The ECtHR standards before the Constitutional Courts:

Balancing rent-control and property rights in Poland, Croatia and Slovenia

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Abstract

This thesis examines the legislative changes undertaken by Poland, Croatia and Slovenia in regards to their housing schemes, as a part of a sweeping set of democratic reforms. In the midst of a comprehensive denationalisation based on the „sale to occupier" principle, the rights of the „previous owners" came to clash with the rights of the tenants. Balancing those rights became a difficult task for the domestic legislators and for the Constitutional Courts. The main objective of the thesis is to evaluate the impetus provided by the Constitutional Courts, as preconditioned by the national legislation, and observed in the light of the property protection standards set by the European Court of Human Rights. This thesis emphasises the key role of the Constitutional Courts, not only in balancing and reconciling the competing rights, but also in setting new, firm points of reference for the ongoing process of democratic transition.

Introduction

In the early 1990's Eastern European countries underwent a series of political and social changes which were meant to facilitate their transition from planned economy and single- party rule to capitalism and democracy. One of the most peculiar features of the old regime was the housing system which was administered by the State under various special tenancy schemes. The subsequent reforms were of great importance and carried significant implications for a very large number of citizens.

This thesis will focus on three post-communist countries – Poland, Croatia and Slovenia. During the communist period, some flat owners were forcefully deprived of their flats and special tenancy schemes were established in favour of third parties in relation to those flats. After the changes of the early 1990's, it seemed only logical that the newly democratic states would introduce legislation to fully remedy the injustice done to the „previous owners", in terms of allowing the (previous) owners to freely use and rent out the flats at market price. For a number of reasons, some legislators chose to retain the status quo or just create the illusion of change by using new terminology. When the „previous owners" eventually took their cases to Strasbourg (*Hutten-Czapska v. Poland*[1] and *Statileo v. Croatia*[2]), the European Court of Human Rights (ECtHR) found a violation of Article 1 of Protocol 1.

One has to bear in mind that the domestic Constitutional Courts examined the relevant legislation on several occasions previously to the ECtHR judgments. However, at the time the Courts themselves only started to seek new points of reference and authority, which eventually led to some unpredictable developments in their case law. Kuti argues that the

[1] *Hutten-Czapska v Poland*, App no 35014/97 (ECtHR, 19 June 2006).
[2] *Statileo v Croatia* App no 12027/10 (ECtHR 10 July 2014).

approach of the Eastern European Constitutional Courts remained „far from consequent and conclusive, as they sometimes either upheld problematic provisions, or contributed, through their decisions, to the enhancement of confusion and perpetuation of injustice.“[3] Korzec claims that „the vicissitudes of democratization were recorded in the EUCrtHR and the Constitutional Tribunal's case-load and Poland's role in Strasbourg, which evolved from tiresome violations to stimulating developments of the technique of pilot and quasi-pilot judgments.“[4]

Rodin reproaches the Croatian Constitutional Court for showing „unsolicited subservience to the legislature, characterized by a low intensity of judicial scrutiny“[5], while Cerar (in terms of characterising the Slovenian Constitutional Court) talks of an „overly positive self-perception of the Constitutional Court judges and of the court itself.“[6] Avbelj and Letnar Černič corroborate his claim by emphasising the Courts active approach in overseeing the Parliament and the Government.[7]

As for the ECtHR cases, *Hutten-Czapska* is a well-known Grand Chamber judgment which resulted in a pilot-procedure being applied. The judgments in *Statileo* and *Berger-Krall and Others v. Slovenia*[8], date from 2014 and carry important lessons in regards to Article 1 of Protocol 1 of the European Convention on Human Rights (ECHR). So far, there has been no systematic attempt to analyse the implications and the relevance of these two cases, despite the many interesting points of comparison. To begin with, the Croatian and the Slovenian

[3] Csongor Kuti, *Post-Communist Restitution and the Rule of Law* (Central European University Press 2009) 292-293.
[4] Piotr Korzec 'Poland' in Leonard M Hammer and Frank Emmert (eds), *The European Convention on Human Rights and Fundamental Freedoms in Central and Eastern Europe (*Eleven International Publishing 2012) 351-352.
[5] Siniša Rodin 'Croatia' in Leonard M Hammer and Frank Emmert (eds), *The European Convention on Human Rights and Fundamental Freedoms in Central and Eastern Europe (*Eleven International Publishing 2012) 136.
[6] Miroslav Cerar, 'Slovenia's Constitutional Court within the Separation of Powers' in Wojciech Sadurski (ed), *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (Kluwer Law International 2003) 244.
[7] ibid 528.
[8] *Berger-Krall and Others v Slovenia*, App no 14717/04 (ECtHR, 12 June 2014).

legislation on the matter went their separate ways in terms of actually changing the position of the „previous owners“ and the tenants. Furthermore, *Statileo* is a case brought by the „previous owner“ while in *Berger-Krall* the case was made by the tenants. Last but not least, the involvement of the Constitutional Courts differed greatly, as well as the main points emphasised in their judgments.

This being the general context, my interest goes beyond the comparison of the legislative solutions and the subsequent cases before the ECtHR. I am interested in the „contribution“ made by the national Constitutional Courts and their approach to this fundamental transitional issue, in light of the ECtHR rights protection standards. The national legislative frameworks are set up through the activities of the national parliaments and subsequently through the activities of the Constitutional Courts, in either *in concreto* or *in abstracto* review.

The aim of this thesis is to demonstrate that Constitutional Courts contribute the most to keeping the national legislation aligned with the ECtHR rights protection standards when they play an active, assertive role. Of course, this is a difficult task due to the complexity of the situation, since the transition to democracy in practice entails a comprehensive social reform while simultaneously dealing with numerous accumulated problems and a chronic lack of funds.

As for the Constitutional Courts - several important issues need to be raised. How do Constitutional Courts deal with delicate matters which carry far-reaching consequences while shaping the broader national post-communist context? Can they be perceived as the generators of transition? How do they weigh the conflicting property rights while protecting the rule of law? What are the circumstances under which they fail to achieve the above mentioned goal despite their best efforts?

I have found that Constitutional Courts which take on the inactive, formalist, „rear view mirror“ approach, become reluctant to go into any kind of serious proportionality analysis. The ones that do go into the analysis focus on the proportionality of the limitations imposed on the individual property rights (the controlled rent), but sometimes an additional analysis is conducted, in regards to the possible financial burden on other actors, such as the municipalities.

While acknowledging the political nature of the Constitutional Courts, this thesis will not discuss matters such as the influence of judge's affiliations and party politics on the judgments.

The thesis is composed of three chapters. The first chapter introduces the communist housing systems and the legislative developments of the 1990's. I believe that it is important to give sufficient context and clarify the implications of the legal legacy to get a better understanding of the following chapters. In the second chapter I will discuss the actual judgments of the Constitutional Courts, their arguments, viewpoints and the impact on the legislation, while assessing the influence of the ECtHR standards. The third chapter is on the protection of property before the ECtHR and the Court's proportionality analysis in the housing cases. A part of chapter three is also dedicated to the lessons learned and the follow-up, particularly in the light of the Polish pilot-procedure.

Chapter I – The old and the new housing legislation

In order to get a full picture of the nature and the complexity of the transitional housing issues, one must first look at the housing legislation relevant in both periods. The purpose of this chapter is therefore to provide an overview of the social and legal background of the housing regimes in communist Poland and Yugoslavia. Taking this as a starting point, I will then elaborate on the new housing legislation of the 1990's. Since its primary focus was on the privatisation of the housing sector, the legislation regulating the lease mostly failed to reconcile the rights of the lessees and the „previous owners".

In *Hutten-Czapska* and *Statileo*, the European Court of Human Rights found that the rights of the applicants (flat owners) were violated under Article 1 of the Protocol 1 of the Convention. By introducing „Sale to occupier" laws in the 1990's, the majority of former tenants in Poland, Croatia and Slovenia became owners of the denationalised flats under very favourable conditions. However, for the tenants living in flats which were nationalised or de facto put under state management, appropriate tenancy schemes needed to be set up. As the ECtHR judgments in *Hutten-Czapska* and *Statileo* demonstrated, this was done by putting an excessive financial burden on the flat owners. Apart from the legislators, the Constitutional Courts share some of the blame, since they apparently failed to carry out their task in human rights protection. But one has to wonder, how much maneuvering space the Constitutional Courts actually had when deciding on large-scale issues like housing, especially in a transitional context. Could they ever have the last word in an altercation with the legislators and how much were they bound by the legacy of the former regimes? And did the lack of funds make the situation even worse?

1.1 The housing legacy of Poland and Yugoslavia

Although this thesis covers three different jurisdictions – Poland, Croatia and Slovenia, for the period up to 1991, only two jurisdictions will be discussed in regards to the „old" legislation – Poland and Yugoslavia. From 1945 until 1971, housing issues in Yugoslavia were regulated on the federal level but after 1971 the republics were allowed to legislate on the matter. In practice, however, the republics incorporated the provisions of federal laws into the „republic laws".[9] Of course, one should bear in mind that the former communist regimes made sure that important issues were regulated in a uniform manner.

In Poland, the communist elite primarily kept a firm grip on the economy and therefore the „postwar nationalisation mainly affected industrial facilities and large farms, not housing."[10] „Soviet-style centralized state planning was introduced in the First Six-Year Plan, which began in 1950"[11] and which involved developing giant factories and work-intensive industries. The Polish centrally planned economy envisaged the development of heavy industry as its main priority, and with all the investment going into the industry, significantly smaller funds were allocated towards the social needs of the workers, namely the housing.

As Szymanska and Matczak explain, „over the 50 years after the Second World War, Poland was transformed from a country where the majority of the population lived in rural areas to one with a distinctly urban character." [12] Industrialisation paved the way for urbanisation, but providing accommodation for the workers was a constant problem. The anticipated influx of workers most definitely had an impact on the property rights of wealthier

[9] Jadranko Crnić, *The Housing Act with commentary* [*Zakon o stambenim odnosima s komentarom*] (Crnalić Asim (ed), 3rd edn, Narodne Novine 1987) 1-2.
[10] Alina Muziol-Weclawowitz 'Poland: Old Problems and New Dilemmas' in Jozsef Hegedus, Martin Lux and Nóra Teller (eds), *Social Housing in Transition Countries* (Taylor & Francis 2012) 200
[11] 'Poland - From Stalinism to the Polish October' <http://countrystudies.us/poland/17.htm> accessed 22 March 2015.
[12] D. Szymanska and A. Matczak, 'Urbanization in Poland: Tendencies and Transformation' (2002) 9 European Urban and Regional Studies 39, 42.

families. A number of family houses in Poland (like the one owned by the parents of the applicant in *Hutten-Czapska*) were put under state control, but indeed „the communist penchant for nationalization never extended to private buildings and apartments.“[13] In 1945, the Cabinet Decree on the state management of housing and lease control introduced „state management of housing matters“, which was then followed by the Decree on the lease of dwellings. The two Decrees administered all housing matters, gave the state authorities the power „to issue a decision assigning to a tenant a particular flat in a privately owned building“ [14] and also „laid down rules concerning rent control,“ [15] In 1974, the „state management of housing matters“ was replaced by the “special lease scheme,” [16] which continued the existing practices.

„[T]he right to lease a flat in a building subject to 'State management' (…) was conferred on a tenant by an administrative decision,“[17] therefore the selection of the tenants and the terms and the duration of the lease were completely out of the owner's control. As Garlicki points out, „while the original landlords were technically not deprived of ownership, in practice their property rights became illusory. Furthermore, landlords remained responsible for maintaining their properties in habitable condition, an obligation that could not be offset by the very low rates of official rents.“[18] Regardless of whether it was on purpose or not, ownership was made burdensome and forced to take a back seat to communist values and priorities.

In the former Yugoslavia, however, many flat owners actually lost their property titles but „some homeownership was preserved, so that families were allowed to own a maximum

[13] L. Garlicki, ‘Cooperation of Courts: The Role of Supranational Jurisdictions in Europe’ (2008) 6 International Journal of Constitutional Law 509, 513.
[14] *Hutten-Czapska* (n 1) para 68.
[15] ibid.
[16] ibid para 69.
[17] ibid.
[18] Garlicki (n 13) 513.

of two larger or three smaller dwellings."[19] But what actually happened was that even the privately owned flats came under state management. The „purpose" of the nationalisation was to accumulate „state ownership" and build a state-run industry. As the „state ownership" increased, the state bureaucracy managing became more and more powerful.[20] The remedy was introduced in a form of „socially owned property" which means that „the immediate worker has to be reconnected with the means of production"[21] (and which is eventually achieved by cutting out the bureaucracy and introducing communal decision making bodies, such as worker councils and worker self-management).

The concept of „socially owned property", used only in Yugoslavia, perceived flats and houses through the ideological lens of satisfying the needs of the *worker and his family*. The 1953 Yugoslav Decree on Administration of residential buildings introduced the „right to a flat, entitling its holder to permanent and unrestricted use of a flat for living purposes."[22] Each organisational unit employing the workers (*osnovna organizacija udruženog rada*), created its own by-laws which set the grounds and the criteria for awarding the flats.[23] Despite the emphasis being on the worker, an additional category was introduced in the form of „flats of solidarity,"[24] aiming to provide housing for low income families. Subsequently, the 1959 Housing Act introduced a unified concept of „specially protected tenancy" and turned the management of the flats completely over to the organisational units and the municipalities.[25]

Legal theory had a hard time classifying the „specially protected tenancy". It is best described as a „right sui generis". Being awarded with this right „entitled its holder and the

[19] Gojko Bežovan, 'The Social Housing Search Delayed by Postwar Reconstruction' in Jozsef Hegedus, Martin Lux and Nóra Teller (eds), *Social Housing in Transition Countries* (Taylor & Francis 2012) 130.
[20] Martin Vedriš and Petar Klarić, The elements of Property Law [*Osnove Imovinskog Prava]* (7th edn, Narodne Novine 1989) 243.
[21] ibid 245.
[22] *Statileo* (n 2) para 24.
[23] Legal Encyclopedia *[Pravna Enciklopedija]*, vol 2 (3rd edn, Savremena administracija 1989) 1247.
[24] Bezovan (n 19) 131.
[25] ibid 130.

members of his or her household to permanent (lifelong) and unrestricted use of a particular flat for living purposes against the payment of a nominal fee covering only maintenance costs and depreciation.“[26] Indeed, the holder's prerogatives were quite broad – apart from having management prerogatives, the holder could sub-let or even exchange the flat for a different flat. The holder could lose their right „only in judicial proceedings and on limited grounds, the most important one being failure by the holder to use the flat for living for a continuous period of at least six months without justified reason.“[27]

Compared to Poland, the specially protected tenancy in Yugoslavia was allocated by „an administrative decision followed by a contract“[28] but again the „previous owners“ or the private owner (in those cases where flats were not nationalised but came under the management of the authorities) had no say on the terms of the contract or on the selection of the holder.

The holders of the „specially protected tenancy“ and their families lived under improved living conditions. They were no longer at the mercy of the landlord and the system was set up to take into consideration the size and the actual needs of the family. In addition, new housing was constantly being built with the funds contributed by employed citizens on a monthly basis.[29] The fact that „specially protected tenancies“ were designed to be passed from one generation to the next, demonstrated a level of genuine concern for the future well being of the family.

The communist regimes however, demonstrated blatant disrespect for the individual property rights. Legal and de facto restrictions on individual property proved to be unsustainable even in the broader context of stagnating economies of the 1980's. Serious crisis

[26] *Statileo* (n 2) para 24.
[27] ibid.
[28] *Berger-Krall* (n 8) para 8.
[29] ibid para 15.

was on the horizon. Poland and Yugoslavia were not members of the Council of Europe, since the organisation pursued goals unacceptable to the communist regimes. It is ironic how their housing schemes eventually came under the scrutiny of the ECtHR.

1.2 The transition to democracy and housing reform

After forty-five years of Communism, the new democracies found themselves under the heavy burden of high expectations. The territory of transition was uncharted and former communist states needed to look for familiar points of reference. According to Gavella, „after Croatia's independence, a process of reintegration of the Croatian legal order into the continental legal sphere had begun.“[30] The old Austrian Civil Code became a source of inspiration for the future Croatian legislation. Together with Poland and Slovenia, Croatia went on to build modern legal systems, capable of protecting private property.

As Gavella points out, transition implies two tasks – one of them is to set up a new legal order against the norms of the existing legal order, which need to be eliminated, replaced or subordinated to the new legal order. To this purpose, transitional provisions are used. The other task, the more difficult task, is to alter the legal and social relations that are based on the legal norms stemming from the previous system.[31]

I agree with Allen and Douglas when they argue that „the primary value of the rule of law in post-communist states is the stability of expectations.“[32] The „acquired rights“ should not be interfered with in an nontransparent manner. Introducing large scale changes,

[30] Nikola Gavella 'Property Law Regulation in the Croatian Legal System and the Legal Relations Transition Process' [Stvarnopravno uređenje u hrvatskom pravnom poretku i proces tranzicije pravnih odnosa in Stvarnopravna uređenja tranzicijskih zemalja], in Tatjana Josipović (ed), Property Regimes in Transitional Countries - Current State and Perspectives [*Stvarnopravna uređenja tranzicijskih zemalja – stanje i perspektive*] (Sveučilište u Zagrebu, Pravni fakultet 2009) 2.
[31] ibid 6.
[32] Tom Allen and Benedict Douglas 'Closing the door on restitution: the European Court of Human Rights' in Antoine C Buyse and Michael Hamilton (eds), *Transitional Jurisprudence and the European Convention on Human Rights: Justice, Politics and Rights* (Cambridge University Press 2011) 211

especially in housing matters, is very sensitive and any such change potentially affects thousands of citizens. The legislation introducing the changes needs to be well-written,[33] as clear as possible, and its implementation should be facilitated by educated, efficient public administration.

Have these criteria been met? Having the legislation scattered in several acts does a disservice to the transparency attempts. The Croatian parliament dealt with the matter through the Sale to Occupier Act,[34] the Lease of Flats Act,[35] and the Restitution Act.[36] The Lease of Flats Act, besides regulating ordinary lease, contains an entire section on former specially protected tenants and now protected lessees. According to Article 30, with the Act coming into force, the „specially protected tenants" were automatically to be considered protected lessees. They were given a six month period to enter into a lease contract with the owner and in those cases where the owner rejected to do so, they were given recourse to court.

Mr Statileo, the applicant in the Croatian case, found himself in this particular situation. He did not want to sign the lease contract and the lessee brought a civil action against him in order to obtain a judgment by the court to replace the lease contract. The municipal court, and all the other domestic instances ruled in favour of the lessee, which was in fact no surprise, having regard to the Lease of flats Act. Therefore, Mr Statileo was left

[33] Legislation which is not susceptible to constant amendments and corrections, which makes both compliance and implementation more difficult.

[34] Sale to Occupier Act [*Zakon o prodaji stanova na kojima postoji stanarsko pravo*] („Official Gazette of Republic of Croatia" nos. NN 43/92, 69/92, 87/92, 25/93, 26/93, 48/93, 2/94, 44/94, 47/94, 58/95, 103/95, 11/96, 76/96, 111/96, 11/97, 193/97, 119/97, 68/98, 163/98, 22/99, 96/99, 120/00, 94/0 and 78/02)

[35] Lease of Flats Act [*Zakon o najmu stanova*] („Official Gazette of Republic of Croatia" nos. NN 91/96, 48/98, 66/98 and 22/06).

[36] Restitution Act [*Zakon o naknadi za imovinu oduzetu za vrijeme jugoslavenske komunističke vladavine*] („Official Gazette of Republic of Croatia" nos. NN *92/96, 39/99, 42/99, 92/99, 43/00, 131/00, 27/01, 34/01, 65/01, 118/01, 80/02, 81/02)*

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with an unwanted tenant, leasing the flat indefinitely, with very few eviction grounds and charging rent in the amount set by the government.

The Decree on the standards and criteria for the determination of protected rent[37] provided the owners with a complicated mathematical formula to calculate the rent given the variables such as location, usability and the features of the flat. The amount of actual rent charged in accordance with this formula remained very low compared to market rent.[38] It was quite obvious that such significant difference in the amount of rent charged was designed to protect the low-income lessees from market prices.

A similar solution was adopted in Poland, because apparently a housing shortage and steep rent prices „prompted the legislature not only to maintain elements of the so-called 'special lease scheme' in respect of State-owned dwellings, but also to continue to apply that scheme – temporarily, for a period of ten years expiring on 31 December 2004 – to privately owned buildings and dwellings.“[39] With a constantly rising number of urban population[40] Poland had the most severe housing shortage in Eastern Europe. Being well aware of the discontent among the owners, the Polish legislator decided to avoid the particularly humiliating act of having the owners sign the lease contract. The „administrative lease“ was to be treated as a „contractual lease“.[41]

Regardless of the inherent difficulties, it is easy to fall under the impression that a comprehensive reform has not been given much thought in Poland and Croatia. The concerns

[37] Decree on the standards and criteria for the determination of protected rent [*Uredba o uvjetima i mjerilima za utvrđivanje zaštićene najamnine*] („Official Gazette of Republic of Croatia“ nos. 40/97 and 117/05

[38] In *Statileo*, the monthly protected rent, which ranged between 102.14 and 174.48 Croatian Kuna, while a similar flat in the area was rented out for as much as 2.631 Croatian Kuna

[39] *Hutten-Czapska* (n 1) para 14.

[40] Between 1950 and 1997, the share of urban areas has increased from 42.5 percent to 61.7. See Szymańska D., Matczak A, (n 12) 39.

[41] *Hutten-Czapska* para 77.

of the governments were of a different nature – mostly how to privatise the economy. The tedious tasks of executing a comprehensive housing reform was left for another time and possibly for another government. But did Poland and Croatia choose convenience over reform by keeping the present tenants in the flats and their rents low, and furthermore, did they knowingly act at the expense of the owners?

On the one hand, Poland's policy is somewhat understandable – there is still a significant housing shortage, and low-income families are dependant on rent control.[42] Nevertheless, the ECtHR found a systemic violation of Article 1 of Protocol 1. The pilot-procedure introduced after the *Hutten-Czapska* judgment achieved its purpose, but the „process of wiping out all the causes and consequences of the violation of the Convention found in the pilot case had necessarily to take place gradually.“[43] Therefore, there is no doubt that meaningful reform takes longer then a single government term.

On the other hand, the Croatian housing policy is slightly more difficult to grasp. As mentioned earlier, specially protected tenancy in Yugoslavia had an ideological overtone. From 1974 onward, it was only possible to award „specially protected tenancy“ over „socially owned property“, a legal construct which was abolished under the new legislation. Why then introduce the „protected lease“ which so obviously coincides with the „specially protected tenancy“? In its arguments before the ECtHR, the Croatian government tried to present the „protected lease“ as the means to „ease the negative consequences of the transition from the Socialist social and economic system to a democratic system and market economy.“[44] Personally, this seems like a very vague argument which could be used for any number of

[42] Alina Muziol-Weclawowitz (n 10) 200.
[43] Council of Europe, Press release no. 284, 31.03.2011, „European Court closes pilot judgment procedure in Polish “rent-control” cases, following introduction of compensation scheme“.
[44] *Statileo* (n 2) para 103.

subjects, and I suspect that its real purpose was to emphasise the wide margin of appreciation enjoyed by the state.

Some additional questions need to be raised in the *Statileo* case. If there was no shortage of flats to make the prices skyrocket, what was the purpose of the „protected lease"? Could the „protected lease" be regarded as a general safety net for anyone who had the misfortune of being awarded specially protected tenancy on a flat with a „previous owner", which prevented the purchase under favourable conditions? Have we really detached ourselves from the old mindset if everybody is supposed to own the flat they live in? Why have there been no attempts to examine the current financial situation of the tenants to see if they actually need that protection?

In the 2012 Annual Report, the Croatian Ombudsman presented a complaint made by a landlord who was (under the Lease of Flats Act) forced to pay the condominium fee, meaning that a „78 year-old pensioner, [is thus forced to] co-finance the housing of a working-age tenant who is 39 years old."[45] In the 2013 Annual Report, the Croatian Ombudsman expressed her disagreement with the proposed 2013 Amendment to the Lease of Flats Act arguing that the „ten-year period in which the protected rent should reach the level of freely negotiated rent for the owners means restriction of their right of ownership contrary to the Constitution, which guarantees the right of ownership and provides that property may be taken or restricted in the interest of the Republic of Croatia [only] against payment of compensation for its market value."[46] Up to the present moment, the amendment proposed in 2013 has neither been adopted by the Parliament (Sabor), nor has it been replaced by another proposal.

[45] *Statileo* (n 2) para 83.
[46] ibid para 84.

In Slovenia, the „specially protected tenancies“ were dismantled through the Housing Act, and the Denationalisation Act, both passed in 1991. As in Poland, the protected tenancy was automatically replaced by a lease contract, but under somewhat different terms. New terms of lease were established. Additional eviction grounds (for misconduct) were introduced. The rent charged was legally regulated non-profit rent (as in Poland and Croatia) but the rent „not only covered maintenance costs and depreciation, but also included a sum to offset capital costs and management of the dwelling.“[47] Furthermore, only the spouse, partner or immediate family member living in the flat could „inherit“ the lease.

However, the changes under the Housing Act were not as controversial as those under the Slovenian Denationalisation act. By eliminating the „socially owned property“, flats with „previous owners“ became ownership of the municipalities.[48] After the Slovenian Parliament had passed the relevant housing legislation, the deadlines for filing restitution claims ran parallel to those for the purchase of the flats, but the latter were shorter. If any of the specially protected tenants were unaware of the existence of the „previous owner“ of the flat, they were up for an unpleasant surprise after having their purchase requests denied.[49] In principle, the tenancy was not supposed to affect the denationalisation proceedings but not being able to participate in the proceedings put the tenants in a vulnerable position.[50] Upon the conclusion of the denationalisation proceedings, the previous holders of specially protected tenancy could only purchase the flats if the owners agreed to sell within one year from the restitution.“[51]

With uncertainty exacerbated, the Housing Act amendment which introduced „the third model“ was embraced by the tenants.[52] The „third model“ allowed the tenants to

[47] *Berger-Krall* (n 8) para 23.
[48] ibid para 18.
[49] ibid para 26.
[50] ibid para 28.
[51] ibid para 20.
[52] ibid para 138.

„purchase a comparable substitute flat on favourable terms from the municipality,“[53] and therefore serious disturbances occurred when the „third model“ got repealed by the Constitutional Court[54] for putting an excessive financial burden on the municipalities.

1.3 The undeniable appeal of ownership

The fuss raised over the repealed „third model“ in *Berger-Krall* answers the question why everybody wants to own a flat. A chance to buy a discounted flat is a once in a lifetime chance, especially as a part of a campaign of wide-spread denationalisation. If others are buying property under extremely favourable terms, no one wants to be left out. But the tenant who was denied this opportunity would eventually settle for a special lease regime with a high level of protection (resembling those from the communist times).

I imagine that a Western economist would raise many issues on this topic. On the one hand, losing money by renting out a flat makes no economic sense for the owner. On the other hand, in a system which pretends to have embraced market economy, allowing everybody to buy „discounted“ flats is unheard of. But this is what the situation was like and having to deal with these „strange“ phenomena was not an easy task for the domestic Constitutional Courts (assuming they had the ECtHR standards in mind).

The transition from Communism to democracy entailed a number of reforms, housing reform being one of them. The main idea of the reform was privatisation, however, the „sale to occupier“ principle could not be applied to flats which had „previous owners“ or to privately owned flats which were managed by the state. As a consequence, under the new legislation the former tenants became lessees and remained in the flats, while paying the owner a sum of rent set by the state. The new lessees kept a number of rights stemming from

[53] *Berger-Krall* (n 8) para 35.
[54] Decision of the Slovenian Constitutional Court no. U-I-268/96 dated 25 November 1999, available in Slovenian language, accessed on 25 March 2015 <http://odlocitve.us-rs.si/sl/odlocitev/US19817?q=U-I-268%2F96>

the previous regime, which added an additional strain in the relations with the owner of the flat. The scope of these rights and standards for setting the amount of rent were therefore at the heart of the issue. In conclusion, this chapter demonstrated that countries coming from a similar communist milieu, (in terms of housing legislation) created different solutions to similar problems, although some of them were quite dubious (Croatia and Poland). In any case, the Constitutional Courts had the opportunity to provide the impetus for a comprehensive housing reform. The next chapter of the thesis will go into in-depth analysis of the judgments and their overall approach.

Chapter II – Constitutional Courts

As it was pointed out in the previous chapter, the transitional housing legislation left many „previous owners" and tenants unhappy. The Polish,[55] Croatian and Slovenian Constitutional Courts received an overwhelming number of constitutional complaints coming from both sides. Still, the issue for the Constitutional Courts was not limited to ruling in those cases – it was also about actively developing rights-protection jurisprudence and influencing the process of democratic transition. This chapter therefore has two main points of interest. Firstly, it will consider the prerequisites, the tools and the importance of introducing ECHR standards into the national rights-protection jurisprudence, by claiming that it took a considerable amount of activism on the behalf of the post-communist Constitutional Courts to introduce these standards. Secondly, this chapter will analyse to what extent the lines of reasoning displayed in the transitional housing cases of the Polish, Croatian and Slovenian Constitutional Courts reflected the ECHR values.

2. 1 Democratic Constitutions set the limits on the Constitutional Courts

The Constitutional Court should first and foremost be bound by the provisions of the Constitution which prescribe the competences, the procedures and the powers of the Constitutional Court. The constitutional setup is obviously beyond the control of the Constitutional Court and it reflects the role which was initially intended for the Court by the drafters of the Constitution. The democratic Constitutions adopted in Croatia and Slovenia (in 1990 and 1991), explicitly provided the Constitutional Courts with the power to repeal unconstitutional laws[56] as well as to review constitutional complaints.[57] In Poland, on the

[55] Further on: the Polish Constitutional Court.
[56] Official translation of the Constitution of the Republic of Slovenia, Article 161 of the Slovenian Constitution [Ustava Republike Slovenije], accessed 20 March 2015 < http://www.us-rs.si/en/about-the-court/legal-basis/ >, Official translation of the Constitution of the Republic of Croatia, Article 131 [Ustav Republike Hrvatske], accessed 20 March 2015 < http://www.sabor.hr/Default.aspx?art=2410>.

other hand, „the Sejm retained its power to reject the CC judgments on the unconstitutionality of statutes“[58] up until 1997, when the new Constitution came into force (the new Constitution introduced the constitutional complaint as well). In fact, the initial limitations hindered the work of the Polish Court less then one might expect.[59] The institutional setup in retrospect makes less of a difference then the actual actions and the stance taken by the Court.

The following question consequently comes to mind - does the text of the Constitution determine the Court's reasoning? According to Sadurski „Constitutional courts are (…) subordinate to the constitution as it was shaped by the historical experience of its compliance.“[60] That implies that in their reasoning, the Constitutional Court ought to be bound by the day-to-day material aspect of living under a set of constitutional norms. In the new democracies, torn between high expectations and the old system crumbling, the Constitutional Courts were mostly unwilling to use the chaos as a point of reference.

Does this mean the Constitutional Courts ought to have completely ignored the social realities of the democratic transition and closed themselves off to a space where legal norms are neatly organised and detached from their real-life consequences? By embracing the concept of the Kelsenian „negative legislator“ the post-communist Constitutional Courts could have remained in the safe realm of value-neutrality and at least nominally avoid opposing the legislature (claiming that the Court, by having to „reconstruct the legal situation

[57] Official translation of the Constitution of the Republic of Slovenia, Article 160 of the Slovenian Constitution [Ustava Republike Slovenije], accessed 20 March 2015 < http://www.us-rs.si/en/about-the-court/legal-basis/ >, Official translation of the Constitution of the Republic of Croatia, Article 129 [Ustav Republike Hrvatske], accessed 20 March 2015 < http://www.sabor.hr/Default.aspx?art=2410>.

[58] Leszek Lech Garlicki 'The Experience of the Polish Constitutional Court' in Wojciech Sadurski (ed), *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (Kluwel Law International 2003) 266.

[59] ibid.

[60] Sergio Bartole 'Conclusions: Legitimacy of Constitutional Courts: Between Policy Making and Legal science' in Wojciech Sadurski (ed), *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (Kluwel Law International 2003) 419.

before the statute, (…) is legislating positively as well.“)[61] One might claim that judicial review disguised as a simple „stage in the elaboration of statutes,“[62] would have also posed less of a threat to the political elites. But all these „benefits“ are illusory. The Constitutional Courts would have ended up underperforming and passing up the opportunities to genuinely contribute to the democratisation of the post-communist societies.

Comparable to other citizens, the justices of the post-communist Constitutional Courts feared that the overall societal insecurity caused by the transition would become permanent. New political elites entered the national parliaments to pursue their agenda, (some of it being rather objectionable) and used the transitional legislation as „a vehicle of social, political and ideological transformation.“[63] This was indeed uncharted territory. The instinctive reaction of the Courts was to develop a „commitment to reforms intended to restore 'reasonable normalcy'.“[64] The Constitutional Courts were faced with a difficult task of having to „create a constitutional tradition rather than transform an existing one.“[65] The following chapter will discuss the different approaches developed by the Polish, Croatian and Slovenian Constitutional Courts.

2.2 The fundamental constitutional values and their role in active rights protection

In order to support democratisation through their jurisprudence and to make up for the lack of a constitutional tradition, the post-communist Constitutional Courts used several

[61] John Ferejohn and Pasquale Pasquino 'Constitutional Courts as Deliberative Institutions: Towards an Institutional Theory of Constitutional Justice' in Wojciech Sadurski (ed), *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (Kluwel Law International 2003) 30.
[62] Wojciech Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer 2005) 87.
[63] Kuti (n 3) 294.
[64] Venelin I. Ganev 'Foxes, Hedgehogs, and Learning: Notes on the Past and Future Dilemmas of Postcommunist Constitutionalism' in Adam Czarnota, Martin Krygier and Wojciech Sadurski (eds), *Rethinking the Rule of Law After Communism* (Central European University Press) 75.
[65] ibid.

different vehicles to increase rights protections. One of them was using „fundamental constitutional values as a foundation for interpreting the Constitution,"[66] especially if the Constitution explicitly protects values such as „[F]reedom, equal rights, national and gender equality, peace-making, social justice, respect for human rights, inviolability of ownership, conservation of nature and the environment, the rule of law and a democratic multiparty system."[67] One can question the true intentions of the drafters for introducing such provisions into the text of the Constitution, but nevertheless, these nice, Western-European values provide the Court with the opportunity to strike down any non-conforming legislation which had remained from the old or possibly arisen from the new (deviant) regime.

In the absence of such an elaborate list, the Slovenian Constitutional Court had to make do with „formulating numerous constitutional (sub)principles, which have been implemented as abstract value criteria from directly recorded constitutional principles."[68] A very extensive list of (sub)principles[69] was derived from the constitutional values common to the majority of European countries. Namely „the rule of law, the principle of the social state, the principle of the separation of power**,** the principle of equality or even the principle of democracy"[70] became an endless source of inspiration for the Slovenian Constitutional Court.

It is noticeable that most of the listed constitutional principles and (sub)principles correspond to the Council of Europe values in the areas of human rights, democracy and the rule of law and a number of references to the Convention were made by the Slovenian Constitutional Court even before Slovenia ratified the Convention. Nevertheless, the values highly resembling the Convention values were introduced by an alternate route, through

[66] Branko Smerdel, *On constitutions and men* [*O ustavima i ljudima*] (Novi Informator, 2012) 151.
[67] Croatian constitution (n 56) art 3.
[68] Cerar (n 6) 242 .
[69] The following (sub)principles were derived from the principle of rule of law „principle of legal security and the principle of predictability, the principle of trust in law, the principle of proportionality (…) the principle of fairnes, the principle of preventing arbitrariness" See Cerar (n 6) 242
[70] Cerar (n 6) 242.

expanding the content of the domestic constitutional provisions.

The Polish Constitutional Court did not have such an option at its disposal, but yet again, managed to turn a disadvantage into an advantage. The lack of relevant constitutional provisions in the 1992 „Small Constitution" made the Court develop an extensive jurisprudence „to fill many gaps and adapt the old text of the Constitution to the needs of the transformation."[71] The Polish Constitutional Court simply had to be more explicit about its intentions to introduce Convention values through „transplanting principles and standards of western constitutionalism into Poland"[72]. It seems that finding effective solutions became the specialty of the Polish Constitutional Court.

The boldness and the determination of the Constitutional Courts to use or even create the means of human rights protection ultimately paves the way to the effectiveness of the protection. If „[C]onstitutional [C]ourts must have strong powers to monitor the constitutionality of legislation if constitutional rights are to be meaningful,"[73] then these powers must be used to protect the groups which have only regained their rights after the fall of the old regime. The tendency to pursue the business as usual policy in „marginal issues", generates an environment of continuous rights violations. Therefore, individual rights can be protected only by Constitutional Courts which demonstrate the „willingness to strike down important laws even if (…) a decision upholding the provisions in question was an option genuinely available."[74]

Sadurski lists the Polish and the Slovenian Constitutional Courts among those „most dynamic and powerful in the region."[75] These are the Courts which have openly embraced democratisation and individual rights protection. In times of democratic transition, confidence

[71] Garlicki (n 58) 281.
[72] Bartole (n 60) 410.
[73] Sadurski (n 62) 107.
[74] ibid 104.
[75] ibid.

is demonstrated by insisting on aligning with the values which have a continuous, decade-long tradition in the West. In most cases, the efforts of the Courts did not get a warm welcome from other domestic actors. Considering „the importance of the laws invalidated under the rights provisions and nature of the reasoning leading to such invalidation,"[76] the Polish and the Slovenian Constitutional Courts have been referred to as „particularly activist."[77] Some of this activism was effectively demonstrated in the controversial cases on housing and rent-control.

2.3 Judicial activism and the ECHR

The Convention system is commonly perceived as „an authoritative, dynamic, and transnational source of law."[78] However, one must not forget that the European Convention on Human Rights retains the constitutional status of a treaty in most national legal systems. Before the 1997 Polish Constitution was adopted, the position of international law (ECHR included) within the domestic legal system was not explicitly regulated.[79] A provision in the 1997 Constitution ascertained that the ratified treaties would „constitute part of the domestic legal order and (…) be applied directly.[80] Under Article 141 of the Croatian Constitution international treaties come subordinate only to the Constitution and „have primacy over domestic law" [81] although before the 2010 amendment [82] there were no constitutional provisions which would authorise the domestic courts to apply treaties directly. According to Article 8 and Article 153 of the Slovenian Constitution, treaties shall be directly applicable

[76] ibid 97.
[77] Wojciech Sadurski, *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (Kluwer 2003) 14.
[78] Helen Keller and Alec Stone Sweet, *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Helen Keller ed, Oxford University Press 2008) 25.
[79] Magda Krzyzanowska-Mierzewska 'The Reception Process in Poland and Slovakia' in Helen Keller and Alec Stone Sweet (eds), *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Helen Keller ed, Oxford University Press 2008) 542.
[80] Official translation of the Constitution of the Republic of Poland, Article 91(1) of the Polish Constitution [Konstytucja Rzeczypospolitej Polskiej], accessed 20 March 2015, <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>
[81] Croatian Constitution (n 56) art 141.
[82] Official Gazette NN 76/10.

and have a supra-legislative status. Therefore, at least in Croatia and Poland, there were periods of time when the enforcement of the Convention depended greatly on the efforts made by the Constitutional Courts.

As mentioned earlier, the Slovenian Constitutional Court enforced the ECHR before its ratification (1994)[83], and as the Slovenian judge Zupančić elaborated, it seems „it has now become impossible to maintain the view that the European Court's jurisprudence is simply a separate *virtual reality*, which happens to be above and beyond the systems being continuously fashioned by the national constitutional courts.“[84]

But let us return to the *reality* of the Slovenian housing legislation. Although the legislation aimed towards actual reform, some legislative solutions were initially not as explicit. However, the Slovenian Constitutional Court eliminated the initial „shortcomings“ in an unusually adamant way. In 1996, the Court held that providing tenants with pre-emption rights on denationalised flats (flats with „previous owners“) was unconstitutional.[85] As for the amount of rent charged to former protected tenants, the limitation set on the increase (37%), was found unconstitutional.[86] The Court also restricted the number of household members which could take over the non-profit lease.[87] There is no doubt that these rulings had an impact on the initial policies of the government and the legislator, but not to the extent of jeopardising them completely. However, by deciding to repeal the „third model“[88], the Constitutional Court dropped a real bomb on the legislator. The purpose of the „third model“ was to absorb the shocks and provide a permanent housing solution for tenants unable to buy

[83] Bartole (n 60) 410.
[84] Boštjan M Zupančič, 'Constitutional Law and the Jurisprudence of the European Court of Human Rights: An Attempt at a Synthesis' [2003] Revus 57 para 16.
[85] Decision of the Slovenian Constitutional Court no. U-I-119/94 dated 21 March 1996, available in Slovenian language, accessed on 25 March 2015 < http://odlocitve.us-rs.si/sl/odlocitev/US17780?q=U-I-119%2F94>
[86] Decision of the Slovenian Constitutional Court no. U-I-303/00 dated 20 February 2003 available in Slovenian language, accessed on 25 March 2015 <http://odlocitve.us-rs.si/sl/odlocitev/US22122?q=U-I-303%2F00>
[87] Decision of the Slovenian Constitutional Court no.U-I-128/08 dated 7 October 2009 available in Slovenian language, accessed on 25 March 2015 <http://odlocitve.us-rs.si/sl/odlocitev/US28876?q=U-I-128%2F08>
[88] Decision of the Slovenian Constitutional Court no. U-I-268/96 (n 54)

the flat from the „previous owner". The interests of the municipalities were evidently overlooked in the process. One of the municipalities filed a constitutional complaint under which the Constitutional Court found that „the additional financial burden had unduly restricted the municipalities' newly acquired ownership rights over dwellings which had previously been socially owned."[89] The Constitutional Court even pointed out that the interests of the tenants looking for a substitute dwelling cannot justify these restrictions on the rights of the municipalities.[90] The Slovenian Association of tenants subsequently lodged a „constitutional initiative" essentially demanding that all of the new housing legislation be reviewed by the Constitutional Court.[91]

Slovenian Constitutional Court rejected the „constitutional initiative" and used the occasion to clearly outline its viewpoints while making strong references to the ECtHR case law. Firstly, the Court stated that neither the ECHR nor the domestic legislation imposed an obligation on the state to maintain the same scope of rights (as they existed during Communism).[92] Secondly, the right to home had not been violated since the applicants remained in the flats as tenants under the terms of lease comparable to that in other countries.[93] Thirdly, the Court dismissed the claims of discrimination by reiterating that the position of the applicants differs from the position of other tenants (who managed to buy the flats) because their rights collide with the property rights of the „previous owners".[94] Therefore, the Court concluded that the property rights of the „previous owners" need to take precedence in this case.

[89] *Berger-Krall* (n 8) para 37.
[90] ibid.
[91] ibid para 59.
[92] Decision of the Slovenian Constitutional Court no.U-I-172/02 dated 25 September 2003 available in Slovenian language, accessed on 25 March 2015 <http://odlocitve.us-rs.si/sl/odlocitev/US22659?q=U-I-172%2F02>
[93] ibid.
[94] ibid.

The Slovenian example has shown that the Constitutional Court can in fact bring the legislation in line with the ECHR standards through its judgments. In a sense, this is also due to the dynamics between the legislator and the Constitutional Court, where the legislator turned out to be the less insistent one. At the same time, the legislation was set up in a way where substantive changes were made possible by means of simply repealing certain sections of the statutes. Therefore, several factors had to align to make such a scenario possible.

For these precise reasons and despite its best efforts the Polish Constitutional Court had a very hard time applying the ECHR rights protection principles in the transitional housing cases. In its judgment from January 2000 the Court „invalidated the scheme of rent control, finding that the ongoing restrictions affected the very essence of the right of property and were incompatible with the constitutional guarantee of property rights.“[95] The Court emphasised the essential trait of property in a market economy – the owner ought to have „the possibility of deriving profit from the object of ownership.“[96] In terms of collecting rent, this of course, means that the amount of rent should exceed any costs the owner (landlord) bears. If the rent-control system causes the owner to lose money and take on additional expenses, his right to property is hindered in its very essence.[97] The Court observed that many tenants and their families found themselves in a very hard financial situation[98] and therefore needed the rents to stay low, but regardless of that fact there was „no constitutional necessity to afford the tenants such protection mostly at the expense of private individuals.“[99] This judgment became only the first among the many.

[95] Garlicki (n 13) 513-514.
[96] Hutten-Czapska (n 1) para 82
[97] ibid.
[98] ibid.
[99] ibid.

The Constitutional Court not only delivered a landmark judgment repealing the housing legislation, but it also „imposed on the Parliament to adopt new legislation"[100] within the next eighteen months. In June 2001, the Parliament passed the required statute but did not address the shortcomings of the repealed statute in the way the Constitutional Court had expected. The provisions on the controlled rent were replaced by a „statutory correlation between rent increases and the increase of prices for consumer goods and services, which were not related in reality to the costs of maintaining a building."[101] The Polish Constitutional Court called it „a defective mechanism for controlling increases in rent,"[102] „perpetuating the state of a violation of property rights,"[103] and repealed it as unconstitutional. It is specially worth noticing that the Court particularly addressed the necessity and the proportionality of the restrictions imposed on property. The Parliament was yet again given a deadline to find a more acceptable legislative solution.

Due to the obvious disagreement between the Constitutional Court and the Parliament, there were several subsequent amendments to the housing legislation, none of them providing any permanent solutions. In the ruling from April 2005 the Polish Constitutional Court expressed its discontent with the legislator's disregard for the rule of law and with the housing legislation which failed to provide market mechanisms and prolonged the housing transition (initially set to last from 1994 to 2004).[104] Garlicki interestingly points out that „as long as parliament was not ready to abandon the old system, none of the domestic bodies were able to provide a durable solution."[105] I find this to be correct and it seems that Constitutional Courts can do only so much. But these efforts are (in perspective) by no means futile.

[100] Garlicki (n 58) 280.
[101] *Hutten-Czapska* (n 1) para 96.
[102] ibid 103.
[103] ibid.
[104] ibid para 137.
[105] Garlicki (n13) 514.

The Croatian Constitutional Court failed to engage in that sense**.** As mentioned in the previous chapter, the 1990 Croatian Constitution eliminated „socially owned property" and replaced the „specially protected tenancy" with a civil lease reinforced containing special features designed to protect the tenant (somewhat similar to the Polish legislation). Despite numerous petitions for abstract constitutional review, the Croatian Constitutional Court developed a very modest jurisprudence which could hardly be characterised as activist. Compared to the judgments of the Slovenian and the Polish Constitutional Courts, the reasoning of the Croatian Constitutional Court seemed to reflect a different attitude toward its own role and towards the transition.

Bačić labels the Croatian Constitutional Court as formalist.[106] Smerdel claims that the Croatian legal system „lacks the tradition of direct application and interpretation of the Constitution."[107] With special attention paid to the „ruleness"[108], the Court preferred keeping a low profile and used formalist interpretation to justify and support the acts of the legislator. Even the Kelsenian Court, which I characterised as an underachieving court (in the transitional context), would eventually get much more done then the hesitant formalist court.

In the transitional housing cases initiated by the flat owners, the Court argued that since „no new restrictions on property were introduced (…) therefore the flat owners are not burdened with the social welfare of the tenants."[109] In a case where the petition was filed by the Association of tenants, the Court openly admitted that having „the status of the lessee has not significantly changed the content of the specially protected tenancy, as it was acquired in

[106] Arsen Bačić, *Croatia and the Challenges of Constitutionalism* (Književni krug Split 2001) 126.
[107] Branko Smerdel, *The Constitutional Order of the European Croatia [Ustavno uređenje europske Hrvatske]* (Narodne Novine 2013) 508.
[108] Bačić (106) 125.
[109] Decision of the Croatian Constitutional Court no.U-I-533/00 dated 24 May 2000 available in Croatian language, accessed on 25 March 2015 <http://sljeme.usud.hr/usud/praksaw.nsf/Praksa/C1256A25004A262AC12568F2002D00AE?OpenDocument>

the former system.“[110] In both cases it upheld the Housing Act. Therefore, the Court considered that the factual continuation of the relations inherited from the previous regime was not an issue, as long as the appropriate new terms „tenancy“ and „lessee“ are used. On top of this, the Court refused to examine the constitutionality of the Decree on the standards and criteria for the determination of protected rent, claiming that the Decree in no way violates the property rights of the flat owners (which makes for a fascinating comparison to the Polish Court). It should be noted that after spending a decade ignoring the ECtHR, the Croatian Constitutional Court started rediscovering the case law of the ECtHR after 2000.[111]

This chapter acknowledged that Constitutional Courts have a rather precise role in the national legal systems. They are not omnipotent since their actions are bound by the wording of the Constitution, and by the actions of other domestic actors. However, the Constitutional Courts do get to influence the processes of transition and democratisation through their judgments. At times, the Courts are provided with a welcoming legislative setup, other times their efforts are in vain. The crucial thing is that the Courts acknowledge the importance of their interference and activism in aligning the transitional housing legislation with the Convention standards. The ECtHR obviously was and still is a source of inspiration for the Slovenian and the Polish Constitutional Courts, not only because of its fascinating case law, but also because of the increasing number of Polish and Slovenian cases coming before the ECtHR. Finishing this chapter with a quote from Judge Zupancic seems appropriate: „[A] State with an independent [C]onstitutional [C]ourt aware of the ECHR's human-rights jurisprudence is much less likely to be condemned for a violation of the Convention.“[112]

[110] Decision of the Croatian Constitutional Court no.U-I-762/96 dated 31 March 1998 available in Croatian language, accessed on 25 March 2015 <http://narodne-novine.nn.hr/clanci/sluzbeni/1998_04_48_604.html>
[111] Sandra Marković, Marijana Radin and Sanja Trgovac, ‘Constitutional Protection of Property in the Light of the Positions Taken by the Croatian Constitutional Court’ [Ustavna zaštita prava vlasništva u svjetlu stavova Ustavnog suda Republike Hrvatske](2011) 32 Zbornik Pravnog fakulteta Sveučilišta u Rijeci 599.

[112] Zupančić (n 84) para 20.

Chapter III - The procedure before the ECtHR

The previous chapter discussed the rulings delivered by the Slovenian, Polish and Croatian Constitutional Courts in the transitional housing cases. The housing legislation proved to be a sensitive issue bearing its far-reaching consequences, while the broader transitional context required new points of reference. In dealing with the housing legislation, the Polish and the Slovenian Constitutional Courts employed an activist, Convention - oriented approach. Being well aware of the ECtHR case law, these Courts indirectly attempted to align the domestic legislation with the Convention standards, by interpreting the Constitutional provisions in the light of those same standards. This chapter will discuss Article 1 of the Protocol 1 and its application before the ECtHR, while the focus will be on three cases mentioned in the previous chapters – *Hutten-Czapska*, *Statileo* and *Berger-Krall*.

3.1. The principles of property protection before the ECtHR

Article 1 of Protocol 1 to the Convention reads as follows:

> *Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
>
> *The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*[113]

In the Convention system the term „possessions“ (mentioned in the first paragraph) „has an autonomous meaning; it extends beyond physical goods, and covers a wide range of

[113] Article 1 of Protocol No. 1 to the European Convention on Human Rights.

rights and interests which may be classified as assets."[114] Under Article 1 of Protocol 1 protection is extended to *existing* property, whether it is „stocks and shares, intellectual property, debts, economic rights stemming from a contract,"[115] an „Internet domain name"[116] or a „licence to sell alcoholic beverages where this is vital to an applicant's business."[117]

Being an autonomous concept under the Convention, the Convention term „possession" is not to be confused with legal term „possession". As Grgić and Mataga point out, „[t]he "travaux préparatoires," (…) confirm this unequivocally: the drafters continually spoke of 'right of property' or 'right to property' to describe the subject-matter of the successive drafts which were the forerunners of the present Article 1." The Court interprets Article 1 of Protocol 1 along these lines and states that „[b]y recognising that everyone has the right to the peaceful enjoyment of his possessions, Article 1 (P1-1) is in substance guaranteeing the right of property."[118]

However, Article 1 of Protocol 1 does not protect „property which is to be acquired in the future, under uncertain conditions."[119] In the transitional context, this would of course mean that in relation to the property which was nationalised, or in some other way taken away from the owner (by the State) before the Convention was ratified, the Convention does not impose the obligation of return.[120] Nevertheless, Omejec reminds us that once the state, after ratifying the Convention and the Protocol, adopts legislation which returns the nationalised

[114] Francis G Jacobs, Robin CA White and Clare Ovey, *Jacobs and White, the European Convention on Human Rights* (5th edn, Oxford University Press 2010) 481.
[115] Jasna Omejec, *The Convention on the Protection of Human Rights and Fundamental Freedoms in the Practice of the European Court of Human Rights* [Konvencija za zaštitu ljudskih prava i temeljnih sloboda u praksi Europskog suda za ljudska prava] (2nd edn, Novi Informator 2014) 957.
[116] Jacobs (n 114) 481.
[117] ibid.
[118] *Marckx v Belgium* App no 6833/74 (ECtHR 13 June 1979) para 63.
[119] Omejec (n 115) 970.
[120] ibid 971.

property to the previous owners, new property rights emerge, and these enjoy the protection under Article 1 of Protocol 1.[121]

In terms of protecting the individual property rights, the state not only has a negative obligation to abstain from interfering, but also an additional positive obligation under which it needs to provide certain procedural safeguards and a recourse to the domestic courts. The lack of the procedural safeguards intended towards „achieving a balance between the interests of protected lessees and those of landlords"[122] occupied the Court's attention in *Hutten-Czapska* and *Statileo*.

3.2 The Court's assessment

As an initial step in its assessment, the Court observes the three rules which are included in Article 1 of the Protocol 1 to the Convention. The first rule

> *is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule (...) covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognizes that the Contracting States are entitled (...) to control the use of property in accordance with the general interest. The three rules are not (...) unconnected. The second and third rules (...) should therefore be construed in the light of the general principle enunciated in the first rule.*[123]

3.2.1 Whether there was as interference

The applicants in *Hutten-Czapska* and *Statileo* could not „peacefully enjoy" their property since the interference started decades earlier and perpetuated despite of the new

[121] Omejec (n 115) 971.
[122] *Statileo* (n 2) para 128.
[123] ibid 116.

housing legislation. In 1994, the „administrative lease“ and the „rent-control“ system were imposed on Mrs Hutten-Czapska's house, among others. Mr Statileo's flat had been occupied by a certain P.A. and then her cousin I.T. who became a „protected lessee“ under the 1996 Lease of Flats Act. Under the new housing legislation, both applicants were obliged to pay maintenance fees for the properties and collect rent which was set lower then the actual maintenance fees. The Court found that this kind of interference „amounted to the control of use of property within the meaning of the second paragraph of Article 1 of Protocol No. 1 to the Convention."[124] The protected interests of the tenants in *Berger-Krall* were also interfered with, as their rights were significantly reduced when they went from being „specially protected tenants“ to „lessees.“[125] Furthermore, the Court acknowledged that repealing the „third model“ interfered with their rights,[126] and amounted to „control [over] the use of property.“[127]

3.2.2 Whether the interference was „lawful“

In *Hutten-Czapska*, the applicant argued that parts of the relevant housing legislation were repealed by the Constitutional Court judgments, which made the interference unlawful. However, the Court concluded that the delayed effect of some of the relevant judgments made this argument inapplicable in this case. The Court also found that the interference took place in accordance with the 1994 Lease of Dwellings and Housing Allowances Act which was in force at the time of the interference. *In Berger-Krall*, the applicants claimed that the intervention was unlawful because of Slovenia's international obligations under the European Social Charter.[128] The Court reiterated that the lawfulness of the intervention is assessed in

[124] ibid para 117.
[125] *Berger-Krall* (n 8) para 181.
[126] ibid.
[127] ibid para 184.
[128] In its Decision CC53/2008 of 8 September 2009, the Committee of Social Rights had found that „the combination of insufficient measures for the acquisition of or access to a substitute flat, the evolution of the rules on occupancy and the increase in rents“ were contrary to Article 31§1 of the Charter.

regards to the substantive and procedural domestic legal norms, therefore, according to the provisions of the 1991 Housing act and the subsequent amendments.

3.2.3 The „general interest" and the proportionality of the interference

At this point in the judgment the Court asserts that „the national authorities are in principle better placed than the international judge to decide what is in the public interest."[129] In *Hutten-Czapska,* the Court found that due to the shortage of available housing, the measures which safeguarded the tenants and facilitated the „gradual transition from State-controlled rent to a fully negotiated contractual rent during the fundamental reform of the country,"[130] qualified as a legitimate justification for the interference. Since these measures were aimed at protecting those more vulnerable and with low income, the *ratio legis* of the „rent-control" system was to respond to their housing needs during the transition.

In *Statileo,* the Court accepted that the interference pursued the general interest of social protection of the tenants with the intention of promoting and supporting the economic prosperity of the country.[131] On the other hand, in *Berger-Krall*, the Court recognized the general interest in introducing measures for the „promotion of social, political and economic reforms, the removal of relics of the country's communist past in the social and economic spheres and the protection of the rights of 'previous owners'".[132] But despite enjoying a wide margin of appreciation in reforming the housing sector, the States needed to carefully balance the „general interest" with the individual property rights.

In *Hutten-Czapska*, the Court made a reference to the Polish Constitutional Court which detected the problem of the „disproportionate, unjustified, and arbitrary distribution of the social burden involved in the housing reform (…) mainly at the expense of landlords".

[129] *Berger-Krall* (n 8) para 192.
[130] *Hutten-Czapska* (n 1) para 178.
[131] *Statileo* (n 2) para 122.
[132] *Berger-Krall* para 194.

The rent Mrs Hutten-Czapska collected covered only about 60% of the maintenance cost she was forced to pay.[133] After the „Constitutional Court's judgment in October 2002, it became possible for landlords to increase the rent up to 3% of the reconstruction value of the dwelling"[134] which was later limited to a maximum of 10%. The Croatian applicant Mr Statileo refused to sign the lease contract and furthermore, refused to collect rent (in the period between 1997 and 2007 the rent amounted to approximately fourteen Euros a month).[135]

In *Statileo* and *Hutten-Czapska* the ECtHR reached very similar conclusions. In *Statileo*, where members of one family lived in the applicants flat since 1955, the Court found that a „disproportionate and excessive individual burden was placed on the applicant as a landlord, as he was required to bear most of the social and financial costs of providing housing for I.T. and her family."[136] And this remark is very accurate, because neither the family living in the flat had to finance their own housing, nor did the municipality or the State subsidise their housing needs. Therefore, the financial burden was exclusively on the applicant and this could not be justified by the claims of „general interest". The Court finally concluded that the 1996 Lease of Flats Act provided no „adequate procedural safeguards aimed at achieving a balance between the interests of the protected lessees and those of landlords."[137] In *Hutten-Czapska*, the ECtHR made a point about how Poland „failed to strike the requisite fair balance between the general interests of the community and the protection of the right of property"[138] since it burdened only one group.[139] The margin of appreciation, however wide, is not unlimited.

[133] *Hutten-Czapska* (n 1) para 81.
[134] ibid para 64.
[135] The applicant was obliged to pay a monthly condominium fee in the approximately same amount.
[136] *Statileo* (n 2) para 143.
[137] ibid 128.
[138] *Hutten-Czapska* (n 1) para 225.
[139] ibid.

In *Berger-Krall,* a case mirroring *Statileo* and *Hutten-Czapska,* the Court acknowledged that „the general interest requires the adoption of special de-communisation measures in order to ensure greater social justice or the stability of democracy.“[140] The change in the position of the tenants was an unavoidable consequence of the 1991 Denationalisation act which presented the „possibility of restitution *in natura.*“[141] When balancing the interests of the tenants and the „previous owners“, the ECtHR noted that compared the to traditional lease agreement, the 1991 Housing Act still provides special protection to the applicants.[142] As for the „third model“, the Court found that this was only one of several available models and that „the State took significant steps to provide the applicants with a fair possibility of access to real-estate ownership and to compensate them (…) for the disadvantage created by the objective fact of the existence of a 'previous owner'.“[143] Naturally, the Court did not find a violation of Article 1 of Protocol 1.

3.3 Lessons learned

The transitional housing cases taught us two important lessons. Firstly, the Strasbourg Court is quite concerned with the element of time. Of course, the cases come before the judges with a significant delay, which is in part also due to the ECtHR's backlog. Since *Hutten-Czapska*, *Statileo* and *Berger-Krall* are transitional housing cases, the Court seems to expect the transition to be in an advanced stage. In *Berger-Krall* it somewhat ironically stated that the applicants having “enjoyed such favourable terms more than 22 years after the enactment of the housing reform shows that the transition to a market economy was conducted in a reasonable and progressive manner.“[144] Subsequently, the Court noticed how the applicants have not demonstrated „that the level of the non-profit rent was excessive in

[140] *Berger-Krall* (n 8) para 193.
[141] ibid para 206.
[142] ibid para 208.
[143] ibid para 303.
[144] ibid para 208.

relation to his or her income."[145] In my opinion this was to remind us that after twenty years of transition it would be nice to start playing by Western-European rules. In terms of property rights we need to ask ourselves „[h]ow long and on what grounds can property rights be limited in the name of transforming an inherited property-structure?" [146] The national legislators seem to be quite reluctant to bring actual reform to the housing sector.

The ECtHR judgment in *Statileo* was delivered in June 2014. The Court found a violation of Article 1 of the Protocol 1 of the Convention and the judgment was accompanied by a Press release pointing out the shortcomings of the housing legislation. Moreover, the Press release emphasised „that Croatia should take appropriate measures to redress that balance."[147] So far no measures have been taken, and the official draft Amendment to the Lease of Flats Act is still the one from 2013, which called for an additional ten-year „transitional period" on the rent increase. How much transition is too much transition? I am very curious what the ECtHR would have to say about this.

The second lesson is that the Court cares about numbers, especially big numbers. The pilot-procedure was applied after *Hutten-Czapska* in order to remedy the issue involving 100 000 property owners and twenty-four (and possibly many more) pending cases.[148] The pilot-procedure applied in *Hutten-Czapska* resulted in „new legislation enabling landlords to increase rents in order to cover the costs of maintenance, to obtain a return on their capital investment, and to receive a 'decent profit'."[149] Would the pilot-procedure be a good solution for Croatia? I think it would. The Constitutional Court failed to demonstrate its support for

[145] ibid.
[146] Renata Uitz 'Constitutional Courts and the Past in Democratic Transition' in Adam Czarnota, Martin Krygier and Wojciech Sadurdski (eds), *Rethinking the Rule of Law after Communism* (Central European University Press 2005) 254.
[147] Registrar of the European Court of Human Rights, 'Croatia Should Reform Its Legislation on Rented Flats Formerly Part of a Special Tenancy Scheme under the Socialist Regime' *ECHR 213 (2014) 10.07.2014* (10 July 2014).
[148] Registrar of the European Court of Human Rights, ' European Court closes pilot judgment procedure in Polish "rent-control" cases, following introduction of compensation scheme' *ECHR 284 (2011) 31.03.2011 (31 March 2014).*
[149] Garlicki (n 13) 515.

reform and the legislator is obviously ignoring the issue. In the meanwhile, the flat owners became more organized, and therefore the Croatian housing cases will continue to pile up before the ECtHR. Since the primary purpose of the pilot-procedure is to „assist the Contracting States in fulfilling their role in the Convention system by resolving such problems at national level,“[150] the pilot-procedure has the potential to achieve what the legislator and the Croatian Constitutional Court failed to do, and that is to „accelerate“ the transition. Poland makes for a good example.

[150] *Hutten-Czapska* (n 1) para 234.

Conclusion

The transformation of the communist housing legacy proved to be a difficult task for the new democracies. The previous regimes kept a firm grip over the available housing and used it as a means of achieving their socio-economic and ideological goals. In Yugoslavia, some of the flats had been nationalised, while like in Poland, many flats came under state management. In practice, this made little difference to the owners, because the „specially protected tenancy“ and the „special lease scheme“ established substantial rights for the tenants and deprived the owners of any control over the use of the flats.

After decades of waiting to reclaim their property, the flat owners and the „previous owners“ hoped the new regimes would introduce meaningful reform and tackle the inherent injustice done to them. However, the national housing reforms embraced the „sale to occupier“ principle, which was essentially intended to privatise the housing sector and simultaneously generate a considerable income for the municipalities. The flats were priced well below their actual value and the privatisation proved to be very popular. However, the tenants living in previously nationalised or privately owned flats (which were under state control) could not (for obvious reasons) buy the flats. In order to compensate for their disadvantage, the new legislation introduced rent-control and „protected lease“ under which the lessees (earlier tenants) retained a number of benefits somewhat comparable to those existing in the old regime.

The new housing legislation was taken to the Constitutional Courts, both by the flat owners and by the tenants. The former claimed that their property rights had been excessively restricted by the „protected lease“ and the latter claimed to have been discriminated against, by not being able to participate in the privatisation of the flats. The Polish and the Slovenian

Constitutional Courts attempted to apply the Convention property protection standards, by repealing the excessive restrictions imposed on the property rights of the flat owners and other subjects. For the Polish Constitutional Court it was an uphill battle since it desperately needed the cooperation of the Parliament in setting the proper basis to the housing legislation. The Slovenian Constitutional Court had a better starting point since the housing legislation was genuinely oriented towards reform, but not as much as the Court wanted it to be. But what both of these Courts had in common is that they acknowledged that the Constitutional Courts need to actively guide the way in the transition to democracy by recognising and enforcing a new set of rights protections standards. These activist standards can neither be tacitly taken over from the previous regime nor can they reflect the instability and the incertitude of the transition. This is why the Polish and the Slovenian Constitutional Courts turned to the Constitutional texts and to the ECHR, and insisted that the state interference with property be limited, balanced and in accordance with the rule of law. The Croatian Constitutional Court applied a different approach. By rejecting the notion of setting new standards, it sustained an excessive burden set on property rights, and therefore denied „property" of its rightful role in the new system.

Croatia, Slovenia and Poland make an interesting trio when it comes to finding common points of reference. Slovenia and Croatia shared the same housing system during communism, while Poland and Croatia introduced similar legislative solutions in the transitional period. It was only a matter of time before cases involving the new housing legislation came to Strasbourg.

By examining the judgments of the ECtHR one can get a good sense of how important (and appreciated) the input of the Constitutional Courts really was. On the one hand, the Croatian Constitutional Court does not even get a reference it the reasoning of the ECtHR in *Statileo.* On the other hand, the ECtHR in *Hutten-Czapska* openly supports the Polish

Constitutional Court and considers it its ally, while the pilot-procedure is a clear response to the malfunctioning of the Parliament, not a criticism to the Court. The Slovenian Constitutional Court has somewhat of a mixed role: by repealing the „third model" it caused serious disturbances both for the state and for the tenants, however it actively protected property rights of the municipalities (it is actually important for the citizens to have local governance which is solvent and efficient).

The ECtHR examined *Hutten-Czapska, Statileo* and *Berger-Krall* under the third rule of Article 1 of Protocol 1, and established the lawfulness and the general interest behind the interference. However, when reviewing the proportionality of the interference, the Court established that in the first two cases the rights of the flat owners and the tenants were not properly balanced. Excessive burden was placed on the flat owners, since they were obliged to cover the high costs of maintenance while receiving a disproportionately low rent from the tenants. In *Statileo* and *Hutten-Czapska* the Court found a violation of Article 1 of Protocol 1. In *Hutten-Czapska* a pilot-procedure was applied.

But coming back to the national level, the actions of the Constitutional Courts and the ECtHR need to go towards reconciling the conflicting rights emanating from the previous regimes. Developing and implementing a comprehensive housing reform is undoubtedly a sensitive, complicated exercise. Nevertheless, putting an excessive financial burden on a single social group (flat owners) is unacceptable under the ECtHR rights protection standards. The transitional housing legislation obviously needs to create a better balance between the rights of the flat owners and the rights of the tenants. The initial task is on the legislators. However, if the legislators fail to meet those standards, then it is for the Constitutional Courts to do the balancing.

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