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European Law and Evictions: Property, Proportionality and Vulnerable People

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Abstract: An eviction is a most extreme form of interference with the right to respect for the home. European case law pushes towards more protection of (vulnerable) residents in housing law relationships, and limits property rights and the freedom of contract of property owners. This has resulted in intense debates about the horizontal effects of human rights law and the impact of human rights in landlord-tenant relationships. This article deepens our understanding of the meaning and the influence of human-rights based proportionality enquiries in eviction cases in the rental sector. It assesses how the right to advance a proportionality defence is implemented and whether any indications exists that human-rights based proportionality enquiries improve the legal position of tenants. Doctrinal research and comparative legal analysis show that this is not the case in a large share of the contracting states due to the unwillingness of national judges and lawmakers. Besides that, a quantitative case law analysis shows that there are no indications for a true paradigmatic shift. Although tenants do put forward proportionality defences, no significant differences are found between cases in which the tenant raise a proportionality defence and cases in which they do not advance such a defence. Yet, the European law's push for more protection of vulnerable people might in the end lead to some systemic as well as practical changes. Proportionality enquiries may influence property owners' litigation strategies, and as a result, have an impact in the stages before and after the court procedure too.

Zusammenfassung: Eine Zwangsräumung ist einer der schwerwiegendsten Eingriffe in das Recht auf die Achtung des Heims. Europäische Rechtsprechung drängt auf einen stärkeren Schutz von (schutzbedürftigen) Bewohnern in wohnrechtlichen Rechtsbeziehungen, und begrenzt Eigentumsrechte sowie die Vertragsfreiheit von Immobilienbesitzern. Dies zog intensive Debatten über die horizontale Wirkung von Menschenrechten und deren Einfluss in Mietverhältnissen nach sich. Dieser Artikel vertieft unser Verständnis der Bedeutung und des Einflusses der menschenrechtsbasierenden Verhältnismäßigkeitsprüfung auf Zwangsräumungen im Mietsektor. Er untersucht die Umsetzung des Rechts auf eine Verhältnismäßigkeitsverteidigung und die Existenz von Anzeichen, dass eine menschenrechtsbasierende Verhältnismäßigkeitsprüfung die Rechtslage von Mietern verbessert. Doktrinäre und rechtsvergleichende Forschung zeigen, dass dies im Großteil der Mitgliedsstaaten aufgrund von Aversionen der Richter und Gesetzgeber nicht der Fall ist. Abgesehen davon, zeigt eine quantitative Analyse der Rechtsprechung keine Anzeichen eines Paradigmenwechsels. Obwohl Mieter Verhältnismäßigkeitsprüfungen anfragen, gibt es keine signifikanten Unterschiede

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zwischen Fällen mit und ohne Verhältnismäßigkeitsprüfungen. Dennoch könnte europarechtliches Drängen auf einen stärkeren Schutz von schutzbedürftigen Mietern in einem systematischen und praktischen Wandel resultieren. Verhältnismäßigkeitsprüfungen können zudem die Prozessstrategien von Immobilienbesitzern beeinflussen und dadurch auch Auswirkungen auf Phasen vor und nach der Gerichtsverhandlung haben.

Résumé: Une expulsion ingère de manière intrusive le droit au respect du domicile. La jurisprudence européenne montre que la protection des habitants (vulnérables) semble être favorisée en ce qui concerne le droit au logement, et que les droits à la propriété, et la liberté contractuelle des propriétaires, semblent être en revanche limités. Ceci a résulté en de nombreux débats portant sur les effets horizontaux du droit international des droits de l'homme, et sur l'impact et le rôle des droits de l'homme dans les relations entre propriétaires et locataires. Cet article approfondit notre compréhension de la signification et de l'influence des arguments juridiques fondés sur le principe de proportionnalité appliqué aux droits de l'homme dans les affaires concernant l'expulsion des locataires. Il évalue la manière dont un argument juridique fondé sur ce principe de proportionnalité est implémenté, et s'il existe des indications selon lesquelles cet argument défensif améliorerait la position des locataires. La recherche doctrinale et le droit comparé montrent que ceci n'est pas le cas dans la majorité des États contractants, ce qui est attribuable à une réticence des juges nationaux et des législateurs. De plus, une analyse quantitative de la jurisprudence ne montre aucun indice d'un éventuel changement paradigmatique. Même si nombre de locataires utilisent cet argument juridique fondé sur ce principe de proportionnalité, aucune différence significative n'a été repérée entre les cas où le locataire a utilisé cet argument, et les cas où cet argument n'a point été évoqué. Cependant, cette tendance du droit européen à demander plus de protections pour les personnes les plus vulnérables pourrait éventuellement mener à des changements aussi bien dans la pratique qu'au niveau systémique. Les demandes fondées sur ce principe de proportionnalité pourraient influencer sur la façon dont les propriétaires déclarent un litige, et sur leur choix de le faire, ce qui par conséquent pourrait affecter les étapes à prendre en compte aussi bien avant qu'après une procédure judiciaire.

Keywords: eviction, proportionality, the right to property, right to housing, impact of European law, vulnerability, empirical analysis.

Schlüsselwörter: Zwangsräumung, Verhältnismäßigkeit, Recht auf Eigentum, Recht auf Wohnraum, Wirkung von Europäischem Recht, Schutzbedürftigkeit, empirische Analyse.

Mots-clés: expulsion, principe de proportionnalité, le droit au logement, droits à la propriété, l'impact du droit européen, vulnérabilité, analyse empirique.

1. Introduction

1 Recently, a considerable amount of literature has grown up around the theme of evictions and the legal protection against the loss of one's home.[1] Research in the

1 See M. Vols & J. Sidoli del Ceno, 'Common Threads in Housing Law Research: A Systematic and Thematic Analysis of the Field', in M. Vols& J. Sidoli del Ceno (eds), *People and Buildings:*

United States, for example, found that in Milwaukee one in eight renters experienced a forced move in the previous two years.[2] European research revealed that at least 700,000 people in the European Union were forced to leave their home over five years' time.[3]

2 From a legal point of view, an eviction can be characterized as a clash between interests and rights of various parties. For example, a tenant's right to housing collides with a landlord's right to property, or the rights of mortgagees clash with the rights of mortgagors. However, there are many differences between jurisdictions all over the world on (1) how to characterize such a collision, (2) how the legal system deals with such a clash, and (3) whether such a clash falls under contract or property law. In some jurisdictions, the protection of the right to housing is largely absent, and the law does not provide substantial protection to the interests of residents.[4] In other countries, the power to evict (vulnerable) residents is severely limited by laws that protect the interest of prospective evictees.[5]

3 In most civil law jurisdictions eviction disputes involving rental housing are generally seen as part of contract law, whereas in most common law cultures they are dealt within the framework of land and property law.[6] As a result, the protection against the loss of one's home offered by law can be analysed through the lens of contract law as well as a property law.

4 From a property law perspective, a good theoretical starting point is the concept of 'the rights paradigm' as described by Van der Walt. Central to this paradigm is the idea that property rights have the force and status of trump rights, meaning that they are stronger than weaker rights such as personal rights or the interests of

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Comparative Housing Law (Den Haag: Eleven Publishing 2018), pp 9-12; P. Kenna, S. Nassarre-Aznar, P. Sparkes & C.U Schmid (eds), *Loss of Homes and Evictions Across Europe* (Cheltenham: Edgar Elgar 2018).

2 M. Desmond & T. Shollenberger, 'Forced Displacement from Rental Housing: Prevalence and Neighborhood Consequences', 52. *Demography* 2015, p 1751.

3 P. Kenna, L. Benjaminsen, V. Busch-Geertsema & S. Nassarre-Aznar, *Pilot Project - Promoting the Right to Housing. Homelessness Prevention in the Context of Evictions* (Brussel: European Union 2016), p 49.

4 S. Schipper, 'Towards a "Post-Neoliberal" Mode of Housing Regulation? The Israeli Social Protest of Summer 2011', 39. *International Journal of Urban and Regional Research* 2015, p 1137; M. Gallié, J. Brunet & R. Laniel, 'Les expulsions pour arriérés de loyer au Québec: un contentieux de masse', 61. *McGill Law Journal* 2016, p 611.

5 A.B. Carroll, 'The International Trend Toward Requiring Good Cause for Tenant Eviction: Dangerous Portents for the United States?', 38. *Seton Hall Law Review* 2008, p 427; S. Fick & M. Vols, 'Best Protection Against Eviction? A Comparative Analysis of Protection Against Evictions in the European Convention on Human Rights and the South African Constitution', 3. *European Journal of Comparative Law and Governance* 2016, p 40.

6 C.U. Schmid & J.R. Dinse, 'European Dimensions of Residential Tenancy Law', 9. *ERCL* 2013, p. 201 at 203.

person's without rights.[7] With regard to eviction cases, the rights paradigm prescribes that 'contextual issues such as the general historical, social economic or political context of the dispute and the personal circumstances of the parties have no relevance or effect'.[8] As a result, in the rights paradigm a property owner has a strong position and wins against those without a legally recognized property right.[9] Cowan, Fox O'Mahony and Cobb describe the main idea as follows:

> It is of the essence of superior property rights that the holder of those rights has better title to the property than the occupier. Unless otherwise protected, the holder of the superior property right is entitled to possession of the property as a matter of right against a range of interposers (...). The interposer is the household which occupies the property. They may do so with rights to do so – for example, a tenant is an interposer between the landlord and the property. Alternatively, they may do so without rights to do so, for example, a trespasser is an interposer between the person with superior rights and the property.[10]

5 Yet, the rights paradigm should be seen as a theoretical tool that can be used to analyse property law in real life. Van der Walt acknowledges that the paradigm 'does not exist in a "pure" or unadulterated form in the sense that ownership or stronger property rights in fact always and inevitably trump state regulation or competing property interests'.[11] There are various ways in which government policies and statutory interventions can challenge the rights paradigm. The most minimal challenge is constituted by legislation that merely imposes due process controls that regulate the actual eviction, but do not place any special emphasis on the occupiers' personal or social circumstances. A more extensive challenge is the possibility to delay an eviction because of due process considerations that emphasize the effects of the eviction, the occupiers' personal circumstances, or the social and/or historical context in which the eviction takes place. A more significant challenge to the paradigm is present when controls are imposed on the landlord's right to terminate the tenancy, 'especially when the general socio-economic context and the personal circumstances of the tenant are allowed, in a context-sensitive adjudicative situation where the judicial officer exercises a discretion, to prevent ownership from trumping non-ownership interests in residential property'.[12] A statutory intervention of this nature may be so significant that it challenges the

7 A.J. Van der Walt, *Property in the Margins* (Oxford: Hart 2009), p 27.
8 A.J. Van der Walt, *Property in the Margins* (Oxford: Hart 2009), p 27.
9 A.J. Van der Walt, *Property in the Margins* (Oxford: Hart 2009), p 39.
10 D. Cowan, L. Fox O'Mahony & N. Cobb, *Great debates in Land Law* (London: Palgrave 2016), p 153.
11 A.J. Van der Walt, *Property*, p 70.
12 A.J. Van der Walt, *Property*, pp 81–83.

rights paradigm fundamentally, undermines its integrity and indicates a paradigm shift.[13]

6 If we assess the matter from a contract law perspective, a starting point is the idea that a property owner may choose to limit his/her property right voluntarily by granting a personal right to an interposer through, for example, a contract.[14] If the property owner wants to oblige a resident with a personal right to vacate the property, he/she first needs to terminate the contract and subsequently force the unlawful resident to evict the property. It depends on the jurisdiction which rules exist concerning the termination of such contracts and to what extent legal requirements limit the property right of the property owner. If a legislator does not want to differentiate from the rights paradigm discussed above, he will allow property owners to terminate the contract when they want without offering any protective measures to interposers. Still, research shows that in many jurisdictions the law limits parties' freedom of contract by introducing rental control mechanisms and limiting the possibilities for the unilateral termination of these contracts by the property owner.[15] In earlier research these legal interventions are linked to the theoretical concept of 'life term contracts'.[16] From this theoretical perspective, the law attempts to protect people against the termination of 'contracts that generally have the most important role to play in people's daily lives and existence. These contracts establish social long-term relations that, with regard to certain periods of the lifetime of individuals, provide essential goods, services, labour, and income opportunities for self-realisation and participation'.[17] Agreements that 'ensure a place to live (contracts for rent/leases)' are the most prominent examples of such contracts.[18]

7 Although the property law and contract law perspectives differ in what aspects, in an analysis of legal protection against eviction, are relevant and how to characterize them, both acknowledge that the law intervenes in contractual freedom and property relations between people. From both perspectives, it can be said that

13 A.J. Van der Walt, *Property*, p 82.

14 A.J. Van der Walt, *Property*, p 30.

15 C.U. Schmid & J.R. Dinse, 'Towards a Common Core of Residential Tenancy Law in Europe? The Impact of the European Court of Human Rights on Tenancy Law', in L. Nogler& U. Reifner (eds), *Life Time Contracts. Social Long-Term Contracts in Labour, Tenancy and Consumer Credit Law* (The Hague: Eleven 2014), p 606.

16 E. Bargelli, 'Exploring Interfaces Between Social Long-Term Contracts and European Law Through Tenancy Law', in L. Nogler& U. Reifner (eds), *Life Time Contracts. Social Long-Term Contracts in Labour, Tenancy and Consumer Credit Law* (The Hague: Eleven 2014), p 627.

17 L. Nogler & U. Reifner, 'Introduction: The New Dimension of Life Time in the Law of Contracts and Obligations', in L. Nogler & U. Reifner (eds), *Life Time Contracts. Social Long-Term Contracts in Labour, Tenancy and Consumer Credit Law* (The Hague: Eleven 2014), p 1.

18 L. Nogler & U. Reifner, in *Life Time Contracts. Social Long-Term Contracts in Labour, Tenancy and Consumer Credit Law*, p 5.

the law aims to 'counterbalance excessive dominances by private powers to the detriment of less powerful private actors'.[19] An analysis of recent literature and case law shows this protection is offered at various levels and by various legal instruments. There is a growing body of case law and research literature on the protection against eviction offered by, for example, the International Covenant on Economic, Social and Cultural Rights,[20] European Union consumer law[21] and the European Social Charter.[22]

8 This article, however, focuses on the impact of the protection offered by the European Convention on Human Rights (ECHR) and more especially the right to respect for the home as laid down in Article 8 ECHR. Case law of the European Court on Human Rights (hereafter: the European Court) clearly shows evidence for a push towards a context-sensitive adjudication in eviction litigation. This is mainly the result of a concise section in the European Court's judgment in the *McCann* v. *the United Kingdom* case that reads as follows:

> The loss of one's home is a most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal in the light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, his right of occupation has come to an end.[23]

9 In various other judgments, the European Court has repeated the right of residents to requests a court to assess the proportionality of a (prospective) eviction. As a result of this European case law, it may be said that the same minimum level of protection of eviction needs to be offered in 47 Member States of the

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19 A. Colombi Ciacchi, 'Concluding Remarks', in G. Brüggemeier, A. Colombi Ciacchi& G. Comandé (eds), *Fundamental Rights and Private Law in the European Union: Vol. I and II* (Cambridge: Cambridge University Press 2010), p 428.

20 CESCR 21 July 2017, E/C.12/61/D/5/2015, *Ben Djazia and Bellili* v. *Spain*, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E/C.12/61/D/5/2015&Lang=en.

21 S. Nassarre-Aznar, 'Robinhoodian Courts' Decisions on Mortgage Law in Spain', 7. *International Journal of Law in the Build Environment* 2015, p 127; J.W. Rutgers, 'The Right to Housing (Article 7 of the Charter) and Unfair Terms in General Conditions', in H. Collins (ed.), *European Contract Law and the Charter of Fundamental Rights* (Cambridge: Intersentia 2017), p 125.

22 ECSR 5 December 2007, 39/2006, *FEANTSA* v. *France*, https://www.coe.int/en/web/turin-european-social-charter/processed-complaints/-/asset_publisher/5GEFkJmH2bYG/content/no-39-2006-european-federation-of-national-organisations-working-with-the-homeless-feantsa-v-france?inheritRedirect=false at 25-26.

23 ECtHR 13 May 2008, 19009/04, *McCann* v. *United Kingdom*, http://hudoc.echr.coe.int/eng?i=001-86233, para. 50.

Council of Europe. It is found that the proportionality enquiry in eviction cases is 'highly context specific, encompassing a wide range of factors through the entire course of the repossession process'.[24] Yet, the precise meaning and impact of proportionality in eviction litigation remain unclear.

10 Given this clash between interests, rights, and (contractual) freedoms, questions have been raised whether offering too much protection of tenants' housing rights might in fact result in a violation of the landlords' right to property as laid down in Article 1 of Protocol 1 to the ECHR.[25] In the United Kingdom, some have argued that contextual adjudication and human rights-based proportionality enquiries in eviction cases would cause 'a destabilising loss of certainty and predictability' for property owners.[26] Some have expressed the fear that proportionality enquiries would create 'novel rights to security of tenure in derogation of the existing proprietary rights of others'.[27] Some even argue that proportionality enquiries in eviction cases might 'fundamentally transform the legal principles that regulate the enforcement of property rights'.[28] In a recent judgment (*F.J.M.* v. *the United Kingdom)* that will be discussed below, the European Court has shown to be receptive to this criticism.[29]

11 In light of the above, the objective of this article is to deepen our understanding of the meaning and the impact of proportionality enquiries in eviction cases in the rental sector. To achieve this objective, we will assess whether and how the right to advance a proportionality defence is implemented in various jurisdictions and analyse whether there exists any indications that contextual adjudication and human-rights based proportionality enquiries improve the tenant's legal position and/or deteriorate the landlord's property right. The answers will hopefully give us more insight into both the legal position of tenants and landlords and will fill up an existing knowledge gap, because these positions are 'under-theorized and under-researched'.[30]

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24 S. Nield, 'Article 8 Respect for the Home – A Human Property Right?', 23. *King's Law Journal* 2013, p (147) at 161.

25 M. Habdas, 'The Tenant's Home and the Landlord's Property – The Polish Struggle to Achieve a Balance of Rights', in H. Carr, B. Edgeworth& C. Hunter (eds), *Law and the Precarious Home* (Oxford: Hart 2018), p 109.

26 R. Walsh, 'Stability and Predictability in English Property Law – The Impact of Article 8 of the European Convention on Human Rights Reassessed', 131. *Law Quarterly Review* 2015, p (585) at 585.

27 K. Gray & S.F. Gray, *Elements of Land Law* (Oxford: Oxford University Press 2009), p 124.

28 R. Brits, 'Protection for Homes During Mortgage Enforcement: Human-Rights Approaches in South African and English law', 132. *South African Law Journal* 2015, p (566) at 571.

29 ECtHR 6 November 2018, 76202/16, *F.J.M.* v. *United Kingdom*, http://hudoc.echr.coe.int/eng?i=001-188124, para. 43.

30 K. Hulse & M. Haffner, 'Security and Rental Housing: New Perspectives', 29. *Housing Studies* 2014, p (573) at 573.

12 The methodological approach taken in this article is a mixed methodology based on doctrinal legal research, comparative legal research and quantitative case law analysis. The doctrinal legal research presents the law 'in a way that is as neutral and consistent as possible in order to inform the reader how it actually reads'.[31] The comparative legal analysis concerns a review of available research literature and case law on the implementation of the European requirements in various Member States to discover 'complexly new patterns of divergence and convergence between national solutions'.[32]

13 Moreover, an in-depth analysis of nearly 500 eviction judgments from Dutch courts was conducted. In short, this concerns the systematic collection and coding of court decisions and using statistical techniques such as logistic regression to reveal indications for an impact of putting forward a proportionality defence.[33] This analysis is limited to the Netherlands. An important reason for that limitation is that under Dutch law proportionality enquiries in eviction proceedings have taken place since the 1970s. Even before the European Court required contracting states to implement a context-sensitive adjudication, the Dutch Civil Code (hereinafter: Civil Code) required courts to assess the proportionality of an eviction if the tenant requested the court to do so. In other words, Dutch landlord-tenant law already technically complied with the European minimum level of protection against eviction because of built-in proportionality checks in the Civil Code.[34] As a result, the Dutch case law provides richer data than other countries that are less open to incorporating proportionality enquiries in all types of eviction disputes.

14 Another reason is the availability and accessibility of eviction litigation. A quantitative analysis is difficult to conduct if 'there is much less likelihood of a published written judgment' and access to decisions is much more difficult.[35] For example, an analysis of judgments of United Kingdom county courts will be difficult, because these are rarely published. As a result, most of the law concerning proportionality defences in the United Kingdom is 'invisible', with the 'visible' law

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31 J.M. Smits, *The Mind and Method of the legal Academic*, (Cheltenham: Edward Elgar Publishing 2012), p 13.

32 A.L.B. Colombi Ciacchi, 'Strengthening the Comparative Method in European Legal Research: Three Suggestions', in C. Godt (ed.), *Cross Border Research and Transnational Teaching Under the Treaty of Lisbon: Hanse Law School in Perspective* (Nijmegen: Wolf Legal Publisher 2013), p 30.

33 L. Epstein & A.D. Martin, *An Introduction to Empirical Legal Research* (Oxford: Oxford University Press 2014).

34 M. Vols, 'Evictions in the Netherlands', in P. Kenna, S. Nassarre-Aznar, P. Sparkes& C.U Schmid (eds), *Loss of Homes and Evictions Across Europe* (Cheltenham: Edgar Elgar 2018), pp 214-238.

35 C. Hunter, J. Nixon & S. Blandy, 'Researching the Judiciary: Exploring the Invisible in Judicial Decision Making', 35. *Journal of Law and Society* 2008, p 76 at 79.

being restricted to the reported appellate judgments of higher courts.[36] In the Netherlands, the judiciary publishes relatively large amounts of written decisions on its national website. This makes it possible not only to study decisions of higher courts, but also case law of lower level courts.

15 This article has been divided into six sections. The first section describes the European case law concerning evictions in detail. The second section will assess whether and how the European requirements have been interpreted in various European contracting states, and which impact they have on the legal position of tenants and landlords. The third and fourth sections will discuss the legal debates concerning proportionality in the United Kingdom and the Netherlands in greater detail. The fifth section presents the result of the quantitative analysis of Dutch eviction litigation. The data and methods used are described in detail as well as the results of the statistical analysis. In the final section, the findings are discussed and a conclusion presented.

2. Protection Against Eviction at European Level

16 This section discusses the European requirements with regard to evictions. The discussion will be brief, because a large body of research literature on the meaning of the European case law concerning evictions already discusses the requirements in detail.[37]

17 As said above, the European Court found that a loss of one's home following an eviction is a most extreme form of interference with the right to respect for the home' as laid down in Article 8 ECHR. Under European human rights law, an eviction needs to be necessary in a democratic society. As a result, there has to be pressing social need for the eviction. Furthermore, arguments need to be given to explain the necessity of the eviction.[38] The reasons for the eviction have to be relevant and sufficient and the loss of the home following the eviction has to be proportionate to the legitimate aim pursued.[39]

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36 I. Loveland, 'Proportionality Review in Possession Proceedings', *The Conveyance and Property Lawyer* 2012, p (512) at 513.

37 See A. Remiche, '*Yordanova and Others* v. *Bulgaria*: The Influence of the Social Right to Adequate Housing on the Interpretation of the Civil Right to Respect for One's Home', *Human Rights Law Review* 2012, p 787; P. Kenna, & D. Gailiute, 'Growing Coordination in Housing Rights Jurisprudence in Europe?', 6. *European Human Rights Law Review* 2013, p 606; F. Tulkens, 'La Convention européenne des droits de l'homme et la crise économique. La question de la pauvreté', *Journal Européen des Droits de l'Homme* 2013, p 8.

38 ECtHR 29 January 2015, 15711/13, *Stolyarova* v. *Russia*, http://hudoc.echr.coe.int/eng?i=001-150675, para. 59.

39 ECtHR 27 May 2004, 66746/01, *Connors* v. *United* Kingdom, http://hudoc.echr.coe.int/eng?i=001-61795, para. 81.

18 Member States are obliged to provide safeguards against evictions: the decision-making process leading to the eviction should be fair.[40] Moreover, the evictee should 'in principle be able to have the proportionality and reasonableness of the measure determined by an independent tribunal in the light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, his right of occupation has come to an end'.[41] If an evictee puts forward a proportionality defence, the domestic court has to examine the arguments 'in detail and provide adequate reasons'.[42]

19 An important question is what the concept of proportionality in the eviction context actually entails. A considerable amount of literature has been published on the meanings of the concept proportionality,[43] and it is found that the European Court's use of proportionality test has a 'flexible and open-ended nature'.[44] According to Viljan, it may be impossible to find one fixed definition because the meaning of proportionality is 'so multi-shaped and related to the context under which the examination is undertaken'.[45] In the eviction context the European Court might, for example, take into account the possibility to address the non-performance of a tenant using a remedy that is less restrictive than an eviction. Still, an analysis of the case law above does show that the European Court does not pay ample attention to possible other remedies. In the context of eviction, the court seems not to apply the proportionality test as a 'less restrictive means test'.[46] It interprets the proportionality test in the eviction context in a practical and flexible contextual manner. This means that the European Court requires domestic courts to focus on the specific context of each case and the personal circumstances of the different stakeholders on a case-by-case basis. It did not develop a limited list of factors that should be taken into account in this contextual and individualized proportionality enquiry. However, case law shows that the European Court does refer to factors that a court should take into account such as the risk of homelessness, the lack of a specific need for the eviction, and the personal circumstances and individual characteristics of the evictee. These can include

40 ECtHR 24 April 2012, 25446/06, *Yordanova and others.* v. *Bulgaria*, http://hudoc.echr.coe.int/eng?i=001-110449, paras 117–118.

41 ECtHR 13 May 2008, 19009/04, *McCann* v. *United Kingdom*, http://hudoc.echr.coe.int/eng?i=001-86233, para. 50. See for an overview of other case law: ECtHR 21 April 2016, 46577/15, *Ivanova and Cherkezov* v. *Bulgaria*, http://hudoc.echr.coe.int/eng?i=001-162117, para. 53.

42 ECtHR 24 April 2012, 25446/06, *Yordanova and others.* v. *Bulgaria*, http://hudoc.echr.coe.int/eng?i=001-110449, para. 118.

43 See A. Barak, *Proportionality* (Cambridge: Cambridge University Press 2012).

44 P. van Dijk, F. van Hoof, A. van Rijn & L. Zwaak, *Theory and Practice of the European Convention on Human Rights* (Antwerp: Intersentia 2018), p 318.

45 J. Viljanen, *The European Court of Human Rights as a Developers of the General Doctrines of Human Rights Law* (Tampere: University of Tampere 2003), p 271.

46 P. Van Dijk, F. van Hoof, A. van Rijn & L. Zwaak, *Theory and Practice,* p. 321.

the evictees' health status, their vulnerability, their age, the duration of the occupation, and a long-term connection to the property.[47]

20 Though the contextual adjudication that follows from the European case law can be seen as a challenge to the rights paradigm and contractual freedom, the European Court nuanced the seriousness of that challenge in its own case law. It is, for example, not mandatory to have the proportionality and reasonableness of an eviction determined by court in every case. Only if the tenant 'wishes to raise an Article 8 defence to prevent eviction, it is for him to do so and for a court to uphold or dismiss the claim'.[48] Furthermore, a wide margin of appreciation is granted to the national authorities, if 'there is no reason to doubt the procedure followed'.[49] Moreover, the European court held that it does not accept 'the grant of the right to an occupier to raise an issue under Article 8 that would have serious consequences for the functioning of the domestic systems or for the domestic law of landlord and tenant'.[50] It believes that 'in the great majority of cases, an order for possession can be made in summary proceedings and that it will be only in very exceptional cases that an applicant will succeed in raising an arguable case on Article 8 grounds which would require a court to examine the issue in detail'.[51]

21 Moreover, in 2018 the European Court narrowed down the potential impact of Article 8 ECHR on national tenancy law by limiting the types of evictions for which contextual adjudication is required. In the *F.J.M.* v. *the United Kingdom* case, the European Court had to decide whether the requirement of an individualized proportionality assessment by an independent tribunal was also applicable to cases concerning private sector landlords. The Court holds that the requirements discussed above have 'primarily been applied in cases where applicants had been living in State-owned or socially-owned accommodation', as well in cases 'concerning the judicial sale of property to pay creditors'.[52] The

47 See ECtHR 6 December 2011, 7097/10, *Gladysheva* v. *Russia*, http://hudoc.echr.coe.int/eng?i=001-107713, para. 95; ECtHR 29 May 2012, 42150/09, *Bjedov* v. *Croatia*, http://hudoc.echr.coe.int/eng?i=001-110953, para. 68; ECtHR 12 June 2014, 14717/04, *Berger-Krall and others* v. *Slovenia*, http://hudoc.echr.coe.int/eng?i=001-144669, para. 273.

48 ECtHR 13 May 2008, 19009/04, *McCann* v. *United Kingdom*, http://hudoc.echr.coe.int/eng?i=001-86233, paras 28 and 54.

49 ECtHR 24 September 2013, 31673/11, *Pinnock & Walker* v. *United Kingdom*, http://hudoc.echr.coe.int/eng?i=001-127560, para. 28.

50 ECtHR 21 September 2011, 48833/07, *Orlic* v. *Croatia*, http://hudoc.echr.coe.int/eng?i=001-105291, para. 66.

51 ECtHR 24 September 2013, 31673/11, *Pinnock & Walker* v. *United Kingdom,* http://hudoc.echr.coe.int/eng?i=001-127560, para. 28.

52 ECtHR 6 November 2018, 76202/16, *F.J.M.* v. *United Kingdom*, http://hudoc.echr.coe.int/eng?i=001-188124, para. 37.

Court acknowledges that in the *Brežec* v. *Croatia* judgment of 2013, it also applied the requirements in a case concerning eviction from accommodation under private ownership.[53] Following its reasoning in the judgment in the *Vrzić* v. *Croatia* case of 2016, however, the European Court now holds that the requirement that 'any person at risk of losing his or her home should be able to have the proportionality of the measure determined by an independent tribunal did not automatically apply in cases where possession was sought by a private individual or enterprise'.[54] According to the European Court, 'the balance between the interests of the private individual or enterprise and the residential occupier could be struck by legislation which had the purpose of protecting the Convention rights of the individuals concerned'.[55]

22 In the *F.J.M.* v. *the United Kingdom*, the European Court makes clear that in eviction litigation concerning the private rental sector a direct horizontal effect of Article 8 ECHR and an international right to individualized proportionality testing are undesirable:

> What sets claims for possession by private sector owners against residential occupiers apart is that the two private individuals or entities have entered voluntarily into a contractual relationship in respect of which the legislature has prescribed how their respective Convention rights are to be respected (...). If the domestic courts could override the balance struck by the legislation in such a case, the Convention would be directly enforceable between private citizens so as to alter the contractual rights and obligations that they had freely entered into.[56]

Housing law scholar Benito Sánchez maintains that this judgment of the European Court 'stands at odds with the understanding of the right to housing enshrined in international human rights law'.[57] Moreover, the European Court 'sends a worrisome message in times of housing commodification, where public housing systems in Europe are progressively dismantled to the benefit of increasingly deregulated private housing arrangements'.[58]

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53 ECtHR 6 November 2018, 76202/16, *F.J.M.* v. *United Kingdom*, http://hudoc.echr.coe.int/eng?i=001-188124, para. 38. See ECtHR 18 July 2013, 7177/10, *Brežec* v. *Croatia*, http://hudoc.echr.coe.int/eng?i=001-122432.

54 ECtHR 6 November 2018, 76202/16, *F.J.M.* v. *United Kingdom*, http://hudoc.echr.coe.int/eng?i=001-188124, para. 41. See ECtHR 12 July 2016, 43777/13, *Vrzić* v. Croatia, http://hudoc.echr.coe.int/eng?i=001-164681.

55 *Ibid.*, para. 41.

56 *Ibid.*, para. 42.

57 https://strasbourgobservers.com/2019/01/15/f-j-m-v-the-united-kingdom-judicial-review-of-the-proportionality-of-an-eviction-in-private-rental-housing/.

58 *Ibid.*

3. Overview of Proportionality Debates in Member States

23 The precise meaning of the concept of proportionality and whether individualized proportionality testing is allowed in all eviction litigation will be left to the domestic legislators and courts in the 47 different contracting states of the Council of Europe. In this section, a short comparative legal analysis is conducted to map different approaches that various Member States have taken to deal with the European requirements. Of course, it is impossible to discuss all legal provisions, case law and academic research in all jurisdictions involved. For that reason, we will only briefly discuss developments in a number of European jurisdictions. As a result, the findings presented will be relatively abstract. Still, the analysis will show that the requirements stemming from the European case law have caused similar legal debates on the legal position of evictees and property owners in numerous contracting states all over Europe. It will also demonstrate that contracting states have different ways of dealing with the European case law concerning the protection against eviction. Before we start our short comparative tour, however, we should keep in mind that the recent *F.J.M.* v. *the United Kingdom* judgment concerning evictions from private accommodations will probably change the tone and nature of the debate concerning the need of contextual eviction adjudication and the impact of European law on national tenancy laws.

24 It is interesting to note that, as far as we know, the European case law did not cause heated discussions in the two European jurisdictions with the largest rental sector. In Switzerland 57.5% of population lived in rental housing, and in Germany 48.3%.[59] The rental sector in both countries is dominated by private landlords. Earlier research has assessed the relevant legal framework (predominantly laid down in Articles 543, 569, 573 and 574 of the German *Bürgerliches Gesetzbuch* as well as in Articles 257f and 266a–266o of the Swiss *Obligationenrecht*) and case law on the termination of leases and evictions.[60] It showed that the debate concerning proportionality enquiries and the European case law did not take place, because the national legislation already provided tenants ample protection against the termination of the tenancy agreement and the actual eviction.[61] In 2009 Van der Walt identified several significant challenges to the rights paradigm in German law, 'in that they not only restrict the landlord's right to cancel a lease and evict the former tenant, but in certain instances even prevent the owner from exercising

59 http://ec.europa.eu/eurostat/statistics-explained/index.php?title=Housing_statistics#Tenure_status.

60 M. Vols, M. Kiehl & J. Sidoli del Ceno, 'Human Rights and Protection Against Eviction in Anti-Social Behaviour Cases in the Netherlands and Germany', 2. *European Journal of Comparative Law and Governance* 2015, pp 156–180.

61 See for the same conclusion concerning Belgium: N. Moons, *The Right to Housing in Law and Society* (New York: Routledge), p 109.

those rights purely because of the hardship that doing so would cause for socially weak and marginalised tenants or families'.[62] Vols, Kiehl and Sidoli also found that German tenancy law did not encounter 'major problems in technically complying with the European minimum level of protection because of the already built-in proportionality checks'.[63]

25 In other countries, however, the European case law did result in legal discussions. Based on a literature review, we know that the European requirements concerning proportionality and evictions caused (scholarly) debates in various Member States. Research conducted within the comparative European Tenancy Law and Housing Policy in Multi-level Europe(TENLAW)-project[64] shows that evictions take place in France, and that the law offers some protection to tenants that face eviction. For example, the *Tribunal de grande instance* may delay an eviction if personal circumstances of the tenant require such a delay.[65] Recent case law demonstrates that Article 8 ECHR seems to play a role in French eviction litigation.[66] However, it is also found that French domestic courts often seem to ignore the requirements regarding proportionality stemming from European law discussed above.[67]

26 With regard to Spain, it is evident that the number of evictions has grown due to the severe economic crisis that hit the country in the last decade. Previous research has shown that the Spanish government has taken some legal measures to suspend evictions during the height of the crisis (e.g. *Real Decreto Legislativo* 27/2012).[68] The research also shows that various legal procedures have been amended to speed up the eviction process.[69] Amnesty International held that individualized proportionality enquiries should be implemented in both the owner-occupied and the rental sector of the housing market.[70] It found that

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62 A.J. Van der Walt, *Property*, p 95. See also M. Vols & M. Kiehl, 'Balancing Tenants' Rights While Addressing Neighbour Nuisance in Switzerland, Germany and the Netherlands', 4. *European Property Law Journal* 2015, p 1.

63 M. Vols, M. Kiehl & J. Sidoli del Ceno, 2. *European Journal of Comparative Law and Governance* 2015, p 180.

64 Last accessed 1 July 2019 See https://www.tenlaw.uni-bremen.de/.

65 J. Hoekstra & F. Cornette, *National Report for France* (Bremen: TENLAW 2014), pp 147–151.

66 See for example Tribunal Administratif de Lille 18 October 2016, 1607719, http://lille.tribunal-administratif.fr/content/download/74806/694299/version/1/file/1607719.pdf, para. 17.

67 L. Slingenberg & L. Bonneau, '(In)formal Migrant Settlements a Right to Respect for a Home', 19. *European Journal of Migration and Law* 2017, p 335.

68 E.M. Roig, *National Report for Spain* (Bremen: TENLAW 2014), p 41.

69 E.M. Roig, *National Report for Spain*, pp 167–176. See also S. Nasarre-Aznar & E.M. Roig, 'A Legal Perspective of Current Challenges of the Spanish Residential Rental Market', 9. *International Journal of Law in the Built Environment* 2017, p 115.

70 Amnesty International Spain, *Dereches desalojados*, 2015; Amnesty International Spain, *The Housing Crisis Is Not Over*, 2017.

'contrary to international human rights law, the judicial foreclosure procedure does not respect the principles of equality of arms, effective remedy and independent assessment of the proportionality of evictions of primary homes'.[71] With regard to the rental sector, Spanish law 'does not establish an independent mechanism to assess the proportionality of the eviction, and therefore does not consider the tenant's vulnerability and the procedural or material inequality between landlord and tenant'.[72] Amnesty International advocates that Spanish 'procedural law must give courts the means and competence to examine the proportionality of every eviction and to propose alternative solutions, taking into consideration the gendered impact of evictions as well as tenants' overall material conditions'.[73] Interestingly, in 2018 a group of Members of the Spanish Parliament has proposed a Bill (*Proposición de Ley de emergencia habitacional en familias vulnerables en el ámbito habitacional y de la pobreza energética*) that aims to make it possible for courts to review the proportionality of all types of evictions. If the Bill will be adopted, the law will read as follows:

Artículo 6. Juicio de proporcionalidad en casos de vivienda habitual

En todo procedimiento, antes de ordenar cualquier lanzamiento de personas en inmuebles que constituyan su domicilio, el juez deberá dar audiencia a aquellas para, en su caso, autorizar o denegar la medida atendiendo a las circunstancias concurrentes y con ponderación de los intereses en conflicto, asegurando que el desalojo no menoscaba la protección establecida en el artículo 18 de la Constitución en relación con el derecho una vivienda digna y las garantías establecidas en los Tratados Internacionales suscritos por España en materia de Derechos Humanos.[74]

27 In Sweden, the European case law discussed above have also been discussed in the housing law context. Recent research conducted by Baheru shows that the European requirements concerning proportionality have been taken into account by the Swedish Court of Appeal in eviction litigation.[75] In its judgments, the Court referred to the European case law on Article 8 ECHR and mentions the need for proportionality.[76] Yet, the Court of Appeal also emphasized that a tenant 'has a more restricted right to respect for one's home' than a property owner.[77] In most

71 Amnesty International Spain, *Housing Crisis*, p 7.

72 Amnesty International Spain, *Housing Crisis*, p 17.

73 Amnesty International Spain, *Housing Crisis*, p 20.

74 CONGRESO DE LOS DIPUTADOS, 7 de mayo de 2018, No 122/000234, p 9.

75 H. Baheru, 'Konventionsrättsligt besittningsskydd vid sidan av hyreslagen: tillämpning av EKMR Art. 8', 19 *Juridisk Tidskrift* 2018, pp 67–90.

76 See for example Svea Court of Appeal 5 November 2014, ÖH 9194-14; Svea Court of Appeal 21 November 2014, ÖH 936-14, ÖH 1589-14 & ÖH 1592-14.

77 H. Baheru, 'Tenant's Right to Respect for Home: A Challenge for Swedish Tenancy Courts?', in M. Vols& J. Sidoli del Ceno (eds), *People and Buildings: Comparative Housing Law* (Den Haag: Eleven Publishing 2018), p 141.

cases, the Court did not assess the personal circumstances of the tenants and their children in detail and dismissed their proportionality defence. As a result Baheru maintains that the Swedish judiciary has 'taken a conservative stance towards introducing a human rights paradigm within the context of tenure security. This approach is problematic to the individuals who risk having their rights interfered with due to the courts' reception of the convention as a legal source'.[78]

28 In Ireland, the European case law prescribing contextual adjudication in eviction cases did result in debates. Jordan, for example, holds that European law 'has had a significant impact in Ireland, as elsewhere, on property law and housing law'.[79] The main debate in Ireland focused on protection against evictions in the public rental sector. Under Irish housing law (i.e. section 62(3) Housing Act 1966), courts were obliged to issue a warrant for repossession of a dwelling owned by a local authority without engaging in a review of the circumstances of a case. Various tenants held that this requirement breached their Article 8 ECHR right. In 2008, the Irish High Court concluded in the *Gallagher case* that the Irish law did not 'provide a form in which the proportionality of the grant of a warrant for possession could be ascertained and in which the defendant could articulate excuses, explanations as to extenuating circumstances and pleas based on personal circumstances, all of which were integral to the issue of proportionality'.[80] It found that Article 8 ECHR was violated and awarded a declaration of incompatibility. In 2012, the Irish Supreme Court had to rule in the same case. It developed four requirements to determine the compliance of the Irish law with European human rights law:

> (i) is the framework procedure sufficient to afford true respect to the interests safeguarded by the Article, (ii) is the decision making process fair in such a way as to respect that right, (iii) has the affected person an opportunity to have any relevant and weighty arguable issues tested before an independent tribunal and, (iv) has that person an opportunity to have such an issue considered against the measure, to determine its proportionality.[81]

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78 H. Baheru, *People and Buildings: Comparative Housing* Law, p 166.

79 M. Jordan, *National Report for Republic of Ireland* (Bremen: TENLAW 2014), p 7.

80 High Court 11 November 2008, [2008] IEHC 354, *Dublin City Council* v. *Gallagher*, http://www.bailii.org/ie/cases/IEHC/2008/H354.html. See C. Carney, L. Nic Lochlainn, S. O'Donoghue & T. Power, 'I can't Get No Satisfaction: An Analysis of the Influence of the European Convention on Human Rights on the Repossession of Public Housing in Ireland', 13. *Trinity College Law Review* 2010, p 55.

81 Supreme Court 27 February 2012, [2012] IESC 18, *Donegan & Gallagher* v. *Dublin City Council*, http://www.supremecourt.ie/Judgments.nsf/60f9f366f10958d1802572ba003d3f45/c6f4944e0e6e995e802579bb0052a4d5?OpenDocument&Highlight=0,gallagher, para. 143.

Based on these requirements, the Supreme Court confirmed that the Irish Housing Act 1966 was incompatible with the provisions of the ECHR, because it did not allow courts to review proportionality in individual cases concerning eviction from public housing.

29 This victory for the proponents of proportionality enquiries in eviction cases, however, did not silence the debate on proportionality enquiries in other types of eviction cases in Ireland. For example, Kenna & Kennedy recently found a significant increase in eviction cases concerning mortgage arrears in Ireland over the last years.[82] A large percentage of evictees did not have legal representation and were not well protected. The researchers hold that 'human rights protection requires that those at risk of losing their home have access to justice, and this means equality of arms in a court, and an opportunity for their consumer and human rights to be considered'.[83] According to them, 'it may be the case that a systematic non-application of relevant EU consumer and human rights law is taking place in Ireland'.[84] From a political point of view, the debate concerning the need for proportionality testing in eviction cases is not over yet as well. Currently, the Irish Parliament discusses the *Keeping People in their Homes Bill 2017* that aims amend the Land and Conveyancing Law Reform Act 2009. If Parliament adopts the Bill, there will be a 'statutory base to effectively conduct proportionality assessments in relation to possession orders arising from mortgage arrears on people's homes'.[85]

4. Legal Debate in the United Kingdom: A Clash of Titans

30 Now the legal debate in Europe is mapped out, we will discuss the impact of the European case law on landlord-tenant law in two jurisdictions in greater detail. First, we focus on the 'clash of the titans' (i.e. the House of Lords/Supreme Court versus the European Court) in the United Kingdom that was caused by the European case law discussed above.[86] In this jurisdiction, the European case law probably resulted in the most intense debate. In the 1970s and 1980s, the legislator introduced various due process requirements and substantive tenant protection in the United Kingdom and moved landlord-tenant law away from the traditional rights paradigm.[87] Yet, legislation from the late 1980s and 1990s such as the Housing Act 1988, the Housing Act 1995 and the Anti-Social Behaviour Act

82 P. Kenna & S.W. Kennedy, *Access to Justice and the ECB* (Centre for Housing Law, Rights and Policy: Galway 2018).

83 P. Kenna & S.W. Kennedy, *Access to Justice and the* ECB, p 7.

84 P. Kenna & S.W. Kennedy, *Access to Justice and the* ECB, p 8.

85 Keeping People in their Homes Bill 2017 Explanatory Memorandum, p 2.

86 S. Nield, 'Clash of the Titans: Article 8, Occupiers and Their Home', in S. Bright (red), *Modern Studies in Property Law – Volume 6* (Oxford, GB, Hart 2011), pp 101–129.

87 A.J. Van der Walt, *Property*, pp 103–104.

1996 reduced tenant protection in both the public and private rental sector and, consequently, moved English landlord-tenant law more towards the rights paradigm.[88]

31 After the introduction of the Human Rights Act 1998, tenants in both the public and private sector argued that Article 8 ECHR creates an 'additional judicial discretion that would require (or legitimatize) a judicial weighing-up of landlords' rights against the rights of tenants'.[89] The House of Lords, however, held in the *Qazi* case that it was not open for a tenant against whom possession was sought by a local authority to raise a proportionality argument. It concluded that Article 8 ECHR does not oblige courts to apply a full-scale proportionality test and balance the tenant's housing and home interests and the landowner's property rights, because the balancing has already be done in the legislature.[90] As a result, Cowan et al. characterized the Qazi judgment as 'the zenith of the supremacy of property right over the interposer's human rights'.[91] Van der Walt concludes that in this judgment, 'the House of Lords refused to concede that the right to housing that is protected by the European Convention on Human Rights could derogate from proprietary and contractual rights acquired under domestic law, thereby confirming the presumptive power of ownership as it is enshrined in the rights paradigm'.[92]

32 In 2010 however, the Supreme Court amended its position through the judgment in the *Pinnock* case. It re-interpreted the mandatory requirements in national legislation and accepted that 'any person at risk of being dispossessed of his home at the suit of a local authority should in principle have the right to raise the question of the proportionality of the measure and have it determined by an independent tribunal in the light of article 8, even if his right of occupation has come to an end'.[93] As a result, Cowan et al. maintain that 'the property right thesis was forced to give way to a more Europeanized version through which the interposer could challenge the decisions of the public authority'.[94]

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88 A.J. Van der Walt, *Property*, p 106.

89 A.J. Van der Walt, *Property*, p 106.

90 See House of Lords 31 July 2003, [2003] UKHL 43, *Harrow London Borough Council* v. *Qazi*, https://publications.parliament.uk/pa/ld200203/ldjudgmt/jd030731/qazi-1.htm; House of Lords 8 March 2006, [2006] UKHL 10, *Kay* v. *Lambeth London Borough Council*, https://publications.parliament.uk/pa/ld200506/ldjudgmt/jd060308/leeds-1.htm; House of Lords 30 July 2008, [2008] UKHL 57, *Doherty* v. *Birmingham City Council*, https://publications.parliament.uk/pa/ld200708/ldjudgmt/jd080730/dohert-1.htm.

91 D. Cowan, L. Fox O'Mahony & N. Cobb, *Great debates,* p 155.

92 A.J. Van der Walt, *Property*, p 50.

93 Supreme Court 3 November 2010, [2010] UKSC 45, *Manchester CC* v. *Pinnock*, https://www.supremecourt.uk/cases/docs/uksc-2009-0180-judgment.pdf.

94 D. Cowan, L. Fox O'Mahony & N. Cobb, *Great debates,* p 156.

33 Still, it was unclear whether a proportionality enquiry was needed in eviction cases in the private rental sector. In 2016, the Supreme Court answered this question in the *MacDonald* case. In this case, a private landlord served a 'no fault notice' under section 21 of the Housing Act 1988 meaning that the landlord did not have provide a reason for the termination of an assured shorthold tenancy. On the expiry of this notice, the landlord issued proceedings for possession of the property and requested to the court to oblige the tenant to evict the rented property. The County Court held that 'it had no alternative to make an order for possession' because it was not open to the tenant 'to require the court to consider the proportionality of making an order for possession against a residential occupier, given that the person seeking possession was not a public authority'.[95] Yet, the County Court judge maintained that if 'he had been entitled to consider the proportionality of making an order for possession, he would have dismissed the action, because, "on balance", he would "have taken the view that those circumstances were sufficiently exceptional to justify dismissing the claim for possession on the basis that is was disproportionate"'.[96] The Court of Appeal dismissed the tenant's appeal, after which the Supreme Court had the final say.

34 The Supreme Court held that 'the proportionality of making an order for possession was already taken into account by Parliament through the legislation which limited the landlord's right to obtain possession'.[97] As a result, the Supreme Court takes the view that 'it is not open to the tenant to contend that Article 8 could justify a different order from that which is mandated by the contractual relationship between the parties, at least where, as here, there are legislative provisions which the democratically elected legislature has decided properly balance the competing interests of private sector landlords and residential tenants'.[98] It maintained that 'to hold otherwise would involve the Convention effectively being directly enforceable as between private citizens so as to alter their contractual rights and obligations, whereas the purpose of the Convention is (...) to protect citizens from having their rights infringed by the state'.[99] According to the Supreme Court, the State should be allowed to lay down rules which are of general application 'with a view to ensuring consistency of application and certainty of outcome'.[100] It considers it 'unsatisfactory if a domestic legislature could not impose a general set of rules protecting residential tenants in the private sector

95 Supreme Court 15 June 2016, [2016] UKSC 28, *MacDonald* v. *MacDonald*, https://www.supremecourt.uk/cases/docs/uksc-2014-0234-judgment.pdf, para. 8.
96 *Ibid.*, para. 8.
97 *Ibid.*, para. 35.
98 *Ibid.*, para. 40.
99 *Ibid.*, para. 41.
100 *Ibid.*, para. 43.

without thereby forcing the state to accept a super-added requirement of addressing the issue of proportionality in each case where possession is sought'.[101]

35 To sum up, the Supreme Court rejected the idea that judges in cases concerning evictions in the private rental sector should be allowed to conduct individualized proportionality testing, and take the specific circumstances of the case into account. Lane argues that this approach 'was commendable from the perspective that it have considerable deference to Parliament and did not encroach on parliamentary sovereignty'.[102] Still, she argues, 'the Lords were quick to reject jurisprudence from Strasbourg that could have aided in providing a vulnerable individual with human rights protection'.[103] Loveland holds that 'at a stroke, MacDonald has resolved the uncertainty of the horizontal effect of art. 8 and lifted more than 50 per cent of the rented housing sector beyond art. 8 protection'.[104] Lees argues that the Supreme Court's reasoning is unconvincing. According to her, the 'court's concerns about the proper judicial role and the balance struck between occupier and landlord should filter into this proportionality test under the concept of appreciation or deference'.[105] Still, these concerns 'do not justify no assessment being carried out'.[106]

36 Interestingly, the *MacDonald* was brought to the European Court and resulted in the previously mentioned *F.J.M.* v. *United Kingdom* judgment in 2018.[107] As discussed above, the European Court basically followed the reasoning of the Supreme Court. The European Court holds that the case:

> concerns a contractual (landlord-tenant) relationship between two private individuals or entities, which is governed by legislation prescribing how the Convention rights of the parties are to be respected. In this regard, the Housing Act 1988 reflects the State's assessment of where the balance should be struck between the Article 8 rights of residential tenants and the Article 1 of Protocol No. 1 rights of private sector landlords. Indeed, it is clear from the Supreme Court judgment that in striking that balance the authorities had

101 *Ibid.*, para. 43.

102 L. Lane, *The Horizontal Effect of International Human Rights Law: Towards a Multi-Level Governance Approach* (Groningen: University of Groningen 2018), p 288.

103 *Ibid.*, p 288.

104 I. Loveland, 'Twenty Years Later – Assessing the Significance of the Human Right Act 1998 to Residential Possession Proceedings', 3. *The Conveyancer and Property Lawyer* 2017, p (174) at 192.

105 E. Lees, 'Article 8, Proportionality and Horizontal Effect', 133. *Law Quarterly Review* 2017, p (31) at 34.

106 E. Lees, 133. *Law Quarterly Review* 2017, p 34.

107 ECtHR 6 November 2018, 76202/16, *F.J.M.* v. *United Kingdom*, http://hudoc.echr.coe.int/eng?i=001-188124.

> regard, *inter alia*, to the general public interest in reinvigorating the private residential rented sector (...); something which the court accepted was best achieved through contractual certainty and consistency in the application of the law (...). As the Supreme Court made clear, a tenant entering into an assured shorthold tenancy agrees to the terms – clearly set out in the 1988 Act – under which it could be brought to an end and if, once it comes to an end, he or she could require a court to conduct a proportionality assessment before making a possession order, the resulting impact on the private rental sector would be wholly unpredictable and potentially very damaging.[108]

37 As reflected in this judgment as well as the Supreme Court judgments, a major concern is that proportionality enquiries in eviction litigation will impose unduly onerous burdens on landowners, erode predictability and create uncertainty.[109] Pascoe, however, has argued that there are 'moral and humanitarian grounds for incorporating human rights into disputes between private landowners, even though such incorporation is necessarily at the expense of certainty'.[110]

38 Other scholars have argued that contextual adjudication and proportionality enquiries in practice will not erode the predictability and proprietors' rights.[111] Walsh has criticized how courts in the United Kingdom interpret the European requirements and, according to her, marginalize Article 8 defences. By doing so, the courts have 'minimised the risk of destabilisation'.[112] Nield holds that courts in the United Kingdom 'are keen to restrict its impact so that in almost all cases an eviction based upon established legal rules will be justified under Article 8 (2)'.[113] Research shows that courts in the United Kingdom hear numerous housing possession claims in one day.[114] Regardless the European requirements, they adopt a 'scalar/jurisdictional protectionist approach, which emphasizes the narrowness of the rights'.[115] Courts' processes are 'routinized, mundane, and indeed, "pretty boring stuff", although, at heart, of course, they determine a

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108 *Ibid.*, para. 43.

109 See M. Hutchings, 'The Right to Respect for the Home: Privacy's Poor Relation?', 22. *Judicial Review* 2017, p 69.

110 S. Pascoe, 'The End of the Road for Human Rights in Private Landowners' Disputes', *The Conveyancer and Property Lawyer* 2017, p (269) at 286.

111 S. Nield, 23. *King's Law Journal* 2013, p 171.

112 R. Walsh, 131. *Law Quarterly Review* 2015, p 597.

113 S. Nield, 23. *King's Law Journal* 2013, p 164.

114 C. Hunter, J. Nixon & S. Blandy, 35. *Journal of Law and Society* 2008, p 77; S. Bright & L. Whitehouse, *Information, Advice, Representation in Housing Possession Cases* (Oxford: University of Oxford 2014), pp 42–43.

115 D. Cowan, C. Hunter & H. Pawson, 'Jurisdiction and Scale: Rent Arrears, Social Housing and Human Rights', 39. *Journal of Law and Society* 2012, p (269) at 281.

household's future for retaining or obtaining social and other housing'.[116] Consequently, the 'more European notion of proportionality bear little relevance or reference for the day-to-day work' of housing officers in the United Kingdom.[117] Bright and Whitehouse, however, found that employees working in Housing Possession Courts commentated that 'cases should be longer and noted that particularly with if Article 8 points are raised it would be difficult to deal with in a short hearing'.[118]

5. Legal Debate in the Netherlands: A Proportionality Paradise?

39 The European case law on Article 8 ECHR influenced eviction litigation in the Netherlands as well. The Dutch Supreme Court ruled that an eviction is a very serious interference with the right of the inviolability of the home. According to the Supreme Court, everyone at risk of this interference should in principle be able to have the proportionality of the eviction determined by an independent court before the eviction is carried out.[119] Interestingly, this specific judgments dealt with the question whether squatters could rely on the protection offered by the right to respect of the home laid down Article 8 ECHR. The Supreme Court ruled this was the case, and as a result, under Dutch law the requirements stemming from Article 8 ECHR are applicable to every type of evictions. As a result, from a housing law perspective the Netherland can be characterized as a 'proportionality paradise'.

40 Several studies have already analysed how these requirements function in Dutch law concerning squatters or administrative evictions.[120] In this article, the influence of proportionality enquiries with regard to Dutch landlord-tenant law is discussed. Compared to other countries, the Netherlands has a large rental sector: approximately 40% of the total housing stock are rental housing units. The vast majority of these units are owned by housing associations, which are statutory obliged to provide affordable housing to the public. Still,

116 D. Cowan, C. Hunter & H. Pawson, 39. *Journal of Law and Society* 2012, p 278. See also D. Cowan & E. Hitchings, '"Pretty Boring Stuff": District Judges and Housing Possession Proceedings', 16. *Social & Legal Studies* 2007, p (363) at 364-365.

117 D. Cowan, C. Hunter & H. Pawson, 39. *Journal of Law and Society* 2012, p 294.

118 S. Bright & L. Whitehouse, *Information, Advice*, p 44.

119 Hoge Raad 28 October 2011, http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2011:BQ9880.

120 L. Slingenberg & L. Bonneau, *European Journal of Migration and Law* 2017, pp 335-369; L.M. Bruijn, M. Vols & J.G. Brouwer, 'Home Closure as a Weapon in the Dutch War on Drugs: Does Judicial Review Function as a Safety Net?', 57. *International Journal of Drug Policy* 2018, p 137.

with regard to eviction the same legal framework applies to housing associations as private landlords.[121]

41 If a landlord wants to cancel a lease and oblige a tenant to evict the housing unit, he/she is required to go to court. The court will then assess whether the lease has been breached. The basic rule that courts apply is strict: any breach justifies the cancellation of the lease.[122] However, the court has the discretion not to cancel the lease if the breach, given its specific nature or minor importance, does not justify the cancellation overall.[123] As a result, if a tenant puts forward a proportionality defence the court is entitled to check whether the cancellation of the lease and the following eviction are proportionate or not. Consequently, it can be said that the European requirements that stem from Article 8 ECHR become apparent in the exception to the strict basic rule.[124]

42 Before we take a closer look at how often this legal procedure is used, it is necessary to take into account that landlords developed informal procedures that result in eviction too. Case law indicates that landlords push tenants to terminate the lease and vacate the premise voluntarily to avoid legal problems, costs, and future blacklisting.[125] Unfortunately, there is no data available on the number of informal evictions.

43 With regard to the formal evictions, there is no data available on evictions in the private rental sector. Still, some data on evictions in the social rental sector are published. Every year the number of judgments that entitled the housing association to evict a tenant is published by the national organization of housing association. Yet, it is unclear how many eviction claims are lodged with court, and how many of these claims are dismissed by court. Figure 1 shows the number of eviction judgments over the last thirteen years.[126]

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121 M. Vols, P.G. Tassenaar & J.P.A.M. Jacobs, 'Dutch Courts and Housing Related Anti-Social Behaviour. A First Statistical Analysis of Legal Protection Against Eviction', 7. *International Journal of Law in the Built Environment* 2015, p 148.

122 F.B. Bakels, *Ontbinding van overeenkomsten* (Deventer: Kluwer 2011), pp 82–83.

123 Hoge Raad, 22 June 2007, *Fisser* v. *Tycho*, http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2007:BA4122.

124 Gerechtshof Arnhem-Leeuwarden, 27 August 2013, http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHARL:2013:6811, para. 4.3.

125 District Court Gelderland, 24 May 2013, http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBGEL:2013:3915.

126 Aedes, *Corporatiemonitor* (Den Haag: Aedes 2017).

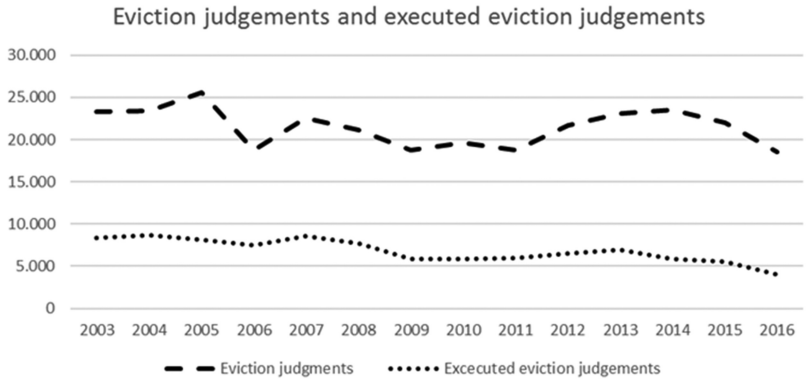

Figure 1 Number of (enforced) eviction judgments

44 The figure shows that the total number of eviction judgments declined over the last years. In 2014 the courts delivered 23,500 eviction judgments, in 2015 there were 22,000 eviction judgments and in 2016 the number declined to 18,500. Unfortunately, the data available on the eviction judgments do not reveal the reason for the proceedings. It is also unknown in how many eviction cases tenants and/or their lawyers appear before court, although data clearly show that in the vast majority of private law cases defendants do not participate in the court.[127]

45 The available information reveals how many eviction judgments are enforced. When a judgment is enforced, the tenant did not leave the premise after the eviction period and a bailiff had to enforce the court order. Figure 1 shows that over the last few years roughly 25% of all eviction judgments were enforced. In 2016, 4,800 eviction judgments were enforced. Rent arrears is by far the most important reason for eviction over the last years. This type of breach of the lease is, in roughly 80% to 85% of all enforced eviction judgments, the main reason. Still, while interpreting these numbers it should be taken into account that in many cases there is a combination of breaches of the lease (e.g. rent arrears and nuisance), which will only be registered as rent arrears. Moreover, the numbers on the enforced eviction judgments are somewhat misleading, because a closer assessment of the definitions used shows that the actual number of tenants that lost their home after the eviction judgment is higher. In 2016, for example, another 1,700 tenants did not wait for the bailiff and left the premise voluntarily. This means that in 2016 the actual number of formal evictions was 6,500.

127 https://opendata.cbs.nl/statline/#/CBS/nl/dataset/80737NED/table?dl=D2D3.

6. Content Analysis of Eviction Litigation in the Netherlands

46 This section of this article presents the results of a quantitative content analysis of Dutch eviction litigation.[128] Over 480 eviction cases are statistically analysed to assess the role that proportionality plays in these cases. Our dataset contains eviction cases concerning rent arrears, nuisance such as noise, and drug-related crime such as the growing of cannabis. We collected a relatively large body of published case law between 2000 and 2017 about evictions from residential premises. We searched the online database of the Dutch judiciary (www.rechtspraak.nl) with fixed search terms in order to ensure reproducibility. We used the following terms: 'lease', 'cancellation', 'eviction', 'rent arrears', 'arrears', 'nuisance', 'cannabis', 'cannabis growing', 'drugs', 'drug dealing', 'stench' and 'assault'. The website allowed us to filter on all judgments of the lowest courts – the district courts – on private law, and we manually selected all judgments on evictions. This search yielded 483 relevant court decisions on evictions.

47 Our sample is a selection of the overall population of judgments, as district courts in the Netherlands do not publish every single judgment. To assess the representativeness of our sample, the official publication policy needs to be examined.[129] The judiciary itself selects which court decision will be published and that the rules for publication are rather vague. Until 2012, court decisions were published on the basis of qualitative criteria including media attention, importance for public life, consequences for application of regulations, and interests of parties. As of 2012 decisions of all highest courts should be published, unless 'the case is unfounded or inadmissible and/or dismissed with a standard reasoning'. Courts are also obliged to publish if a case received attention from the media or if the decision was of significant importance for further rulings. The rules on publication contain some more selection criteria, and courts are allowed to develop additional rules and selection criteria. Given these imprecise rules and the role of the judiciary's judgment in publishing, there is a selection bias that we need to take into account when interpreting the results of the analysis of our sample.

48 The decisions contain a detailed description of the characteristics of the dispute, the parties, their claims and arguments. With a coding scheme, a team of legal researchers coded the decisions and identified relevant variables in the decisions. From a database consisting of 483 decisions of courts of first instance in possession proceedings, we constructed a set of variables including characteristics of the parties involved, the type of breach, parties' arguments/claims/defences, and the court's

128 See on this method: M.A. Hall & R.F, Wright, 'Systematic Content Analysis of Judicial Opinions', 96. *California Law Review* 2008, p 63; R.M. Lawless, J.K. Robbennolt & T.S. Ulen, *Empirical Methods in Law* (Austin: Kluwer 2010); L. Epstein & A.D. Martin, *Introduction Empirical Legal Research.*

129 https://www.rechtspraak.nl/Uitspraken-en-nieuws/Uitspraken/Paginas/Selectiecriteria.aspx.

reasoning. A total of 50 cases were independently coded by two coders to test the inter-coder reliability.[130] The results of this test showed high agreement levels. Lastly, statistical techniques such as a logistic regression analysis were used to assess the possible impact of advancing a proportionality defence on the outcome of a case.[131]

49 Table 1 shows the main characteristics of the 483 cases in our dataset. Both the landlord and the tenant seem to be well represented by lawyers in court. In nearly all (99%) of the cases the landlord had legal representation, and in over 80% the tenant was represented by a lawyer or legal expert.

Table 1. Case Characteristics

	N	*% of Total*
Legal representation		
Tenant has legal representation	397	82%
Landlord has legal representation	476	99%
Type of breach		
Arrears breach	192	40%
Nuisance and crime breach	215	45%
Drug-crime breach	163	34%
Defence strategy		
Tenant advances a substantive defence	369	76%
Tenant denies breach	239	49%
Tenant advances proportionality defence	255	53%
Types of proportionality defences		
Tenant states that breach is not serious	102	21%
Tenant points to loss of home	121	25%
Tenant mentions health issues	59	12%
Tenant mentions child	65	13%
Tenant mentions long duration of stay	29	6%
Court decision		
Court dismisses claim	156	32%
Court orders eviction	327	68%
Total number of cases	483	

50 The table also shows that we distinguished between three types of breaches of a lease. The first type concerns rent arrears, which refers to the tenant failing to pay the rent to the landlord. In 40% of the cases in our dataset the landlord held that the tenant was in arrears and, as a result, requested the court to oblige the

130 See L. Epstein & A.D. Martin, *Introduction Empirical Legal Research*, pp 97-114.
131 L. Epstein & A.D. Martin, *Introduction Empirical Legal Research*, pp 212-219.

tenant to evict the property. The second type concerns anti-social behaviour such as nuisance and crime. In 45% of the cases in our dataset, the landlord accused the tenant of breaching the lease because of nuisance or crime. The third type of breach concerns a specific type of nuisance and crime: drug-related crime. This concerns the dealing and selling of drugs in the premise, the use of drugs in the premise, and the producing drugs in the rental unit (e.g. growing cannabis). In 34% of the cases in our dataset, the landlord accused the tenant of breaching the lease because of drug-related crime.

51 Tenants use various legal defence strategies to fight the landlord's claim. In approximately three quarters of the cases, the tenant advance a defence of a substantive nature. There are two main substantive defences: denying the breach and putting forward a proportionality defence. In 49% of the cases, the tenant denied that the lease was breached or that the landlord did not provide enough proof for this breach.

52 Furthermore, in 53% of the cases the tenant advanced a proportionality defence. In the light of the European case law and research literature discussed above, we identified various proportionality defences. First, a tenant can try to minimize their misconduct and argue that the breach is not serious enough to justify an eviction. In our dataset, tenants advance this defence in 21% of the cases. Second, the tenant can argue that eviction will have serious consequences such as homelessness and eviction is disproportionate. In the cases we analysed, the tenants put forward this type of proportionality defence in 25% of all cases. Third, tenants may argue that children will be disproportionality affected by an eviction. They may emphasize the need of small children for a stable home situation, their need to live close to their school and friends, and the negative consequences for children of losing a home. The tenants in the cases we analysed advanced this defence in 13% of the cases. Fourth, a tenant can advance that he/she is ill and that eviction will worsen the (mental) health problems. This was done in 12% of the eviction cases we analysed. Lastly, tenants can argue that they live in the premise for a long time, feel emotionally, psychologically, and culturally connected to this specific house and, for that reason, eviction is disproportionate. In our dataset, a tenant put forward this type of proportionality defence in only 6% of the cases.

53 It is also shown in how many cases the landlord won his/her case in court. In the case law we reviewed the court allowed the landlord's claim in nearly two third of the cases. In a minority of cases (32%), the court dismissed the landlord's claim and allowed the tenant to continue to reside in the rental unit.

54 Now we know the basis characteristics of the cases in our dataset, we can continue to apply a logistic regression analysis to assess the impact of advancing a proportionality defence on the outcome of a case. In the analysis, a dichotomous

variable 'tenant wins case' is used as the dependent variable.[132] A number of independent variables are added to the model to look for predictors for the outcome of an eviction court case. Table 2 shows the various variables and the results of the analysis: the odds ratio (OR) and the significance level.[133] In short, the odds ratio shows whether there is a negative or positive effect on the likelihood of a tenant winning his/her case. If the OR is equal to 1 there is no effect, if it is higher than 1 there is a positive effect and if the OR is lower than 1 there is a negative effect. The significance level shows whether this effect is found to be substantial: if the significance level found is below 0.05 the effect found is considered to be significant.

Table 2 Logistic Regression on One General Proportionality Defence

Variable	*Odds Ratio (OR)*	*Significance Level*
Proportionality defence	1.351	0.204
Denial defence	1.326	0.243
Tenant legal representation	3.000	0.004
Rent arrears	0.527	0.075
Nuisance/crime	0.374	0.016
Drug-related crime	0.262	0.005
Length breach (months)	0.986	0.027

55 It can be seen that advancing a proportionality defence has a positive effect on the likelihood of a tenant winning a case (because the OR is higher than 1), but also that this effect is not significant (because the significance level is above 0.05). The same holds for putting forward the defence that denies the breach. Other effects found are significant. If tenants have legal representation, they are three times more likely to win their case than if they do not. Furthermore, it can also be seen that all types of breaches have a negative impact on the likelihood of a tenant winning the case. Yet, the negative effect on the likelihood that a tenant wins his/her case is the biggest in cases concerning a drug-related breach. Lastly, the table shows that with every month of continued breach, it becomes more and more unlikely that a tenant wins his/her case.

132 We coded this variable as follows: '0 = "tenant loses and needs to evict" and "1= tenant wins and does not have to evict"').

133 The odds ratio is a 'measure of association between an exposure and an outcome'. See M. SZUMILAS, 'Explaining Odds Ratios', 19. *J Can Acad Child Adolesc Psychiatry* 2010, p (227) at 227.

56 Another analysis was conducted with the same dependent variable, and five independent variables on specific proportionality defences. Table 3 shows the results of this analysis. Again, we found that is more likely that tenants win their case if they have legal representation. Furthermore, it can be seen that being accused of a drug-related breach decreases the likelihood of winning the case. Every extra month that the breach takes place decreases the likelihood of tenants winning their case.

Table 3 Logistic Regression Various Proportionality Defences

Variable	*Odds Ratio (OR)*	*Significance Level*
Tenant: no serious breach	1.730	0.044
Tenant: homelessness	0.779	0.395
Tenant: health issues	1.318	0.420
Tenant: child	1.332	0.399
Tenant: duration of stay	3.045	0.011
Tenant legal representation	2.891	0.006
Denial defence	1.379	0.197
Rent arrears	0.576	0.139
Nuisance/crime	0.376	0.017
Drug-related crime	0.244	0.004
Length breach (months)	0.984	0.017

57 Interestingly, it can also be seen that the effects of two specific proportionality defences are significant. If a tenant minimizes the seriousness of the breach, he/she is 1.7 times more likely to win his/her case. Furthermore, if tenants argue that they live for a long time in the rental unit, they are nearly three times more likely to win the case.

7. Discussion and Conclusion

58 In this section, we discuss whether the results of the doctrinal, comparative and quantitative analyses have revealed any indications that proportionality enquiries in eviction proceedings strengthen the tenant's legal position and deteriorate the landlord's property right. As stated above, with regard to eviction legislators and judges have to decide which parties' position is stronger: should the interest of a property owners (always) trump the interests of tenants, or should the protection of the tenants' interests (always) override the interests of landlords? Nowadays, among legal researchers it is virtually canon that the law should balance the interests of both parties and that a regulatory equilibrium should be established.[134]

134 C. Martinez-Escribano, 'Tenancy and Right to Housing: Privatel and Social policies', 23. *European Review of Private Law* 2015, p 777; C.U. Schmid (ed.), *Tenancy Law and Housing Policy in Europe: Towards Regulatory Equilibrium* (Cheltenham: Edgar Elgar 2018).

Traditionally, however, lawmakers have given the property owners' interests far more weight than tenants' interests. Yet, the European case law discussed above shows a clear move towards more protection of interests of (vulnerable) residents in housing law relationships.

59 The European case law clearly fuelled debates about the horizontal effects of human rights law and the impact of human rights in housing law relationships in the contracting states.[135] We expect that the *F.J.M.* v. *United Kingdom* judgment will further intensify the debate about the need of individualized proportionality enquiries in both the public and private rental sector. The results presented above show that Member States balance residents' and landlords' rights in various ways. In countries such as Germany, Belgium and the Netherlands, the shift towards more protection of tenants did not cause a (legal) uproar at all, due to the already strong tenant protection in those jurisdictions. Under Spanish law, tenants are not entitled to advance a proportionality defence in court to have a court look at the context of their specific eviction case. Yet, Spanish Parliament discusses a Bill that will give tenants that right. In the United Kingdom, tenants in the public and social rental sectors are entitled to put forward a proportionality defence in court and ask the judge to check the proportionality of the eviction in their specific cases. Still, in the private rentals sector tenants do not have the right to this type of individualized proportionality testing, because the Supreme Court held that Parliament already took the proportionality of making an order for possession into account through the Housing Act 1988. In countries such as Sweden and France, courts accept that residents are entitled to ask court to review the proportionality of the eviction in their specific case, but take a slightly conservative stance that fits in the traditional rights paradigm discussed above.

60 It may be argued that the European law and proportionality enquiries as such will not improve the protection of the tenants' interest significantly in a large share of the contracting states. Yet, we hold that this conclusion is too simple. Even when courts and legislators try to minimize or even stop the shift towards more individualized protection of (vulnerable) residents against evictions, it can be argued that from a systemic and theoretical point of view Pandora's Box cannot be closed anymore. The former Vice-President of the European Court Tulkens, for example, holds that:

> the issue of housing has already been given a certain weight in the balancing exercise, in cases which entailed restricting all or some of the classic property-related prerogatives on that account. It may be that even greater weight will be attached to it, thanks to a more fundamental change in the way that we perceive property itself

135 F. Du Bois, 'The Impact of Human Rights on English Contract Law', in L. Siliquini-Cinelli& A. Hutchison (eds), *The Constitutional Dimension of Contract Law* (Cham: Springer 2017), p 1; L. Lane, *The Horizontal Effect*, pp 274 & 289.

and the reasons traditionally advanced to justify protecting it. 'Property entails obligations', as Article 14 § 2 of the German Constitutions states.[136]

With regard to the United Kingdom, Bright argues that, 'the right to possess is no longer absolute. It cannot be said that it will automatically trump the claims of those with no-rights'.[137] She argues that 'the proportionality question does require a shift towards a contextualized, non-hierarchical way of thinking in which factors extraneous to property doctrine come into play, such as the personal circumstances of the occupier and the effect that eviction will have on her and her family or community. This is another way of thinking about ownership'.[138]

61 Interestingly, legislators and courts in Germany and the Netherlands had no problems embracing individualized proportionality enquiries in eviction proceedings, but this happened before international and European (case) law pushed for more protection for (vulnerable) residents. Although this means that it cannot be argued that European law itself improved the tenant's position in those countries, the availably of case law in the Netherlands allowed us a unique opportunity to test the impact of individualized proportionality enquiries on the tenant's and property owner's legal position in eviction proceedings in a more empirical way. It may be said that the Netherlands was a 'proportionality paradise' for tenants already, and as a result provides valuable information on the impact of individualized proportionality testing for countries that did not embrace the shift towards more protection of residents (yet).

62 Nonetheless, the results of the in-depth quantitative analysis of the Dutch eviction ligation do not allow us to answer the question whether individualized proportionality enquiries may improve the tenant's position straight away. The results provide arguments against the proposition that allowing individualized proportionality enquiries impact the legal positions of tenants and landlords in eviction cases, but also arguments in favour of that proposition. Moreover, while interpreting the results we need keep the limits of the study in mind. As discussed above, the quantitative analysis only takes into account published eviction judgments. Informal evictions are not measured, and the same applies to unpublished judgments. Moreover, the data used in the quantitative analysis only concerns case law of one European jurisdiction, so given the specific Dutch housing context

136 F. Tulkens, 'The Contribution of the European Convention on Human Rights to the Poverty Issue in Times of Crisis', article presented at the European Judicial Training Network Seminar on Human Rights for European Judicial Trainers, Strasbourg, 8 July 2014, p 21.

137 S. Bright, '*Manchester City Council* v. *Pinnock* (2010). Shifting ideas of ownership of land', in N. Gravells (ed.), *Landmark cases in land law* (Hart: Oxford 2013), p (253) at 254.

138 S. Bright, in *Landmark cases in land law*, p 254.

(e.g. relatively large social rental sector), we need to be careful in reaching general conclusions that may apply to other jurisdictions too.

63 Still, the analysis reveals at least three arguments against the proposition that individualized proportionality enquiries in eviction proceedings in practice helps tenants in the Netherlands. First, the vast majority of tenants in the Netherlands that face the cancellation of a lease and an eviction seem not to show up in court and, as a result, do not advance any proportionality advance at all. There is no indication that the courts are flooded with eviction cases, because all tenants want to convince judges that their personal circumstances make an eviction disproportional. Most of the Dutch tenants facing eviction do not seem to make use of their right to have the proportionality of the eviction being checked. Second, the case law analysis shows that in the vast majority of cases in which the tenant showed up, the court still allows the landlord's claim. In nearly 70% of the cases we analysed, the court did issue an eviction order. Third, the analysis revealed that advancing a proportionality defence in general does not have a significant effect on the likelihood of the tenant winning his/her case. Other factors such as legal representation do seem to play a more important role. Consequently, it may be argued that in the end even in a 'proportionality paradise' such as the Netherlands the landlords still are the stronger party in most cases. One might say that an individualized proportionality enquiry is nothing more than a procedural hurdle courts need to take before issuing an eviction order.[139]

64 Yet, this conclusion is too simple. There are also arguments that lead to a more nuanced point of view. First, around three quarters of tenants that do show up in court put forward a substantive defence against the landlord's claim. In approximately half of the cases we reviewed, the tenant advances a proportionality defence. In other words, if tenants decide to show up in court a large percentage of them rely on the right to have the proportionality of the eviction in their case tested. Consequently, the way Dutch courts deal with eviction claims will be different than in countries in which individualized proportionality enquiries are not possible in eviction proceedings.[140] Second, it is interesting to see that Dutch courts dismissed the landlord's claim in approximately one third of the cases we reviewed. Although the win rate of tenants will probably be lower in the cases in which the tenants do not appear in court, it is likely that the dismissal rate in similar cases in other countries that do not allow individualized proportionality testing will be significantly lower. Third, although the quantitative analysis shows that a proportionality defence in general does not seem to improve the likelihood of tenants winning their cases, we found that if we distinguish between various types

139 M. Vols, M. Kiehl & J. Sidoli del Ceno, 2. *European Journal of Comparative Law and Governance* 2015, p 156.

140 S. Bright & L. Whitehouse, *Information, Advice*, p 44.

of proportionality defences a slightly different conclusion could be reached. It was found that minimizing the seriousness of the breach of the lease and pointing out to a long duration of stay in the rented property increases the likelihood of a tenant winning his/her case.

65 The conclusion could be refined if we also take into account the possible impact of individualized proportionality enquiries on the phases before and after the court rules on the case.[141] For example, it might be case that the right to advance a proportionality defence and individualized proportionality testing influences the litigation strategy of the property owners in the pre-court phase, especially if they can be characterized as a repeat player. For example, landlords may decide to wait longer to bring a case to court and collect more evidence on the breach of the lease to counter a potential proportionality defence. This longer waiting time due to the 'shadow effect' of proportionality enquiries can result in an improvement of the tenant's position and worsening of the position of landlords.[142] Another effect of this right in the pre-court phase might be that landlords (and their legal advisors) will differentiate between types of tenants and breaches in their litigation strategy. Given the proportionality enquiries in the court phase, the 'evictability' of some tenants may be greater than for other tenants.[143] Landlords may, for example, bring cases involving tenants without children or cases concerning drug-related breaches sooner to court than cases in which tenants are likely to advance a (potentially successful) proportionality defence. Again, this shadow effect of individualized proportionality testing could improve the position of some tenants and weaken the position of the landlord. To find out whether these shadow effects exist in the pre-court phase needs to be analysed in future (more qualitative) research projects.

66 Moreover, to understand the impact of proportionality testing on the legal positions of tenants and landlords, the after-court phase needs to be taken into account as well. The available data shows that Dutch housing associations only enforce a relatively small number of the eviction judgments. This means that in the end an eviction judgment does not always lead to the situation in which tenants that are ordered to leave the property actually lose their home. It may be that the enforcement policies of landlords may affect the argumentative reliability of proportionality defences that tenants put forward in courts. In other words, judges might more easily dismiss a proportionality defence because they know that in practice eviction and subsequent homelessness will not take place. If landlords

141 P. Kenna, L. Benjaminsen, V. Busch-Geertsema & S. Nassarre-Aznar, *Pilot Project*, p 22.

142 R.H. Mnookin & L. Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce', 88. *The Yale Law Journal* 1979, p 950.

143 K. Monsma & R. Lempert, 'The Value of Counsel: 20 Years of Representation Before a Public Housing Eviction Board', 26. *Law & Society Review* 1992, p (627) at 639.

change their enforcement policies and enforce more eviction judgments, judges may consider a proportionality defence more serious, examine the case in more detail, and then dismiss more landlords' claims. Future (qualitative) research should take the possible interaction between enforcement policies and the argumentative power of a proportionality defence into account.

67 To conclude, our study did not find overriding evidence that allowing (individualized) proportionality enquiries in eviction proceedings significantly improves the legal position of tenants. As a result, it cannot be said that the shift to more protection of interposers will automatically result in a violation of the right to property of landlords. One of the reasons why this shift fails to challenge the traditional legal paradigm in a fundamental way, is that in a number jurisdictions the protective requirements are simply ignored or only protect a relatively small group of (public housing) tenants. European human rights law, consequently, will not have a paradigmatic impact on private law relationships.[144] Another explanation may be conservative adjudication. Pascoe, for example, maintains that case law from the United Kingdom Supreme Court 'may reflect the biases of judges, many of whom may be private landlords themselves, who might take the view that public authorities can bear the expense and burden of dealing with art. 8 defences in exceptional cases for deserving tenants, but that private landlords should not be burdened by such social responsibility'.[145] In a more general observation, Van der Walt holds that judges 'often find it difficult to respond to these legislative and policy changes, given the doctrinal hegemony of the rights paradigm and its pervasive influence on lawyerly sensibilities, which are not always sensitized or responsive to socio-economic changes that inspire policy changes and legislative interventions'.[146] Yet, we do want to conclude this article too negative. The research presented in this article has also found some indications that the push for more individualized protection of (vulnerable) residents might in the end lead to some changes in eviction litigation. Future research should assess whether allowing individualized proportionality enquiries really tips the balance and succeeds in helping vulnerable people in precarious housing situations or not.

144 A.J. Van der Walt, *Property*, p 83.
145 S. Pascoe, *The Conveyancer and Property Lawyer* 2017, p 285.
146 A.J. Van der Walt, *Property*, p 79.