

COMPENSATION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS FOR EXPROPRIATIONS ENFORCED PRIOR TO THE APPLICABILITY OF THE CONVENTION

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Abstract. *Forced expropriations of immovable property were common during the Communist era in Eastern Europe. Today, many of the former owners or their heirs are interested in regaining legal ownership of such properties, often decades after the ownership has been reallocated to others. Therefore, the conflict between old and new owners is often resolved in favour of the new owners. While this is understandable from a contemporary political perspective, this approach results in a perpetuation of the results of an earlier human rights violation, thereby resulting in a new human rights violation which will have to be measured against the European Convention on Human Rights (ECHR) if the state in question has ratified it prior to deciding how to handle the long-term effects of expropriations.*

Firstly, in the article we will devote ourselves to the interpretation of the right to property with an emphasis on the problem of expropriation. Above all, we will elaborate on the definition of the term “property” as well as positive and negative obligations of the Member States regarding this right. Finally, we will address the question of expropriations prior to the entry into force of the Convention and just compensation under Article 41 ECHR. Interpretation of the right to property will be supported by the jurisprudence of the European Court of Human Rights.

Keywords: *expropriation, European Convention on Human Rights, temporal applicability.*

Introduction

Many European countries have seen expropriations in the context of regime changes, in particular during the Communist rule in Eastern Europe. As Europe is growing closer together, the membership of former Warsaw Pact states in the European Union has made the property, in particular immovable property, which had been expropriated, more accessible to the former owners or their heirs. But the reinstatement of old property titles causes a number of problems, in particular when it comes to immovable property which has been used by others for decades. At the same time, would states be at fault if they do not deal with these historic wrongs altogether? While at first sight one might think that the European Convention on Human Rights (ECHR), which for most of the states concerned entered into force long after the expropriations took place, a failure to address these expropriations would perpetuate the situation further, giving rise to human rights considerations. In this article we will therefore look at the role the ECHR plays in this context.

We will do so by first looking at the material aspect of the problem, that is, the right to property under the Convention. In fact, the right to property was not included in the original Convention but only in the first protocol to it, reflecting the development of human rights law from political freedoms to social rights after World War II. In a second step, we will look at the possibility to be compensated for human rights violations before answering the question how a state can be held responsible for a human rights violation under a later treaty by perpetuating an old legal situation through mere inaction.

1. The Right to Property under European Human Rights Law

The right to property is protected under Art. 1 of Protocol 1 to the ECHR which is applicable to all States Parties to the Convention.

Art. 1 of Protocol 1 reads as follows:

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

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

This text raises a number of questions as to what exactly is protected under Art. 1 of Protocol 1 to the ECHR. The first sentence of the first paragraph in Article 1 of Protocol 1 not only protects the right to use but constitutes a general principle.¹ The second sentence of the same norm regulates expropriation, that is, loss of property.² In

1 Peters, A. *Einführung in die Europäische Menschenrechtskonvention*. 1st ed. Munich: Verlag C. H. Beck, 2003, p. 193.

2 *Ibid.*

Marckx v. Belgium, the Court explained that the patrimonial rights also fall within the scope of protection of this provision. The judges pointed out that Article 1 of Protocol 1 guarantees the right to the peaceful enjoyment of one's possessions including also the right to dispose of one's property.³

"Property" within the meaning of Article 1 of Protocol 1 to the ECHR are all acquired rights, including immaterial rights.⁴ Expropriations have to take place in public interest⁵ and the individual human rights holder must not be burdened excessively.⁶ In this regard, states parties to the Convention enjoy a certain margin of appreciation, only limited by a reasonableness test.⁷ The margin of appreciation gives states parties to the Convention a certain degree of freedom as to how to comply with their obligations under the ECHR. While this approach is less invasive towards the states which are obliged under the Convention, this freedom of course is not unproblematic in that it offers states the possibility to limit already the scope of the human rights guaranteed by the Convention. But this margin of appreciation is not an absolute norm – despite the obvious popularity it enjoys with the states which are parties to the European Convention on Human Rights. In fact, there is an alternative to the wide margin of appreciation afforded by the Convention organs to the Member States. Actually, a fundamentally opposite approach to interpreting the Convention exists, which has likewise been endorsed by the Court and the old Commission – the notion of autonomous concepts. Rather than arguing that existing differences of opinion between the Member States would require giving the states a wide margin of appreciation, the Convention organs often have taken the opportunity to provide for the definition of certain terms within the context of the Convention by establishing the so-called "autonomous concepts".⁸ Autonomous concepts were created first by the Commission and are still used by the Court "to prevent contracting states from circumventing the Convention guarantees".⁹ The protection of the right to property is a classical test case of the duty of states to refrain from governance which is devoid of any rule of law and the right to property has long been accepted as a key economic human right. The earlier debate about "economic" as opposed to "political" human rights has become virtually moot with the adoption of Protocol 1 to the ECHR but also e.g. with the International Covenant on Economic, Social and Cultural Rights (ICESCR) and socio-economic rights have lost their stigma at the very latest with the end of the East-West conflict. Economic rights are not "lesser" rights when compared to political rights such as the freedom of speech. While the term "property" is identical in all states parties to the Convention, the Court has a wider understanding of the term. While the Court's wider approach is in principle

3 ECtHR, *Marckx v. Belgium*, Application No. 6833/74, Judgment of 13 June 1979, para. 63.

4 Peters, A., *op. cit.*, p. 194.

5 *Ibid.*, p. 195.

6 *Ibid.*

7 *Ibid.*

8 Cf. Letsas, G. The Truth in Autonomous Concepts: How to Interpret the ECHR. *European Journal of International Law*. 2004, 15: 279 *et seq.*, at p. 281 *et seq.*

9 *Ibid.*, p. 282.

friendly towards human rights, the continued use of the margin of appreciation doctrine is problematic.¹⁰

The margin of appreciation doctrine is not applicable if facts are not only clear but absolutely identical in all States Parties to the Convention.¹¹ Without factual difference, there is only a difference in opinion. But while the different “domestic law classification[s] might be] relevant [they are] not decisive for the meaning of the concepts of the Convention. This is what the adjective ‘autonomous’ stands for: the autonomous concepts of the Convention enjoy a status of semantic independence: their meaning is not to be equated with the meaning that these very same concepts possess in domestic law.”¹²

In other words, we are talking merely about a difference in opinion, which ought to come more naturally to a Court than any attempts to weaken the Court’s own legal basis, the Convention, by essentially putting it at risk of being circumvented by the states parties to it through the concept of a wide margin of appreciation.

Concerning the right to property under Art. 1 of Protocol 1 to the ECHR, the Court has begun to realize this in the case of *Gasus Dosier- und Fördertechnik GmbH v. the Netherlands*¹³ and has already applied the notion that the term “property” amounts to an autonomous notion under the Convention to a case of land ownership,¹⁴ making it easier to claim property rights within the meaning of Art. 1 of Protocol 1.

The object of the property right claimed “must be adequately definable in relation to the claims based thereupon”.¹⁵

Even if a Member State claims that an individual had not been expropriated in the proper sense of the term, the Court can rule in favour and find a violation because Art. 1 of Protocol 1 to the ECHR protects the peaceful enjoyment of possessions. A violation is also possible if the property is not affected *per se* but the individual is prevented from using his property.¹⁶

An example here can be the *Loizidou* case, in which access to land was denied to the legitimate owner in the context of the civil war in Cyprus.¹⁷ In that case, while the former European Commission on Human Rights did not see this case to fall within the ambit of Article 1 of Protocol 1, the Court held that the applicant’s complaint was not limited

10 A number of judgments and decisions with regard to the different autonomous concepts identified by the Convention organs is provided *ibid.*, p. 281 *et seq.*, there fn. 6-18.

11 Kirchner, S. Medical and Biotechnological Challenges to Human Rights: The Personal Scope of Article 2 Section 1 Sentence 1 of the European Convention on Human Rights (forthcoming in 2012).

12 Letsas, G., *supra* note 8, p. 282.

13 ECtHR, *Gasus Dosier- und Fördertechnik GmbH v. the Netherlands*, Application No. 15375/89, Judgment of 23 February 1995, para. 53.

14 *Ibid.*; ECtHR, *Matos e Silva Lda. et al. v. Portugal*, Application No. 15777/89, Judgment of 27 August 1996, para. 75.

15 Van Dijk, P., *et al.* (eds.) *Theory and Practice of the European Convention on Human Rights*. 4th ed. Antwerp/Oxford: Intersentia, 2006, p. 867.

16 Van Dijk, P., *et al.*, *supra* note 15, p. 872.

17 ECtHR, *Loizidou v. Turkey*, Application No. 15318/89, Judgment of 18 December 1996, paras. 11 *et seq.*

to the question of physical access to her property and right to freedom of movement.¹⁸ On the contrary, the judges considered that the applicant complained that the denial of access over a period of 16 years had gradually affected her right as a property owner and in particular her right to a peaceful enjoyment of her possessions. As a consequence, the Court held Article 1 to be applicable.¹⁹

2. Compensation for Violations of the ECHR

Art. 41 of the ECHR foresees a right to compensation (“just satisfaction”) for violations of the Convention. For a long time, the standard employed by the European Court of Human Rights was lower than the standard under general public international law under which an individual could be fully compensated. This general compensation rule employs the so called “*Hull*”-formula, which requires compensation to be prompt, adequate, effective and the victim has to receive full compensation.²⁰ Although the Court is not yet as generous as it could be under the *Hull*-formula, recently an increase in the amounts awarded can be noted. It remains to be seen whether this means a development towards full compensation – full compensation being required for a just compensation – or whether it only appears to be so because the Court now concentrates on more important cases, given its backlog of cases.

The standard of compensation in cases of naturalisation has been elaborated on by the Court in *Lithgow*²¹ and while compensation standards may vary,²² compensation may not be denied *per se* – this would amount to a second violation of the right to property because the compensation claim is also protected under Art. 1 of Protocol 1. Only in very extreme circumstances may compensation be denied in expropriation cases.²³ Even a temporal “detention” of movable property amounts to an “interference” into the applicant’s right.²⁴ In addition, the fees payable to attorneys in the context of a particular case can be compensated under Art. 41 ECHR.

3.1. Violation of Human Rights by Omission

Any perpetuation of the expropriation suffered by an individual from the State Party in question is relevant. This denial of the use of possession can also be committed through an omission, failure to take legal action for the protection of the rights of an

18 *Ibid.*, paras. 59 *et seq.*

19 Van Dijk, P., *et al.*, *supra* note 15, p. 873.

20 Cf. Peters, A., *supra* note 1, p. 196.

21 ECtHR, *Lithgow and Others v. The United Kingdom*, Applications nos. 9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; 9405/81, Judgment of 8 July 1986, para. 121.

22 *Ibid.*

23 ECtHR, *Former King of Greece v. Greece*, Application No. 25701/94, Judgment of 28 November 2002, margin no. 78.

24 ECtHR, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland*, Application No. 45036/98, Judgment of 30 June 2005, para. 140.

individual. Keeping in mind the precedent in *Tyrer*, in which the Court has found that states not only have an obligation to refrain from harming individuals (*status negativus*) but also is obliged to take positive measures to ensure the protection of human rights (*status positivus*),²⁵ the Member States are under the obligation to prevent damage to the property. The issue of positive obligations under Article 1 of Protocol 1 to the ECHR is particularly difficult because it used to receive very little attention from the Court.²⁶ In recent years, the positive obligations concerning the right to property have become clearer and the Court will now examine both negative and positive obligations of states parties to the Convention in cases involving the right to property.²⁷

3.2. Precedent for ECHR Claims Regarding Expropriations Prior to the Entry into Force of the Convention

Prior to the case of *Jahn et al. v. Germany* the Court was summoned to rule on cases of expropriation²⁸ on the ground of economic sector reforms for reasons of social justice²⁹ or shortcomings of the law in the public interest.³⁰ But in this case the applicants complained of a violation of their rights under the Convention through the perpetuation by the reunified Germany of the 1945 land reform in the Soviet-occupied East Germany (the so-called “Modrow Law”) which did not foresee any compensation at all. In this case, the European Court of Human Rights held rather instructively that a complete lack of compensation is justifiable only under exceptional circumstances however the State possesses a wide margin of appreciation when passing laws in the spirit of reforms. In *Jahn*, the Grand Chamber acknowledged that there could be circumstances that justified a complete lack of compensation.³¹ In the unique context of the German reunification process the Court did not find any violation of Article 1 of Protocol 1. One of those circumstances was the uncertainty of the legal position and the reasons of social justice upon which the German authorities relied.

25 Ehlers, D. Die Europäische Menschenrechtskonvention. *Jura – Juristische Ausbildung*. 2000, 22: 372 *et seq.*, at p. 374.

26 Cf. Jacobs, F. G.; White, R. C. A.; Ovey, C. *The European Convention on Human Rights*. 4th ed. Oxford University Press, 2006, p. 347.

27 *Ibid.*

28 Also in the case of the ruler of the Principality of Liechtenstein, Fürst Hans Adam II von und zu Liechtenstein, against the Federal Republic of Germany the European Court of Human Rights has had the opportunity to rule on a property issue, ECtHR, *Fürst Hans Adam II von und zu Liechtenstein v. Germany*, Application No. 42527/98, Judgment of 12 July 2001.

29 Cf. ECtHR, *James and Others v. The United Kingdom*, Application no. 8793/79, Judgment of 21 February 1986.

30 Cf. ECtHR, *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. The United Kingdom*, Judgment of 23 October 1997.

31 ECtHR, *Jahn et al. v. Germany*, Applications Nos. 46720/99, 72203/01 and 72552/01, Grand Chamber Judgment of 30 June 2005, para. 111.

Conclusions

In this short article we were trying to outline the interpretation of Art. 1 of Protocol 1 of the ECHR and the case-law of the European Court of Human Rights regarding the notion of “possession” and expropriation procedure conducted by the Contracting States.

It is important to note that the Member States have a certain margin of appreciation regarding the interpretation of the term “possession”. However, over the years the European Court of Human Rights and the European Commission of Human Rights have established “possession” to be an autonomous notion and it is not to be equated with the meaning that these very same concepts possess in domestic law providing for a wider scope of applicability than under national laws.

Also the problem of expropriation prior to the entry into force of the Convention and perpetuation has been addressed. With reference to the cases *Jahn et al. v. Germany* and *Fürst Hans Adam II. von und zu Liechtenstein v. Germany* the authors addressed “just satisfaction” in the sense of compensation for expropriated property. Although the Contracting States are generally obliged to provide for compensation, exceptional circumstances justifying the lack of any compensation can also exist.

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KOMPENSACIJOS PAGAL EUROPOS ŽMOGAUS TEISIŲ KONVENCIJĄ DĖL TURTO KONFISKAVIMO, ĮVYKDYTO PRIEŠ KONVENCIJOS ĮSIGALIOJIMĄ

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Santrauka. *Priverstinis nekilnojamojo turto konfiskavimas buvo įprastinė praktika komunistinės eros laikotarpiu Rytų Europos valstybėse. Šiandien daugelis buvusių turto savininkų ar jų įpėdiniai siekia susigrąžinti neteisėtai konfiskuotą turtą, tačiau daugeliu atvejų jų buvusi nuosavybė yra paskirta kitiems. Naujų nuosavybės savininkų reikalavimai išsaugoti nuosavybės teises dažnai yra palaikomi naujos demokratiškai išrinktos valdžios, kuri nenori kartoti komunistinės valdžios padarytų pažeidimų neteisėtai nusavinant asmenų turtą. Todėl ginčai tarp buvusių ir naujų turto savininkų dažnai yra išsprendžiami naujų savininkų naudai. Tačiau tokiose situacijose komunistinės valdžios padaryti žmogaus teisių pažeidimai tampa pagrindu naujiems pažeidimams bei suteikia galimybę asmenims remiantis Europos Žmogaus Teisių Konvencija pateikti individualias peticijas prieš valstybę.*

Straipsnyje analizuojama teisė į nuosavybės apsaugą, ypač atkreipiant dėmesį į su konfiskavimu susijusias problemas. Taip pat aptariamas termino „nuosavybė“ apibrėžimas, nagrinėjami pozityvūs ir negatyvūs valstybių išpareigojimai, įgyvendinant teisę į nuosavybės apsaugą. Galiausiai straipsnyje analizuojamos probleminės situacijos dėl kompensacijų už turtą, konfiskuotą prieš įsigaliojant Konvencijai, ir remiantis Europos Žmogaus Teisių Teismo jurisprudencija aptariamas kompensacijos pagal EŽTK 41 straipsnį klausimas byloje dėl teisės į nuosavybės apsaugą.

Reikšminiai žodžiai: konfiskavimas, Europos Žmogaus Teisių Konvencija, Europos Žmogaus Teisių Teismas, kompensacija.

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