György MARINKÁS*

Certain Aspects of the Agricultural Land Related Case Law of the European Court of Human Rights**

1. Introduction

The aim of the current article is to examine how the agricultural property is linked to other human rights in the case law of the *European Court of Human Rights* (hereafter: ECtHR) and the *European Commission on Human Rights* (hereafter: ECHR),[1] which were established to interpret the *European Convention on Human Rights*[2] (hereafter: Convention). Studying this topic can be regarded actual for two reasons: *firstly*, the institutions and bodies of the European Union, furthermore scholars and international institutions are involved in a – to say the least – vivid debate about the sustainability of the current market oriented regulation of the EU. Some argue that it would be better if the member states got larger space to manoeuvre, so they can decide on the conditions of trading in their arable lands?[3] *Secondly*, at this very moment, the revision of the land regulation of the *Central and Eastern European* (hereafter: CEE) countries by the *European Commission* is in progress. The question is especially interesting in the light of the fact that the regulations of the CEE countries were based on the western member states' regulations. Regulations that European Commission or the *European Court of Justice* (hereafter: ECJ) found to be in conformity with the EU law during its earlier examinations, if examined the question at all.[4]

György Marinkás: Certain Aspects of the Agricultural Land Related Case Law of the European Court of Human Rights – Az Emberi Jogok Európai Bíróságának mezőgazdasági földekkel kapcsolatos ítélkezési gyakorlatának aspektusai. *Journal of Agricultural and Environmental Law* ISSN 1788-6171, 2018 Vol. XIII No. 24 pp. 99-134 doi: 10.21029/JAEL.2018.24.99

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[1] Which was abolished in 1998 by Protocol 11 of the Convention.

[2] European Convention on Human Rights (Rome, 4 November 1950).

[3] UN GA A/HRC/13/33/Add.2 report, 33; ECOSOC, NAT/632, Brussels, 21 January 2015; Directorate-General for Internal Policies of the Union: Extent of Farmland Grabbing in the EU, 2015; EP: Report on the state of play of farmland concentration in the EU: how to facilitate the access to land for farmers (2016/2141(INI)) A8-0119/2017); 2015 CEDR Potsdam Congress, Concluding Remarks, See: Szilágyi János Ede, Conclusions, *Journal of Agricultural and Environmental Law (JAEL)*, 2015/19, 96-102; European Commission Interpretative Communication on the Acquisition of Farmland and European Union Law (2017/C 350/05).

[4] Papik Orsolya: A Tagállamok birtokpolitikai mozgásterével kapcsolatos trendek, aktuális kérdések – Pódiumbeszélgetés, *JAEL*, 2017/22, 146-159, doi: 10.21029/JAEL.2017.22.132

The current article is not intended to examine purely EU[5] or constitutional law related[6] questions in detail, as these topics are already processed in the writings of other authors. Instead, the main strive is a certain slice of the ECtHR. The author examined four types of cases regarding the agricultural lands: (i) compensation related cases, where the earlier proprietors' or their heirs' interests clashed with the interests of third parties, who acquired the property in good faith; (ii) the land consolidation issues; (iii) deprivation of property or the restriction of the use of property based on environmental protection considerations; and last, but not least (iv) those laws on inheriting agricultural lands, which pursue to prevent the agricultural land to be plotted into small pieces. These cases show the procedural guaranties that states have to obey, when they legislate on agricultural land and when they execute these laws.

The author believes that studying this part of the case law of the ECtHR can contribute to answer some questions which arose regarding the law of the EU on agricultural law, with special regard to the pending infringement proceeding, which aimed to examine the EU conformity of Section 108 of the *Act No. CCXII of 2013 laying down certain provisions and transition rules in connection with Act No CXXII of 2013 concerning agricultural and forestry land trade* (hereafter: Transitional Law), which contains certain provisions on the execution of *Act No. CXXII of 2013 on agricultural and forestry land trade* (hereafter: Land Trade Act). The above mentioned section abolished all contractual ususfructus rights on agricultural land on the 1st of May 2014, in case the contracting parties were not close relatives.

The current article approaches the questions from two aspects: *firstly*, from the *right to a fair trial* and the *right to an effective remedy* as contained by Article 6 and 13 of the Convention, *secondly* from the aspect of *the right to property* as contained by Article 1 protocol No.1[7] to the Convention. Regarding the first one, the author is seeking to answer whether the Hungarian regulation, which is based on the statutory presumption that every single ususfructus established on agricultural land was created with the intention of circumventing the regulations and, which is – according to the Hungarian legislator – best remedied by an ex lege abolishment, excluding the judicial revision. Having some knowledge on the case law of the ECtHR, the author was sure even at the beginning of the current research that in a possible proceeding before the ECtHR, it

[5] Andréka Tamás – Olajos István: A földforgalmi jogalkotás és jogalkalmazás végrehajtása kapcsán felmerült jogi problémák elemzése, *Magyar Jog*, 2017/7-8, 410-424; Raisz Anikó: Topical Issues of the Hungarian Land-Transfer Law Purchasing and Renting Agricultural Land: Legal Framework and Practical Problems, *CEDR Journal of Rural Law,* 2017/1, 68-74; Szilágyi János Ede: A magyar földforgalmi szabályozás új rezsimje és a határon átnyúló tulajdonszerzések, *Miskolci Jogi Szemle,* 2017/1 Special Edition, 107-124; Szilágyi János Ede: Az új tagállamok csatlakozási szerződései és a termőföldek tulajdonjogára vonatkozó nemzeti szabályozások, különösen a magyar jogi szabályozás, *JAEL*, 2010/9, 48.

[6] Olajos István: Az Alkotmánybíróság döntése a helyi földbizottságok szerepéről, döntéseiről, és az állásfoglalásuk indokainak megalapozottságáról, *Jogesetek Magyarázata,* 6/3, 17-32; Téglási András: Termőföldvédelem az Alkotmánybíróság gyakorlatában és az Alaptörvényben, in: Korom Ágoston (edit.): *Az új magyar földforgalmi szabályozás az uniós jogban,* Budapest, Nemzeti Közszolgálati Egyetem, 2013, 93-107.

[7] First Protocol to the ECHR (Paris, 20 March 1952).

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would find a breach of the right to a fair trial and the right to the effective remedy. It is worth mentioning that the advocate general of the ECJ – examining the case from the aspect of community law[8] – already found the Hungarian regulation disproportional and nonconform with EU law.[9]

However the ECtHR provides a broad margin of appreciation for the member states regarding the shaping of their judicial review system, including the rules on public hearing; they cannot exclude the possibility of the judicial review of every single case as a whole. That is to say, ex lege abolishing every ususfructus contract, without the possibility of judicial review, in all probability would be considered disquieting.

While the author could place his examination on solid grounds regarding the right to a fair trial, in the case of the right to property – *the other focal point of his examination* –, he needed to rely on a less established point of view in the dogmatic[10] of civil law. *On the one hand*, the author is totally aware that this part of the writing can easily attract criticism. The author did not find a perfect analogy – according to his best knowledge –, no precedent exist in any other state, which is part of the Convention. The *Hungarian Constitutional Court* (hereafter: HCC) in its decision *25/2015 (VII.21.)* also contradicts the concept of ususfructus as property right: as it stated, the above mentioned regulation should not be judged by the rules of property deprivation, but instead by the rules on contract-law, which contain less strict rules compared to those on property.[11]

The only negligence found by the HCC was that the Hungarian Parliament failed to create the special rules, which are not governed by the Hungarian Civil Code, and which is to be applied in case of the final settlement between the contracting parties.[12] As a result, certain costs and expenses are not reimbursed in the course of the final settlement between the former ususfructuaries and the proprietors.

On the other hand, contrary to the main strive, which is recorded in the resolution of the HCC, it is worth mentioning that – as *Andréka Tamás* writes – the '*ususfructus is a personal servitude*, *which provides certain proprietary rights to the beneficiary*.'[13] It is most probably *Sulyok Tamás*, judge of the HCC, who in his parallel reasoning went the farthest stating that *'ususfructus established on a property can be regarded as a right in rem'*.[14]

Presuming that the ususfructus can be regarded as a quasi-proprietary right, however, it means that it should be examined whether its deprivation is based on law, or pursues to a legal aim and is it can be regarded as proportional? The answer to the

[8] The author, by citing the opinion of the advocate general does not intend to blur the lines between the community law, especially the case law of the ECJ and the ECtHR. He only wishes to point out that the provisions examined in the current study can face criticism on multiple platforms.

[9] ECJ, C-52/16 and C-113/16 SEGRO and Horváth joint cases, the opinion of advocate general *Henrik Saugmandsgaard Øe*, 31 Maj 2017, 92-97.

[10] Special thanks for Mr. Leszkoven László for facilitating my research by providing consultations for me.

[11] HCC resolution no. 25/2015 (VII.21.), 53-66.

[12] HCC resolution no. 25/2015 (VII.21.), 67.

[13] Andréka – Olajos 2017, 417.

[14] HCC resolution no. 25/2015 (VII.21.), The parallel reasoning of judge Sulyok Tamás, 63.

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first question is obviously yes, but the latter two are harder to answer. Correcting the earlier mistakes made by the states – in this case the mistake of the Hungarian state that it established a regulation that was easy to be circumvented or even induced persons to do that[15] – can be evaluated as a legitimate aim. Regarding proportionality it should be examined whether the compensation gained by the parties – if any –, was proportional to the deprived property? As mentioned above, the law does not cover any aspects of the final settlement and even those ususfructuaries, who concluded their contracts in good faith, cannot claim any compensation from the state.

The questions are asked, the answers are given by the below detailed cases.

2. The case law of the ECtHR and the ECHR

2.1. Cases related to compensation

The cases related to compensation were examined thoroughly by *Raisz Anikó*, making valuable statements regarding the awkwardness of the ECtHR's case law in certain aspects.[16]

The current writing concerns the compensation cases, where the previously deprived lands or real-properties were acquired from the state or individuals by third parties, who acted in good faith; and where these third parties' proprietary rights were challenged by the former owners or their heirs. Having regarded the rather similar nature of the cases, the author dispenses with introducing every case in details.

In the *Pincová v. Pinc* case,[17] the heir of the former proprietary of a confiscated house launched successful proceedings against the applicants in 1992.[18] The applicants alleged the infringement of their property rights; since they concluded the contract in good faith and the national court did not grant them compensation proportionate to the value of the lost property.[19]

In the case at hand, the ECtHR found that the interference with the right to property amounted to 'deprivation of possessions' within the meaning of the second sentence of the first paragraph of Article 1 of Protocol No. 1. The Court reiterated its earlier case law and stated that the deprivation of property should be based on law, should pursue to a legitimate aim and should be proportionate, that is to say: it must *strike a fair balance* between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. In the present

[15] Andréka – Olajos 2017, 417.

[16] Raisz Anikó: A Beneš-dekrétumok által érintett tulajdoni kérdések az Emberi Jogok Európai Bírósága előtt, in: Horváth Attila – Korom Ágoston (edit.): *Beneš-dekrétumok az Európai Parlamentben*, Budapest, Nemzeti Közszolgálati Egyetem, 2014; Raisz Anikó, Földtulajdoni és földhasználati kérdések az emberi jogi bíróságok gyakorlatában, in: Csák Csilla (edit.): *Az európai földszabályozás aktuális kihívásai*, Miskolc, Novotni Alapítvány, 2010, 241-253.

[17] ECtHR *Pincová and Pinc v. Czech Republic*, 5 November 2002 (36548/97).

[18] Pincová and Pinc v. Czech Republic 2002, 9-32.

[19] Pincová and Pinc *v.* Czech Republic 2002, 42.

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case even the applicants acknowledged that the state's acts were based on laws.[20] Regarding the legitimate aim the Court reiterated its earlier findings in the *James-case*:[21] *'Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest […] unless that judgment is manifestly without reasonable foundation.'*[22] Arising from this, the notion of 'public interest' is necessarily extensive.[23] The Court examined weather the law succeeded in striking a fair balance between general interest of the community and the requirements of the protection of the individual's fundamental rights. In this regard the Court examined the extent of the compensation, which has to be reasonably related to market value of the lost property. On the other hand, legitimate objectives of 'public interest' may call for less than reimbursement of the full market value. Having regarded the fact that in the case at hand, compensation received by the parties' amounts to the 1/5 of the current market value of the house, the state failed to strike the above mentioned fair balance, thus property rights were infringed.[24]

The joint cases under name *Velikovi*[25] are worth highlighting since the applicants' situation is a bit similar to the ususfructuaries concerned by the Hungarian regulation, since the applicants were either proprietaries or long-term tenants. Furthermore, just like the rules of the Transitional Law, expect for a short period of time, the Bulgarian laws didn't provide compensation for the parties concerned.[26] The ECtHR introduced the case law of the Bulgarian national courts in details, which in most cases declared the contracts concluded during the previous regime null and void on the ground of formal errors,[27] and judged in favour of the persons looking for restitution.[28] However, in the case under the name Velikovi, the ECtHR did not state the infringement of property rights in case the contract was declared null and void by the national courts and the applicants received any compensation from the state.[29] The ECtHR in the course of evaluating the circumstances of the case[30] referred to its former statements made in the *Jahn and others vs. Germany* case, according to *which 'the Court considers it useful to reiterate certain special features of the present case and, in particular, the historical context in which it arose.'*[31]

In the *Pyrantienà v. Lithuania case*,[32] which had a rather similar statement of facts as the previous cases, the Court came to the conclusion that a national regulation, which excludes the judical review of individial cases is contrary to the Convention. The

[20] Pincová and Pinc v. Czech Republic 2002, 47-51.
[21] ECtHR, *James and other vs the United Kingdom,* 21 February 1986 (8793/79).
[22] James and other vs the United Kingdom 1986, 46.
[23] James and other vs the United Kingdom 1986, 46.
[24] Pincová and Pinc v. Czech Republic 2002, 52-64.
[25] ECtHR, *Velikovi and others vs. Bulgaria*, 15 March 2007 (43278/98).
[26] Velikovi and others vs. Bulgaria 2007, 128-141.
[27] For example delegating rights contrary to statutory requirements.
[28] Velikovi and others vs. Bulgaria 2007, 110-113; 117-120; 121-125.
[29] Velikovi and others vs. Bulgaria 2007, 194-200.
[30] Velikovi and others vs. Bulgaria 2007, 169.
[31] ECtHR, *Jahn and others v. Germany*, 30 June 2005 (46720/99, 72203/01 and 72552/01), 99.
[32] ECtHR, *Pyrantienà v. Lithuania,* 12 November 2013 (45092/07).

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Court retairating its earlier jurisdiction – namely the Pincová case –, noted that remedying of old injuries does not create disproportionate new wrongs. To this end, the legislation should *'make it possible to take into account the particular circumstances of each case, so that individuals who have acquired their possessions in good faith are not made to bear the burden of responsibility, which is rightfully that of the State which has confiscated those possessions.'*[33] The particular circumstances include – amongst others – *'the conditions under which the disputed property was acquired and the compensation that was received by the applicant in exchange for the property, as well as the applicant's personal and social situation'*.[34]

In those cases, where the state deprived such persons from their property, who acquired their land or houses from another person and not directly from the state or state enterprise, which were directly involved in the deprivation, some particularly interesting questions arise. – True, however that sellers themselves bought the property in the previous regime from the state or such state enterpriese, which was directly involved in the nationalisation. – These type of cases were particularly common in Bulgaria.

In the *Tomov and Nikolova vs. Bulgaria case,*[35] the heirs of the formers owner filed a petition in 1991 to the local land commission requesting the restitution of the property confiscated by the previous regime. The local land commission granted their request on the 4th April 1996. Subsequently the heirs alienated the land to Mr. K., who, in 2003, in order to actually come into possession, launched legal proceedings against the applicants, who acquired the property in good faith. The Supreme Court of Bulgaria found *that the claims of those seeking for restitution should prevail* over the claims of those, who acquired the property in good faith.[36]

The applicants alleged the infringement of their rights to property and the right to an effective remedy. The Court was of the view that examining the latter one is not necessary.[37]

Contrary to the state's point of view, the Court was of the view that the state is responsible for the situation, even if it did not participate directly in concluding the contracts at stake, since it was the state, which created such a legal environment, which provided primacy for the interests of the former owners or their heirs over the interests of those, who acquired the property in good faith. The ECtHR – amongst other reasons – saw no reason to set aside principles developed in the Velikovi-case.[38] Just like in the Velikovi-case, the ECtHR noted that former eastern bloc countries were in special situation during their transition from socialist regimes into market oriented capitalist states with a democratic political regime and the Court evaluated this fact,

[33] Pyrantienà v. Lithuania 2013, 50.
[34] Pyrantienà v. Lithuania 2013, 51; Furthermore the ECtHR referred to the ECtHR, *Mohylová v. Czech Republic,* 6 September 2005 (75115/01) case.
[35] ECtHR, *Tomov and Nikolova v. Bulgaria,* 21 July 2016 (50506/09).
[36] Tomov and Nikolova v. Bulgaria 2016, 6-12.
[37] Tomov and Nikolova v. Bulgaria 2016, 20, 2.
[38] Tomov and Nikolova v. Bulgaria 2016, 35, 4.

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when the above mentioned countries were concerned.[39] This period for clemency applied only to the first years of the change of regime, however. The Bulgarian regulation at hand was inaugurated in 1997 – years after the change of regime –, which excluded the possibility of applying any clemency, mentioned above. Thus, the Court concluded that the Bulgarian law cannot be regarded as pursuing to a legitimate aim or, which conforms the requirement of legal certainty.[40]

In the *Krasteva and others v. Bulgaria*[41] the statement of facts[42] were almost identical to those of in the above introduced Tomov and Nikolova case. The similarity was apparent for the ECtHR too; therefore the Court asked the respondent state to provide statistical data on the similar cases tried before national court in a year. Based on the data provided by the respondent state, between 2010 and 2014, the courts of first instance heard approximately 35-50 cases.[43] The applicants alleged the infringement of their right to property, the right to a fair trial, and the infringement of the prohibition of discrimination. The Court was of the view that it was sufficient to examine the complaints under the right to property.[44]

2.2. Land Consolidation

In the case law of the ECtHR, the land consolidation cases were to be found mainly related to Austria. The land consolidation procedure aims at defragmenting the fragmented agricultural lands by exchanging them in order to create economically better plot of lands. The procedure is based on the agreement of the concerned farmers and approved by authorities or conducted by the authorities. These procedures are complex and time consuming by their very nature, since the concerned plots are different in their extent and in their quality.[45] As a result it's almost 100% sure that one or more farmers, who did not even want to participate – but were obliged by the authorities –, or those, who participated voluntarily, felt that the short end was given to them. In the complaints regarding the land consolidation the applicants either alleged the infringement of their right to property or the right to fair trial. The preceding was typically alleged because of the deprivation of the property of the applicants, without receiving proper compensation, while the latter one was asked because of the unreasonably long procedures or the dismissal of their request for an oral hearing.

The question of property rights is particularly interesting in the light of the provisions of the Austrian laws, which state that as a result of the land consolidation proceedings land owners loose ownership of their original plots of land with the

[39] This meant that the Court left an even vaguer margin of appreciation for the states concerned with a change of regime regarding the restructuration of their society and economy.
[40] Tomov and Nikolova v. Bulgaria 2016, 43, 44, 48, 51, 54-55.
[41] ECtHR, *Krasteva and others v. Bulgaria,* 1 June 2017 (5334/11).
[42] Krasteva and others v. Bulgaria 2017, 5-10.
[43] Krasteva and others v. Bulgaria 2017, 20-23.
[44] Krasteva and others v. Bulgaria 2017, 17-18, 22-30.
[45] The possible internal water and the amount of sunny hours are of paramount interest.

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provisional transfer.[46] Thus, based on the case law of the ECtHR[47] those lands can no longer be considered as a 'possession' within the meaning of Article 1 of Protocol No. 1. Furthermore – as the Court notes –, '*where the law makes it clear that possible changes in value which arise after the provisional transfer are not to be taken into account, no legitimate expectation arises*',[48] which could be evaluated as possession under certain circumstances.[49] Having considered the above mentioned, in certain cases the ECtHR rejected to examine the application under Article 1 of Protocol No.1.[50]

In the *Erkner and Hofauer v. Austria* case[51] the applicants did not show up at the hearing despite the notice of the authorities. As a result, decision was made in their absence. In the same year they attended another hearing with their attorney and asked for the renegotiation of the land consolidation plan as far as it concerned their plot of land, since the new plot, which was offered them was of worse quality, over-shadowed and laid far from their place of residence. The authorities dismissed the request.[52]
The applicants alleged the infringement of Article 6, 8, 14 and Article 1 of Protocol No.1. The Commission was of the view that it was sufficient to examine the complaints under Article 6 and Article 1 of Protocol 1.

The Court first examined the alleged infringement of Article 6 in merits. Reiterating its earlier case law, the Court noted that in civil proceedings, the 'reasonable time' normally begins to run from the moment the action was instituted before the 'tribunal'[53] – as it was the case in the case at hand –, in certain cases, however it could be an earlier date.[54] Also, referring to its earlier case law[55] the court reiterated that the reasonableness of the length of proceedings is to be assessed regarded the (i) complexity of the case; (ii) the applicants' behaviour and the (iii) conduct of the relevant authorities. Although the complex nature of the case at hand – having regarded the fact that by the end it concerned 38 owners – was beyond question, a procedure, which lasted for 16.5 years, cannot be considered as concluded within a reasonable time.[56]

Regarding the right to property, the Court came to the conclusion that it was the right to the 'peaceful enjoyment of property' – first sentence of the first paragraph of Article 1 of Protocol No.1 –, which was infringed, since neither *de jure* nor *de facto*

[46] See: ECtHR, *Prischl v. Austria,* 27 April 2007 (2881/04), 35-37.
[47] ECtHR, *Marckx v. Belgium,* 13 June 1979 (6833/74), 50.
[48] ECtHR, *Kolb and others v. Austria,* 21 February 2002 (35021/97) (45774/99).
[49] ECHR, *A, B, C, D, E, F, G, H and I v. the Federal Republic of Germany*, 16 July 1976 (5573/72 and 5670/72), DR 7, 8; ECHR, *Consorts D. v. Belgium*, 18 December 1988 (11966/86).
[50] Prischl v. Austria, 2007.
[51] ECtHR, *Erkner and Hofauer v. Austria*, 24 March 1987 (9616/81), merits.
[52] Erkner and Hofauer v. Austria 1987, 8-36.
[53] ECtHR, *Kern v. Austria*, 24 February 2005 (14206/02), 51; Kolb, Op. cit. 49; ECtHR, *Wiesinger v. Austria*, 30 October 1991, 52; ECtHR, *Deumeland v. The Federal Republic of Germany*, 29 May 1986 (9384/81), 77.
[54] ECtHR, *Golder v. the United Kingdom*, 21 February (4451/70), 32.
[55] Amongst others: ECtHR, *Frydlender v. France*, 27 June 2000 (30979/96), 43; *Wiesinger* Op. cit. 54; ECtHR, *Zimmermann and Steiner v. Switzerland*, 13 July 1983 (8737/79), 66; ECtHR, *Buchholz v. Federal Republic of Germany*, 6 May 1981 (7759/77), 49.
[56] Erkner and Hofauer v. Austria 1987, 63-70.

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deprivation took place.[57] Regarding the fair balance between the public interest and the individual rights, the Court stated that the procedure lasted for 16.5 years. Although the government held that the length of the procedure cannot be examined under the right of the property, the Court reminded that based on its earlier case law,[58] *'one and the same fact may fall foul of more than one provision of the Convention and Protocols.'* That is to say they are interchangeable with each other. The Court, after having examined all the relevant circumstances of the fact, came to the conclusion that the authorities did not reach the necessary fair balance between public interest and individual rights.[59]

In the *Ernst and Anna Lughofer v. Austria* case[60] the Austrian authorities instituted land consolidation proceedings in 1973, and in the course of the proceedings a public hearing was held. As a result of the proceedings, the authorities issued a land consolidation plan, which was appealed by the applicants on the ground that they did not receive a fair compensation.[61] The applicants alleged the infringement of Article 6, as the administrative court dismissed their claim for a public hearing. The ECHR shared the applicants view and even the state admitted the fact of infringement. Having regarded these facts and its own earlier case law, Court found a breach of Paragraph (1) Article 6.[62]

In the *Walder v. Austria case,*[63] the applicant alleged the infringement of the right to fair trial, since the length of the proceedings was beyond reasonable. The Court – like in the similar previous cases stated the complex nature of such proceedings and the aspects to be examined in such cases and found that the right to a fair trial was infringed.[64]

In the *Prischl v. Austria* case the applicant alleged that her lands are more valuable than they were estimated earlier and that her late husband did not receive a proper compensation in turn for his plots. Based on these circumstances, she alleged the infringement of her property rights.[65] On the other hand, the applicant primarily alleged the infringement of her right to a fair trial, based on the fact that the length of the proceedings were contrary to the requirement of reasonable time and the national courts rejected her request for a public hearing.[66]

Regarding the alleged infringement of Article 6, the Court was of the view that it was sufficient to examine the length of the proceeding and dismissed the other two complaints. The Court pointed out the fact that based on its case law the *land reform committees are considered as courts,* thus a public hearing held by such committees can be regarded as a hearing by a national court.[67] Thus the alleged infringement did not occur.

[57] Erkner and Hofauer v. Austria 1987, 71-74.
[58] ECtHR, *Airey v. Ireland*, 9 October 1979 (6289/73), 31-33.
[59] Erkner and Hofauer v. Austria 1987, 76, 79, 80.
[60] ECtHR, *Ernst and Anna Lughofer v. Austria*, 30 November 1999 (22811/93).
[61] Ernst and Anna Lughofer v. Austria 1999, 6-9.
[62] Ernst and Anna Lughofer v. Austria 1999, 13-14, 16-18.
[63] ECtHR, *Walder v. Austria*, 30 January 2001 (33915/96).
[64] Walder v. Austria 2001, 26-33.
[65] Prischl v. Austria, 2007, 4-16, 34.
[66] Prischl v. Austria, 2007, 18.
[67] ECtHR, *Stallinger and Kuso v. Austria,* 23 April 1997 (14696/89 14697/89), 37.

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Regarding the applicant's allegation that the procedure was not fair, the ECtHR reiterated that based on its case law[68] the procedure of the national authorities and the courts can only be subject of examination by the ECtHR in case the procedure infringes a right protected under the Convention. The Convention however does not contain any provision on the rules of evidence of the national courts, e.g. what should be considered admissible and how it should be evaluated. Regarding the length of the proceedings the Court reiterated the aspects to be examined as in its earlier cases. Having regarded all the circumstances of the case, the Court found the infringement of Paragraph (1) of Article 6.[69]

Regarding the alleged infringement of the right to property, the Court reiterated[70] that the applicant did not have a right to property, which could have fallen under the Convention and thus refused to examine the application in this regard.[71]
In the *Ortner v. Austria* case[72] the applicant alleged the infringement of the right to fair trial, and the right to property. The preceding was requested by the applicants, since the case was tried beyond reasonable time. In the similar cases[73] the Court was prone to find the infringement that the cases were beyond reasonable time. In the present case, the statement of facts were rather complex,[74] and having regarded all the circumstances of the case, the length of procedure was beyond reasonable time, thus the Court found infringement of Article 6.[75]

The Court refused to examine the infringement of the right to property for two reasons: *firstly,* the applicant failed to prove that he had to bear a disproportional burden, and *secondly,* the length of the procedure in itself does not suffice to state the infringement of the right to property.[76]

2.3. Environment protection

In the *Matos e Silva*[77] case the crucial question was, whether the Matos e Silva – a company registered under the Spanish laws – had property rights on the plot of land, which was the subject of the case. The company cultivated the plot, which was given into concession by a royal decree issued in 1884 and, which was bought by the company in 1899 from the original beneficiary of the concession. This fact was recorded in the land registry. Still, the royal decree granted the right to the state to take back the plot without any compensation. Accordingly, when the state created an environmental protection zone in 1978, did not grant any compensation for the

[68] ECtHR, *García Ruiz v. Spain,* 21 January 1999 (30544/96), 28.
[69] García Ruiz v. Spain 1999, 21, 24, 29-33.
[70] As it was written in the introduction of the current sub-section.
[71] Prischl v. Austria, 2007, 35-37.
[72] ECtHR, *Ortner v. Austria*, 31 May 2007 (2884/04).
[73] See the Kolb and others case!
[74] Like in the *Wiesinger* case, 55.
[75] Ortner v. Austria, 2007, 21-23, 30-34.
[76] Ortner v. Austria, 2007, 36-37.
[77] EJEB, *Matos e Silva Lda. and other v. Portugal*, 16 September 1996 (15777/89).

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company. The state was of the view that based on the 1884 decree the state withdrew the concession and did not expropriate the property.[78]

The applicants alleged the infringement of Section (1) Article 6 of the Convention based on the unreasonable length of the proceeding and the infringement of the right to an effective remedy (Article 13 of the Convention). In their view, the state failed to provide the latter one. Furthermore, they alleged the infringement of Article 1 of Protocol No.1 and the infringement of Article 14 taken in conjunction with Article 1 of Protocol No.1.[79]

Regarding the infringement of Article 6 and 13, the Court took the view that the unreasonable length of the proceedings does not concern the access to tribunal. The difficulties encountered by the applicants should be judged under the conduct of the authorities and their right to access those remedies. Since the applicants were able to institute proceedings the right under Article 13 was not infringed. Having examined the length of the procedure, the court found the infringement of Paragraph (1) of Article 6.[80]

As mentioned earlier, the core issue of the case was the property right of the applicants: the state was of the view that applicants could not allege the infringement of property rights, since the plot had never been their property. The state did not expropriate the plot, only withdrew a concession. Moreover the state contested the Court's jurisdiction to decide whether or not a right of property exists under domestic law. The applicants argued the fact that their ownership title was registered in the land registry in 1899, and that the state authorities had always regarded Matos e Silva as owner of the land proves the existence of their property rights.[81]

The ECtHR took the view that the applicants' argument is correct; they can be regarded as the owners of the plot.[82] Regarding the other argument of the state – which contested the Court's right to decide on the ownership title of the applicants –, the Court reiterated its case law, and noted that *the notion of possession has an autonomous meaning*.[83]

Subsequently the ECtHR determined that in the case at hand it was the right to peaceful enjoyment of property, which was infringed. Regarding the fair balance between the public interest and the individual rights, the Court came to the conclusion that having regarded the length of the proceedings and the uncertainty, what the applicants had to bear in connection with losing their property and the possible compensation, the state failed to strike a fair balance between them. Thus the Court found the breach of the right to property. Regarding the alleged infringement of Article 14 it was of the view that it was not necessary to examine the case under this head.[84]

[78] Matos e Silva Lda. and other v. Portugal 1996, 10-45.
[79] Matos e Silva Lda. and other v. Portugal 1996, 54.
[80] Matos e Silva Lda. and other v. Portugal 1996, 60-70.
[81] Matos e Silva Lda. and other v. Portugal 1996, 72-73, 75, 77.
[82] Matos e Silva Lda. and other v. Portugal 1996, 74-75.
[83] ECtHR, *Gasus Dosier- und Fördertechnik GmbH v. the Netherlands*, 23 February 1995 (15375/89), 46.
[84] Gasus Dosier- und Fördertechnik GmbH v. the Netherlands 1995, 86-93, 96.

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In the *Schelling v. Austria case*[85] the applicant wanted to lay down a culvert through a drain, on his agricultural land, which was under cultivation at the time. The applicant requested the approval of the competent authorities, which after an oral hearing, dismissed his request. The domestic courts consistently refused to hold oral hearings. Having regarded this fact, the applicant alleged the infringement of Paragraph (1) of Article 6.[86]

The ECtHR was of the view that courts have every right to abstain from holding a public hearing if it is necessary for the effective and economic conduction of the procedures,[87] and where proceedings concerned exclusively legal or highly technical questions,[88] which can be clarified by experts and not by the public. In the present case however, the Court did not find that any of these circumstances would stand and therefore found the infringement of Section (1) of Article 6.[89]

In the *Barcza and others v. Hungary* case,[90] the applicants possessed an agricultural plot, which based on a decision – became effective on the 16 December 2002 – of the administrative authorities, became part of a newly established environmental protection area. The decision ruled on the expropriation and obliged the state to make an offer on the compensation for the applicants. Since the state failed to fulfil its obligation to expropriate the land and compensate the applicants, they offered their lands for sale for the state multiple times. The authorities did not take the offer. The case was ended by the local government office, which determined the amount of compensation in 31.170.000 Ft, that is to say 126.000 €. The applicants received the amount in the next year.[91]

The applicants complained that their right to peaceful enjoyment of possessions had been violated because the domestic authorities continuingly failed to settle the expropriation and as a result they were unable to make use of their property. The state contested the applicants stand as a victim, arguing that the statement of facts invoke Paragraph (1) of Article 6, because – amongst other facts – the applicants did receive compensation. Contrary to the *Brumărescu*[92] and *Jasiūnienė*[93] cases, where the applicants did not receive compensation, thus the ECtHR found that both the right to a fair trial and the right to the property were violated.[94] The Court reiterated its own

[85] ECtHR, *Schelling v. Austria,* 10 November 2005 (55193/00).
[86] Schelling v. Austria 2005, 8-25, 26.
[87] See the earlier mentioned Prischl case, where the Court come to the view that the oral hearing held by the administrative bodies constituted enough procedural guarantee.
[88] Furthermore: ECtHR, *Döry v. Sweden,* 12 November 2002 (28394/95), 42-43; ECtHR, *Speil v. Austria*, 5 September 2002 (42057/98); ECtHR, *Varela Assalino v. Portugal*, 25 April 2002 (64336/01); ECtHR, *Schuler-Zgraggen v. Switzerland*, 24 June 1993 (14518/89), 58.
[89] Schelling v. Austria 2005, 29-33.
[90] ECtHR, *Barcza and other v. Hungary,* 11 October 2016 (50811/10).
[91] Barcza and other v. Hungary 2016, 5-22.
[92] ECtHR, *Brumărescu v. Romania*, 28 October 1999 (28342/95).
[93] ECtHR, *Jasiūnienė v. Lithuania,* 6 March 2003 (41510/98).
[94] Barcza and other v. Hungary 2016, 28.

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earlier case law[95] and came to the conclusion that *'a decision or measure favourable to the applicant is not in principle sufficient to deprive him or her of victim status unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention.'*[96]

Regarding the nature of expropriation of property, the applicants were of the view that they were hindered in disposing over their property, the state argued that de facto expropriation took place, while the ECtHR having regarded all the relevant facts of the case, concluded that applicants were hindered in the peaceful enjoyment of their property. Subsequently the Court examined whether the state stroke a fair balance between public interest and the individual rights of the applicants. The Court was of the view that having considered the uncertainty that the applicants had to suffer for years and that the applicants did not have a realistic chance to sell the property or obtain a just compensation, the right to property was breached.[97]

In the *Tumeliai v. Lithuania* case[98] just like in the previous case, the applicants' plot of land was declared to be a natural protection area, which resulted in the restriction of their right to dispose over it. The case started, when the authorities ordered the demolition of the applicants' building, which was built illegally in the view of the authorities. The applicants claimed that the building was constructed according to the laws.[99] The applicants alleged the infringement of their right to property and fair trial, since the principle of legal certainty was not respected by state authorities. The Court was of the view that it was sufficient to examine the case at hand under the alleged infringement of the right to property.[100]

The state argued that the applicants did not have a property right or any legitimate claim to property right within the meaning of Article 1 of Protocol No. 1, since the case law of the country's constitutional court does not recognise property rights over illegally obtained property. The ECtHR came to the opposite conclusion from the very same case law, stating that illegally obtained property too, is entitled for protection.[101]

The ECtHR highlighted the important nature of environment protection in several cases.[102] Notwithstanding the state is still obliged to strike a fair balance between the public interest and the individual rights.[103] At the case at hand, the Court evaluated the interference as the restriction of the applicants' 'right to dispose over their property.' The decision of the authorities was based on law, and pursued public interest

[95] ECtHR *Dalban v. Romania*, 28 September 1999 (28114/95), 44; ECtHR, *Konstantin Markin v. Russian Federation,* 22 March 2012 (30078/06), 82.
[96] Barcza and other v. Hungary 2016, 31-38.
[97] Barcza and other v. Hungary 2016, 39-48.
[98] ECtHR, *Tumeliai v. Lithuania,* 9 January 2018 (25545/14).
[99] Tumeliai v. Lithuania 2018, 5-23.
[100] Tumeliai v. Lithuania 2018, 58, 83-85.
[101] Tumeliai v. Lithuania 2018, 59-66.
[102] ECtHR, *Depalle v. France*, 29 March 2010 (34044/02), 81; ECtHR, *Turgut and others v. Turkey,* 8 July 2008 (1411/03), 90; ECtHR, *Köktepe v. Turkey*, 22 July 2008 (35785/03), 87; ECtHR, *Şatır v. Turkey*, 10 March 2009 (36192/03), 33.
[103] ECtHR, *Vistiņš and Perepjolkins v. Lithuania*, 25 October 2012 (71243/01), 109.

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– environment protection –, thus the only question to be determined was whether it was proportionate or not.[104] In this regard the Court, referred to its earlier case law,[105] and took the view that in the case at hand the authorities, while correcting their earlier mistakes put striking and disproportionate burden on the applicants. Thus the Court found the right to property was infringed.[106]

2.4. Inheritance

Many EU member states have a legal prescription on the minimum size of agricultural land, which – amongst other solutions[107] – is secured by that in case of multiple heirs to a farm, only one of them can be the principle heir, who takes over the farm and pays off the others. The principle heir is generally the *elder* and/or the one with *appropriate qualification*. These legal prescriptions restrict the right to acquire property, which is not protected by the Convention based on the case law of the ECtHR;[108] on the other hand it raises some interesting question from the view of constitutional law.[109]

In the *Inze v. Austria* case[110] the applicant inherited a farm alongside with his siblings. Subsequently the applicant submitted a request to the authorities – as required by Austrian laws – to point him as the principle heir, as the elder and the one, who has the necessary qualifications. The applicant intended to pay off the other heirs. Furthermore he stated that the other heirs do not have the necessary qualification, which excludes them from inheriting an agricultural land according to Austrian laws. The authorities dismissed his claim based on the then applicable laws, which gave preference to legitimate child over illegitimate child. Furthermore, an expert asked by the authorities held that the applicant's sister had the necessary qualification to take over the farm. Since the applicant failed before the national courts too, he agreed to sign a deal, which was rather disadvantageous for him.[111]

The applicant claimed that he was discriminated against; when the authorities denied pointing him out as the principle heir because of his status as illegitimate child.

[104] Tumeliai v. Lithuania 2018, 73-76.
[105] ECtHR, *Romankevič v. Lithuania*, 2 December 2014, (25747/07), 38-39; ECtHR, *Albergas and Arlauskas v. Lithuania,* 27 May 2014, (17978/05), 59.
[106] Tumeliai v. Lithuania 2018, 77, 80, 82.
[107] Bányai Krisztina: A Földszerzés korlátozása Nyugat-Európában, *Miskolci Jogi Szemle*, 2017/2 (special edition), 71-80.
[108] Having regarded that the Convention – contrary to the former Hungarian Constitution and the Basic Law in effect does not refer to the right of inheriting, it does not appear in the case law of the ECtHR independently. In some cases however, where the Court concerned the right to inherit in conjunction with a right protected by the Convention or its Protocols. See the Marckx case!
[109] The already HCC resolution 5/2016 AB (III.1.) concerned the parallels between the right to inherit and the right to property both in the majority opinion and the parallel reasoning of judge Tamás Sulyok.
[110] ECtHR, *Inze v. Austria*, 28 October 1987 (8695/79).
[111] Inze v. Austria 1987, 8-24, 25.

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Having regarded this fact, he alleged the infringement of Article 14 of the Convention – which prohibits discrimination – in conjunction with the infringement of his property rights.[112]

The state contested the applicant's stand as a victim, since he already received compensation. The ECtHR on the other hand alongside with the applicant and the ECHR was of the view that the applicant was not in the proper position to make a fair deal, when he signed the above mentioned agreement. Actually he acted out of necessity.[113] Furthermore the state contested the applicant's right to property: in its view just like in the *Marckx case*[114] the applicant did not own a property right or legitimate expectation to property right,[115] thus no infringement of right occurred. The ECtHR however was of the view that in the case at hand, – contrary to the Marckx case, where the applicant alleged the infringement in an abstract manner[116] – the applicant had already acquired a right to a share of his deceased mother's estate by inheriting it.[117]

As the Court pointed out, based on its earlier case law, the infringement of Article 14 can only be stated if the difference of treatment 'has no objective and reasonable justification', that is to say, if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'. In this regard the states own a vague margin of appreciation, the limits of which is determined by the circumstances and the subject of the case.[118] At the same time the Court noted that the Convention is a living instrument to be interpreted in the light of present-day conditions. Having regarded the above mentioned, in the present case the Court did not accept the state's out of date argument on the possible causes of preferring legitimate child over illegitimate child in case of rural population. Thus, the Court found the infringement of Article 14 in conjunction with the infringement of Article 1 of Protocol 1.[119]

In the *Osinger v. Austria case*[120] too, both the applicant and his sister asked to be pointed as the principle heir of a farm.[121] The applicant alleged the infringement of his right to a fair trial, since the Austrian authorities dismissed his request for a public hearing.[122]

The state argued that in the hereditary procedures the exclusion of the general public is necessary in order to protect the private life of the parties as contained by

[112] Inze v. Austria 1987, 35.
[113] Inze v. Austria 1987, 30-34.
[114] Marckx v. Belgium 1979
[115] See: ECtHR, *AGOSI v. the United Kingdom,* 24 October 1986 (9118/80), 48.
[116] The applicant challenged the laws, which restricted her illegitimate child's future right to inherit.
[117] Inze v. Austria 1987, 37, 38.
[118] See: ECtHR, *Lithgow and others,* 8 July 1986 (9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; 9405/81) 177.
[119] Inze v. Austria 1987, 41-45.
[120] ECtHR, *Osinger v. Austria*, 24 March 2005 (54645/00).
[121] Osinger v. Austria 2005, 8-35.
[122] Osinger v. Austria, 2005, 38.

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Article 8 of the Convention – 'Right to respect for private and family life' – , since the family relations and the pecuniary issues of the parties are none of the general public's concern. Referring to the earlier case law of the ECtHR[123] the state argues that deciding on such a technical question – like the hereditary nature of a farm –, can be judged without holding a public hearing. The ECtHR, while acknowledged that the above argument is legitimate, reiterated that based on its case law,[124] publicity is one of the main guarantees of fair trial, which provides the control of society above the procedures of the state organs. It is fact that the Court's case law allows the states to exempt certain cases;[125] the ECtHR however still reserves the right,[126] to supervise such national rules. In the present case, the ECtHR was not satisfied with the state's argument, that in the case at hand, just like in the *Schuler-Zgraggen v. Switzerland case*[127] it was only a question technical nature, which was needed to be clarified and accordingly found the infringement of the right to a fair trial because of the lack of public hearing.[128]

3. Summary

The author of the current article sought to the answer whether Section 108 of the Transitional Law is in conformity with the Convention from the perspective of the right to a fair trial, the right to an affective remedy and the right to property.

According to the permanent case law of the ECtHR regarding the *right to a fair trial*, the states enjoy a wide margin of appreciation regarding the rules of judicial review and the kind of evidence they require. In the land consolidation and environment protection cases the denial of holding a public hearing was a rather common complaint. The Court reiterated that according to its case law – amongst others in the Stallinger and Kuso – case, the land commissions can be regarded as courts and since they hold public hearings, there is no need for a public hearing held by the domestic courts. Furthermore, the oral hearing can be dismissed in case, when answering the question at stake requires high technical qualification or it is necessary to answer a complicated legal question as it occurred in the Schelling case, which was introduced among the environment protection cases. A regulation however, which categorically excludes judicial revision – as it was put into record amongst others in the Pyrantiená case – contraradicts the Convention.

In the land consolidation cases the other typical complaint was the unreasonable length of the procedures as some of the procedures lasted for a decade or

123 ECtHR, *Varela Assalino v. Portugalia,* 25 April 2002 (643369/01).
124 ECtHR, *Sutter v. Switzerland*, 22 February 1984 (8209/78), 26.
125 In the particular case the Court accepted the state's argument that in case of dangerous criminals providing publicity requires disproportional efforts from the state on the field of maintaining security. See: ECtHR *Campbell and Fell v. the United Kingdom*, 28 June1984 (7819/77 7878/77), 87-88.
126 ECtHR, *Riepan v. Austria*, 14 November 2000 (35115/97), 34.
127 ECtHR, *Schuler-Zgraggen v. Switzerland*, 24 June 1993 (14518/89).
128 Osinger v. Austria 2005, 39, 43-44, 47, 49, 51, 53.

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even longer. The court based on its case law examines three aspects in this regard: (i) the complexity of the case; (ii) the applicants' behaviour and the (iii) conduct of the relevant authorities. While land consolidation procedures are complex and time consuming by their very nature, in most cases the Court found the infringement of the right to a fair trial as that their length was beyond reasonable time.

Summarizing the above, it can be concluded that in the land consolidation cases, the applicants typically alleged the infringement of their right to a fair trial. The infringement of the right to property was alleged only secondarily in nature, typically because of the insufficient amount of compensation received. Moreover, the ECtHR in itself found it unnecessary to examine the cases under the right to property. At the same time, it occurred that the Court examined the length of the proceedings under the property rights, instead of the right to a fair trial as the Courts case law – Airey case – states: '*one and the same fact may fall foul of more than one provision of the Convention and Protocols'* That is to say they are interchangeable with each other.

The permanent case law of the ECtHR – which was brought into prominence in the compensation and hereditary related cases –, requires that the expropriation must be based on law, to pursue a legitimate aim and has to be proportionate. Public interest for example can be regarded as a legitimate aim, regarding of which, the state legislatures enjoy a vague margin of appreciation as stated in the James case. Moreover, the former eastern bloc countries were in special situation and enjoyed an even wider margin of appreciation as noted in the Jahn case by the ECtHR.

Public interest is necessarily a vague notion, which can include the correcting of mistakes committed by the state earlier, e.g. providing compensation for those – or their heirs –, who were deprived of their property after the Second World War. Based on the case law of the Court however, remedying of old injuries does not create disproportionate new wrongs as it was stated in the Pincová case.

Preventing the fragmentation of agricultural plots through state legislation, which allows only one heir – most probably the eldest and the one, who has the necessary qualification – can be regarded as pursuing to public interest. Actually, Austrian laws restrict the right of the heirs without the necessary qualification to acquire agricultural property. This regulation is in conformity with the Convention as far as it's not discriminatory like the Inze case, and the rules of a fair trial are held, like in the Osinger case.

Examining the proportionality of the deprivation of property, the amount of compensation received by the applicants is of paramount nature, which *on the one hand* has to be reasonably related to market value of the lost property, on the other hand legitimate objectives of 'public interest' may call for less than reimbursement of the full market value as it was stated in the Pincová case.

The question to be answered after studying the case law of the ECtHR is whether the Hungarian regulation, namely Section 108 of the Transitional Law is in conformity with the Convention. The author of the current article firmly believes that from the point of the right to a fair trial it is surly against the convention, while from the aspect of the right to property, it is most probably against it. – On condition that the presumption introduced in the first chapter is accepted.

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Regarding *the right to a fair trial*, the Hungarian regulation, by ex lege abolishing every ususfructus contract on agricultural land based on a statutory presumption – namely that every ususfructus contract was concluded in order to circumvent the law –, and excluding the judicial review of the cases on a one by one basis is contrary to the rights of fair trial and effective remedy even if state legislations enjoy a wide margin of appreciation as it was stated in the Pyrantienà case.

Regarding the right to property it has to be examined whether the act of the state authorities is based on the law, pursue to a legitimate aim – e.g. public interest – and is it proportionate? The answer to the first question is clear: it is based on the law. The answers to the other two questions are not that easy, however. While the abolishment of contracts, which were concluded contrary to the law, with the intention of circumventing the laws, can be regarded as pursuing legitimate aim, public interest, the method chosen by the state is disproportionate to the aim to be achieved as it affects those parties too, who acted in a good faith. As a result remedying of old injuries create disproportionate new wrongs, which is against the Convention as it was stated in the Pincová case. Furthemrore, it has to be noted that – as it was stated in the Tumeliai case –, illegally obtained property too, could enjoy statutory protection. Thus, ususfructus contract aiming at circumventing laws can enjoy some kind of protection too, even if it's not fair based on a natural sense of justice.

Going further with these thoughts, from the aspect of proportionality it should be examined how the compensaton received compares to the market value of the lost property as it was stated in the Pincová case. The HCC in its resolution 25/2015 (VII.21.) found that the fact that the Hungarian Parliament failed to create the special rules which are to be applied in case of the final settlement between the contracting parties, where the general rules of the Hungarian Civil Code cannot be applied is contrary to the Basic Law of Hungary. As a result, certain costs and expenses are not reimbursed in the course of the final settlement between the former ususfructuaries and the proprietors.

One should keep in mind however that in the land consolidation cases, the ECtHR – in case the parties alleged at all – either refused to examine the violation of property right arguing that based on Austrian laws the parties did not have a property right, like in the Prischl case, or examined the infringement of property right under the length of the procedure as in the Erkner case. In a third instance – the Ortner case – the Court did not examine it arguing that stating the violation of the right to a fair trial in itself constitutes a just satisfaction.

The question whether the ECtHR would examine a Hungarian case possibly brought before it under the right to property or only under the right to fair trial is still waiting to be answered.

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