* (Il Mulino, 2007).
possession of the landscape, could have avoided the construction of the eco-monster and therefore the factual basis of the case later judged by the ECtHR. In other words, a better protection of the use value generated by the environment and by the landscape could have been possible if only the conventional system (as well as the national ones) had developed a conception of ‘possession’ less simplistic than the current one. In this regard, it is not the case if such a centrality of the use value has been defined as a ‘provocation’ for the Court of Strasbourg by an influential doctrine.

The accommodation of the commons in the conventional system would be of major significance. In particular, defining commons as possessions under Article 1 P-1 allows balancing the above-discussed set of interpretative strategies of the ECtHR by reconciling them with the paradigm shift introduced with the interpretation of Article 8. The crucial role recognised to the category of use in Article 8 seems capable of redefining the traditional, hierarchical and reductionist reading of Article 1 P-1.

The complex issue of the distinction between ‘deprivation of property’ and ‘control of use of things’ is always an open question, but it can be addressed in light of the commons. National public authorities should maintain the power to regulate and control the use of things that can be defined as commons thanks to the peculiar utilities they offer. However, such authorities should be limited by the Convention in their harmful choices and in their power to alienate them in violation of ‘commons as possessions’ according to our suggested interpretation of Article 1.

In other words, the exercise of such public authority—that normally does not imply the obligation of compensation—should not jeopardise the common use of the ‘possession’ put in place by the community that is entitled to take care of it. Should that happen, a deprivation relevant to Article 1 P-1 could be recognised, with the normal consequence of the conviction of the State to pay compensation and with the additional difficulty to define the correct amount of reparation that has to do with use values and priceless possessions.

Such a theoretical enrichment could result in a broader use of the fair balance doctrine. As it is in the above-mentioned case of Article 8 ECHR with regard to the notion of ‘home’, even under Article 1 P-1 we can affirm that the relevance of commons offers new criteria for the theoretical and argumentative construction of any proportionality test. In particular, the aim to protect the peaceful and shared enjoyment of commons should be adequately taken into account by the interpreter in dealing with issues concerning the use of things, as well as the conduct of public authorities and private subjects.

Most importantly, the doctrine of commons as possessions offers a springboard for urgently needed progress in liberal democratic constitutionality. It renders justiciable government decisions to privatise (formally or de facto) that thus far do not allow any possibility of second-guessing on judicial grounds of public necessity or proportionality. Without a robust theory of the commons as a justiciable collective entitlement, even the most dramatic political decisions to privatise remain at the full political discretion of the government in office. Most of the time, privatisations involve assets accumulated by the community over long periods of time and it seems therefore odd that their transfer from the public into private hands can occur outside of the same due process guarantees that are available for the transfer from private into public hands.

A principled judicial supervision of privatisations, such as the one that commons-as-possessions would introduce into the European legal order, would restore some balance to a system that proved especially unbalanced in favour of

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79 It is possible to refer the same arguments to the huge processes of privatisation that have been carried out by several States with regard to assets formally falling into the public property. In other words, massive privatisations can be considered ‘deprivations of the property’ if commons are ‘possessions’ pursuant to Article 1 P-1.

80 See A. Gambaro, ‘Giurisprudenza della Corte Europea dei Diritti dell’Uomo e influenza sul diritto interno in tema di diritto di proprietà’ (2010) Rivista di diritto civile, 132. The precision of Gambaro’s statement is confirmed by Varvara v. Italy, decided by the ECtHR in 2013. In this case, the Court stressed the interpretative approach inaugurated with Sud Fonà and censured the Italian model of confiscation for unlawful land development carried out by the applicant, even if ‘the criminal offence had been time-barred and his criminal liability had not been established in a verdict as to his guilt’ (para. 72 of the judgment). The most recent intervention of the ECtHR in this matter is represented by the important decision in G.I.E.M. S.r.l. and Others v. Italy, eventually delivered by the Grand Chamber on 28 June 2018.


82 Mattei, above, n. 77.
private property in the neoliberal era. To be sure, because of the phenomenon of power concentration in large private corporations,\(^{83}\) the idea that governmental political discretion can be \textit{per se} considered reflective of the public interest is untenable.\(^{84}\) It is therefore crucial that Courts of law, arguably more insulated from influence than governments, can play a role in determining principles capable of protecting the commons in the interest of future generations.

From both legal and institutional perspectives, commons-as-possessions can make a core contribution for a more pluralistic, balanced and reasonable conventional framework.

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\(^{83}\) Global corporations could not reproduce their [unprecedented] control if it were not for national state apparatuses that provide for property rights, arbitration, and social control, and that open up national territories to transnational corporations.’ W.J. Robinson, \textit{Global Capitalism and the Crisis of Humanity} (Cambridge University Press, 2014) at 74.

\(^{84}\) Capra and Mattei, above, n. 3.