



RIGHT TO PROPERTY IN THE CONTEXT OF ARTICLE 1 PROTOCOL 1 TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND FREEDOMS

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INTRODUCTION

The Analysis “Right to property in the context of Article 1 Protocol 1 to the European Convention on Human Rights and Freedoms” was developed within Horizontal Facility for Western Balkans and Turkey 2019-2022, funded by the European Union and the Council of Europe, with the aim to realise the activities targeting harmonisation of court practice and its alignment with the relevant human rights standards, aimed at further strengthening of the judicial dialogue.

The need for such Analysis stems from the fact that, even if in its decisions the European Court of Human Rights points to the basic principles of the protection of property, there arose issues which could lead to doubts as to the scope and rights protected under Article 1 Protocol 1 of the European Convention on Human Rights and Freedoms. The Analysis, thus, aims to inspire a more comprehensive review of these issues, and try to offer an answer to them with the aim to harmonise the court practice and the application of human rights standards.

In this context, the Analysis consists of three Chapters, as follows:

- I Chapter – Right to property in the practice of the European Court of Human Rights;
- II Chapter – Factual expropriation and statute of limitations;
- III Chapter – Property right and contractual obligations.

RIGHT TO PROPERTY IN THE PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS

Ledi Bianku,
former judge of the European Court of Human Rights

Art. 1 of Protocol No. 1 to the ECHR states:

“1. Every natural or legal person is entitled to 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.

2. 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”.

It is true that several Articles of the Convention indirectly protect property. This is the case of Article 6 protecting fair trial, especially in cases related to access to court, length of proceedings, or enforcement of decisions, where economic interests are at stake, or Article 10 when operation of broadcasting companies is at stake. Other provisions protect indirectly specific aspects of property rights such as Article 8 which protects inviolability of home premises. However, it must be said that Article 1 of the additional Protocol is the only ECHR provision that directly and explicitly concerns the protection of economic rights. The inclusion of this right in the Additional Protocol and not on the Convention text as such, although a draft of the provision was ready when the Convention was signed, shows the difficulty of the Member States in agreeing with the protection of this right in the framework of the European Convention of Human Rights.

In the well-known case of *Sporrong and Lönnroth v. Sweden*¹ the Court has elaborated for the first time that Article 1 of the additional Protocol protects the property

¹ *Sporrong and Lönnroth v. Sweden*, nos. 7151/75 and 7152/75, 23 September 1982, § 61, *Series A*, No. 52. See, also *Agosi v. United Kingdom*, 24 October 1986, § 48, *Gasus Dosier-und Fördertechnik GmbH v. The Netherlands*, 23 February 1995, § 55; *Air Canada v. United Kingdom*, 5 May 1995, § 30; *Immobiliare Saffi v. Italy*, 28 July 1999, § 44; *Iatridis v. Greece*, 25 September 1999, § 55; *The Former King of Greece v. Greece*, [G.C.] 23 November 2000, § 50;

through the operation of three rules. According to that judgment, “the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest. The second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule”.

The three rules elaborated by the Court in *Sporrong and Lönnroth v. Sweden*, as such, have not dissipated as such the early uncertainties related to the provision of Article 1 of the Protocol 1.

- The first uncertainty concerns the entity that ‘enjoys’ the property or the possessions. Such uncertainty was rather easily resolved in view of the drafting of the first paragraph of Article 1 of Protocol 1. It clearly states that “Every natural or legal person is entitled to peaceful enjoyment of his possessions”. The Court has readily confirmed that legal entities do have right to property².
- The second uncertainty raised by the wording of the provision of Article 1 Protocol 1 has been more difficult to be dissipated and continuous to raise debates and to produce case-law in Strasbourg. We will deal with that below.

What is considered as a possession in the context of Article 1 of Protocol 1 to the European Convention on Human Rights?

This question is fundamental for the purpose of the applicability of Article 1 of Protocol 1 of the Convention. Since its early case-law the Court has had to deal with this question, especially in view of the different wording used by the provision of Article 1, Protocol 1, and the different meanings the terms used had in various jurisdictions.

In the famous *Marckx v. Belgium*³ the Court has said that:

“... by recognising that everyone has the right to the peaceful enjoyment of his possessions, Article 1 is in substance guaranteeing the right of property. This is the clear impression left by the words “possessions” and “use of property” (in french: “biens”, “propriété”, “usage des biens”); the travaux préparatoires,

2 *Agrotexim and others v. Greece*, 24 October 1995, *Lekić v. Slovenia* [G.C.], 11 December 2018 (lifting of corporate veil), *Ankarcrona v. Sweden* (Dec.), *Glas Nadezhda Eood and Anatoliy Elenkov v. Bulgaria*, *Cdi Holding Aktiengesellschaft and Others v. Slovakia* (Dec.), *Meltex Ltd and Movsesyan v. Armenia*, *Veselá And Loyka V. Slovakia* (Dec.), *G.J. v. Luxembourg*, *Hyde Park and others v. Moldova* (no. 4), no. 18491/07, § 33, 7 April 2009, etc.

3 Judgment of 13 June 1979, Series A, no. 31, §§ 63-64,

for their part, confirm this unequivocally: the drafters continually spoke of “right of property” or “right to property” to describe the subject-matter of the successive drafts which were the forerunners of the present article 1. Indeed, the right to dispose of one’s property constitutes a traditional and fundamental aspect of the right of property ...”

In his dissenting opinion to that judgment, Judge Fitzmaurice underlined:

“The apparent equivalence of the terms “possessions”, “property”, “biens” and “propriété”, in different contexts and without evident justification, leads to confusion. The best translation of the French “biens” is the English “assets”, and not “possessions”; but the best French translation of the English “assets” is “avoirs”. In other words, there is no French equivalent really satisfying for the plural term “possessions”.

The Court has responded to this confusion underlined by judge Fitzmaurice by developing the *autonomous concept* instrument. This instrument has allowed as well for an effective application of the protection offered by Article 1 of Protocol 1. The Court has said that

“...the notion “possessions” (in french: biens) in Article 1 of Protocol no. 1 (P1-1) has an autonomous meaning which is certainly not limited to ownership of physical goods: certain other rights and interests constituting assets can also be regarded as “property rights”, and thus as “possessions”, for the purposes of this provision (P1-1).”⁴

Thus, it seems that the term ‘possession’ under the Convention is wider than the term ‘property’ as understood especially in Roman law tradition countries where the property is linked to the features of *usus*, *fructus* and *abusus*. The case-law in Strasbourg expands the notion of property protected under Article 1 of the Protocol not only to existing legal entitlement but also to legitimate expectations. The Court has clearly accepted this in indicating that:

“To fall within the meaning of a possession the applicant must be able to show a legal entitlement to the economic benefit at issue or a legitimate expectation that the entitlement will materialise.”⁵

The Court has used both these notions, legal entitlement (a) and legitimate expectation (b) in a rather extensive way. In case of doubt whether Article 1 of Protocol 1 applies in relation to a proprietary interest, it belongs to the Court in Strasbourg to give the final answer⁶.

4 *Gasus Dosier-und Fördertechnik GmbH v. the Netherlands*, 23 February 1995, Series A, no. 306-B, p. 46, § 53. The same has been reiterated in *Iatridis v. Greece* [G.C.], No. 31107/96, § 54, ECHR 1999-II; *Beyeler v. Italy* [G.C.], No. 33202/96, § 100, ECHR 2000-I; *Parrillo v. Italy* [G.C.], No. 46470/11, § 211, ECHR 2015, *Bélané Nagy v. Hungary* [G.C.], No. 53080/13, § 76, 13 December 2016, etc.

5 *Stran Greek Refineries & Stratis Andreadis v Greece*, 9 December 1994, Series A no. 301-B

6 *J.A. Pye (Oxford) Ltd. and J.A. Pye (Oxford) Land Ltd. v. UK* [G.C.] no. 44302/02, § 61, ECHR 2007-III.

Existing entitlement

The Court has recognised that existing entitlement or possessions is also an autonomous concept and does not necessarily depend on the domestic law qualification. Thus, it has usually accepted that existing entitlements attract protection under Article 1 of the Protocol 1 especially if the domestic law accepts that they are objects of the right to property⁷. However, it has also decided, in specific cases that the recognition of a proprietary interest by domestic courts is very relevant, but not decisive⁸. On the other hand, it has expanded the concept of existing entitlement to include as well, illegal constructions⁹ or titles that have been revoked under national law, which both in certain circumstances, can be regarded as “possessions”¹⁰. It has reiterated that:

“It is not for the Court to decide whether or not a right of property exists under domestic law. However, it recalls that the notion “possessions” (in French: “biens”) in Article 1 of Protocol no. 1 has an autonomous meaning (...). In the present case the applicants’ unchallenged rights over the disputed land for almost a century and the revenue they derive from working it may qualify as “possessions” for the purposes of Article 1”¹¹

To properly identify whether there is a possession or not for the purposes of Article 1 of Protocol 1, the Court invites that:

“it is necessary not only to consider whether there has been a formal taking or expropriation of property but to look behind the appearances and investigate the realities of the situation complained of”¹².

Thus, in the case of *Öneriyildiz v. Turkey*, the Court considered that an habitation irregularly built by the applicant in a shantytown, which had been destroyed by an explosion of methane in a dumping thereby had a “**substantial economic interest**” protected by Article 1 of Protocol no. 1¹³. The economic interest appears to be of critical importance for qualification as “possession” under Article 1 of the Protocol 1. It can be noted this provision find applications when there is a right or interest having economic value, irrespective of whether such a right or interest is formally recognized by the national legal system. It can also be noted that for the Court, the concept of “possessions” is much broader than the concept of “property” and even than the concept of “right in rem”.

7 *Ivanova and Cherkezov v. Bulgaria*, no. 46577/15, 21 April 2016, § 68, *Sharxhi and others v. Albania*, no. 10613/16, 11 January 2018.

8 *Broniowski v. Poland* [G.C.], no. 31443/96, ECHR 2004-V, §§ 130-131.

9 *Öneriyildiz v. Turkey* [G.C.], no. 48939/99, ECHR 2004-XII § 127; *Depalle v. France* [G.C.], no. 34044/02, ECHR 2010, § 85.

10 *Beyeler v. Italy* [G.C.], 5 January 2000, §§ 104-105, *Krstić v. Serbia*, no. 45394/06, 10 December 2013, § 83; *Čakarević v. Croatia*, no. 48921/13, 26 April 2018 § 52, *Bélané Nagy v. Hungary* [G.C.], no. 53080/13, 13 December 2016, § 75.

11 *Matos and Silva Lda and Others v. Portugal*, 16 September 1996, 16 September 1996, Reports of Judgments and Decisions 1996-IV, § 75.

12 *Brumarescu v. Romania*, [GC], no. 28342/95, 29 October 1999, § 76, ECHR 1999-VII.

13 *Öneriyildiz v. Turkey*, mentioned above, §§ 141-142

*The Court has repeated that it is immaterial that, according to national law, the title of retention was more in the nature of a security right in rem than a “true” ownership and that “enjoyment” of it was limited to secure the payment of the purchase price, stating that “the notion ‘possessions’ (...) in Article 1 of Protocol no. 1 has an autonomous meaning which is certainly not limited to ownership of physical goods: **certain other rights and interests constituting assets can also be regarded as ‘property rights’, and thus as ‘possessions’, for the purposes of this provision**”¹⁴*

Legitimate expectations

Before trying to answer to this concrete question, it might be useful to clarify the applicability of Article 1 of Protocol 1 in relation to the legitimate expectations.

In the above-mentioned judgment in the case of *Marckx v. Belgium*, a case which seems quite pertinent to the question, the (former) European Commission on Human Rights clarified that:

“The relationships between a mother and her natural child with regard to Article 1 of Protocol no. 1 two aspects: the right the child to acquire property from his mother by way of succession or liberality and the right of the mother to dispose of her property in favor of his child by donation or will.

As far as the situation of the child is concerned, the Commission considers that Article 1 of the Protocol, if it guarantees to all person’s respect for his property, does not guarantee any right to acquire property by inheritance or liberality. A such right escaping the application of Article 1 of the Protocol,...”

“With regard to the situation of the mother, the right to dispose of his property by donation or will is, not to doubt, one of the attributes of the right of property that protects Article 1 of the Protocol.”¹⁵

In its judgment on the same case the Court, maintained the same position¹⁶, and confirmed that:

“...this Article (1 of Protocol 1) does no more than enshrine the right of everyone to the peaceful enjoyment of “his” possessions, that consequently it applies only to a person’s existing possessions and that it does not guarantee the right to acquire possessions whether on intestacy or through voluntary dispositions.”¹⁷

14 *Gasus Dosier-und Fördertechnik GmbH v. the Netherlands*, 23 February 1995, Series A no. 306-B, § 53

15 *Marckx v. Belgium*, No. 6833/74, Commissions Report, 10 December 1977,

16 *Marckx v. Belgium*, 13 June 1979, Series A, no. 31, §§ 50-65.

17 *Ibid.* § 50

Therefore, in the Marckx case, Article 1 of the Protocol, and as consequence Article 14, did apply in the case of the mother but not of the child.

For a legitimate expectation to be able to attract the protection of Article 1 of Protocol 1, it is necessary that that “entitlement or ...legitimate expectation that the entitlement will materialise”. In certain circumstances, even a “legitimate expectation” of obtaining an asset may also enjoy the protection of Article 1 of Protocol no. 1¹⁸.

More recently, in the case of *Bélané Nagy v. Hungary*, the Grand Chamber of the Court has confirmed that:

“75. A legitimate expectation must be of a nature more concrete than a mere hope and be based on a legal provision or a legal act such as a judicial decision. The hope that a long-extinguished property right may be revived cannot be regarded as a “possession”; nor can a conditional claim which has lapsed as a result of a failure to fulfil the condition ... Further, no “legitimate expectation” can be said to arise where there is a dispute as to the correct interpretation and application of domestic law and the applicant’s submissions are subsequently rejected by the national courts ...

76. In cases concerning A. 1, P.1, the issue that needs to be examined is normally whether the circumstances of the case, considered as a whole, conferred on the applicant title to a substantive interest protected by that provision ... In applications concerning claims other than those relating to existing possessions, the idea behind this requirement has also been formulated in various other ways throughout the court’s case-law. By way of example, in a number of cases the court examined, respectively, whether the applicants had “a claim which was sufficiently established to be enforceable”¹⁹.

...

*79. Notwithstanding the diversity of the expressions in the case-law referring to the requirement of a domestic legal basis generating a proprietary interest, their general tenor can be summarised as follows: for the recognition of a possession consisting in a legitimate expectation, the applicant must have an assertible right which, applying the principle enounced in paragraph 52 of *Kopecký* (rendered in paragraph 77 above) may not fall short of a sufficiently established, substantive proprietary interest under the national law.”*

It seems that the fundamental criteria for a legitimate expectation to be considered a possession for the purposes of Article 1 of Protocol 1 is that of the materialisa-

18 See *Pressos Compania Naviera S.A. and others v. Belgium*, 20 November 1995, Series A no. 332, § 31. See a contrario *Gratzinger and Gratzingerova v. the Czech Republic* (dec.) [G.C.], § 73.

19 See also *Gratzinger and Gratzingerova*, mentioned above, § 74.

tion of the expectation, which should be an assertible right and not a “genuine dispute” or an “arguable claim”. That expectation may not fall short of a sufficiently established, substantive proprietary interest under the national law and reliance on a legal act which had a sound legal basis such as a domestic court decision is of critical importance for Article 1 of Protocol 1 to be able to apply. On the basis of these fundamental criteria, coupled with principles that are enshrined in the entire Convention system such as respect for rule of law and existence of procedural guarantees applicable to such legitimate expectations, the following has been considered as “possessions” for the purpose of Article 1 of the Protocol 1.

i. Arbitration awards

The Court has considered that an arbitration award that is enforceable is a possession and so is a pending claim in civil proceedings so long as it is sufficiently established²⁰. In the case of *Stran Greek refineries and Stratis Andreadis v. Greece*, the Court examined the legislative intervention declaring the arbitration award void and unenforceable under the general rule of Article 1 Protocol 1 and found a violation of the applicants’ right to property.

ii. Restitution

As far as the restitution of properties is concerned, The Court has said that Article 1 of Protocol 1 cannot be interpreted as imposing any general obligation on the Contracting States to return property which was transferred to them before they ratified the Convention nor the extent of such return²¹. In addition, it has specified that a promise to adopt restitution legislation does not constitute “legitimate expectation” for the purposes of Article 1 of Protocol 1 to apply. However, the Court has confirmed in numerous cases that when the States adopt restitution and/or compensation measures themselves the decisions taken pursuant to that legislation then Article 1 of Protocol 1 does apply in relation to these decision when they are final²². The same may apply in respect of arrangements for restitution or compensation established under pre-ratification legislation, if such legislation remained in force after the contracting state’s ratification of protocol no. 1²³.

iii. Company shares and other financial instruments

The Court has accepted that a company share with an economic value together with various rights attaching to it which enable a shareholder to exert influence on a company, can be considered a “possession”²⁴. This encompasses also an indirect

20 *Pressos Compania Naviera SA v Belgium*, See also *Marini v. Albania*, no. 3738/02; 18 December 2007.

21 *Gratzinger and Gratzingerova v. the Czech Republic*, [G.C.], mentioned above, §§ 70-74; *Kopecký v. Slovakia* [G.C.], mentioned above, § 35; *Smiljanić v. Slovenia* (dec.), no. 481/04, 2 June 2006 § 29.

22 *Maria Atanasiu and others v. Romania*, mentioned above, § 136.

23 *Von Maltzan and others v. Germany* (dec.) [G.C.], § 74; *Kopecký v. Slovakia* [G.C.], § 35; *Broniowski v. Poland* [G.C.]

24 *Olczak v. Poland* (dec.), § 60; *Sovtransavto Holding v. Ukraine*, § 91; *Shesti Mai Engineering OOD*

claim to the company's assets, including the right to a share in these assets in the event of its being wound up, but also other corresponding rights, especially voting rights and the right to influence the company's conduct and policy²⁵.

iv. Lease and rent

Lease and rent of goods²⁶ or of land²⁷ can also attract the protection of Article 1 of Protocol 1 of the Convention.

v. Licences and trademarks

Licences recognised by the national authorities fall under legitimate expectations as well and are protected by Article 1 of the Protocol 1. In relation to a licence to sell alcoholic beverages²⁸ the Court held that "*the economic interests connected with the running of [the applicant's restaurant] were 'possessions' for the purposes of Article 1 of the Protocol. Indeed, the Court has already found that the maintenance of the licence was one of the principal conditions for the carrying on of the applicant company's business, and that its withdrawal had adverse effects on the goodwill and value of the restaurant*". With the same logic the Court has accepted that Article 1 of Protocol 1 protects a cinema licence²⁹, a banking licence³⁰ or fishing rights³¹. So are protected as well by Article 1 of Protocol 1 intellectual property rights such as patents³², trademarks³³ and copyrights³⁴ copyright holders are protected by Article 1 of Protocol no. 1.

vi. Clientele

The Court has also recognised that the clientele built by an economic or commercial activity could have in many respects the nature of a private right and constitutes an asset because it is linked with an economic activity which has been built. In such case interferences with the exercise of such activity could reduce the value of the business and attracts the protection of Article 1 Protocol 1³⁵.

and Others v. Bulgaria, § 77)

25 See *Company S. and T. v. Sweden*, Commission decision; *Reisner v. Turkey*, § 45; *Marini v. Albania*, no. 3738/02; 18 December 2007, § 165

26 *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland* [G.C.], § 140).

27 *Di Marco v. Italy*, §§ 48-53

28 See *Tre Traktören AB v. Sweden*, 7 July 1989, § 53.

29 *Iatridis v. Greece*, 25 March 1999

30 *Capital Bank AD v. Bulgaria*

31 See *Alatulkkila And Others V. Finland*, § 66 and *O'Sullivan Mccarthy Mussel Development Ltd V. Ireland*, § 89

32 *Smith Kline and French laboratories ltd v. the Netherlands* (dec.).

33 *Anheuser-busch Inc. V. Portugal* [G.C.], §§ 72, 76 and 78, *Melnychuk v. Ukraine* (Dec.).

34 *Neij and sunde kolmisoppi v. Sweden*, See in relation to musical works (*SIA AKKA/LAA v. Latvia*, § 55) and in relation to translations *SC Editura Orizonturi SRL v. Romania*, § 70

35 See judgment of 26 June 1986 in the case of *Van Marle and others v. the Netherlands*, § 41-42.

vii. Remuneration and social security benefits

As far as salaries and other forms of remuneration are concerned the Court has specified that they can be considered a possession only where they have already been earned or where there is an enforceable claim to it, which means they are due to be paid on strength of legislation, decision or enforceable contract between the parties³⁶. For example, while the fees due to a lawyer according to the regulations in force in Italy were considered as “existing possessions”, such was not the case in the absence of remuneration for a pupil lawyer appointed as counsellor *pro deo* by the bar³⁷.

As far as the social security benefits are concerned the traditional position of the Court made a distinction between those linked to payment of contribution and those not linked to any contribution³⁸. However, in cases concerning pensions the Court has modified that position and now accepts that legislation providing for payment of an old-age pension, whether conditional or not on contributions, generates a proprietary interest falling within the ambit of that article for those satisfying its requirements³⁹.

Does a monetary claim become property upon the finality of a probate decision, which excludes it from the statute of limitations?

Before answering this question, it would be useful to briefly recall the case-law on the applicability of Article 1 of the Protocol 1 in relation to claims and judgment debts.

In this regard it has been clearly stated that:

“the Court’s case-law does not contemplate the existence of a “genuine dispute” or an “arguable claim” as a criterion for determining whether there is a “legitimate expectation” protected by Art. 1 of Protocol no. 1...

... On the contrary, the Court takes the view that where the proprietary interest is in the nature of a claim it may be regarded as an “asset” only where it has a sufficient basis in national law, for example where there is settled case-law of the domestic courts confirming it.”⁴⁰

36 *Greek Federation of Customs Officers v Greece*

37 See judgment 23 November 1983, *van der Musselle v. Belgium*, § 48

38 See *Klein v. Austria*, § 57, *Gaygusuz v. Austria*, § 41, *Kjartan Ásmundsson v. Iceland*, § 39; *Müller v. Austria*, Commission Decision, p. 49.

39 See *Carson and others v. the United Kingdom* [G.C.], § 64, *Bélané Nagy v. Hungary* [G.C.], § 86, *Čakarević v. Croatia*, §§ 54-65.

40 *Kopecký v. Slovakia* [G.C.], no. 44912/98, § 52, ECHR 2004-IX. See also *The Pine Valley Developments Ltd and others v. Ireland*, §§ 51-52, See also *Plechanow v. Poland*, § 83; *Vilho Eskelinen and others v. Finland* [G.C.], § 94; *Anheuser-Busch inc. v. Portugal* [G.C.], § 65; *Haupt v. Austria* (dec.), § 47; *Radomilja and others v. Croatia* [G.C.], § 142.

This means that Article 1 of the Protocol 1 does not protect the right to acquire property, the expectations to become an owner or possessions by way of intestacy. In the same way hope of recognition of a property right which it has been impossible to exercise effectively cannot be considered a “possession” within the meaning of Article 1 of Protocol no. 1, nor can a conditional claim which lapses as a result of the non-fulfilment of the condition⁴¹. In the same way, a judgment debt which is not final, and as such does not create, at least for the time being a subjective right to an economic interest, cannot be considered “sufficiently established to be enforceable” and accordingly does not constitute a “possession”.

However, as the Court says, if there is a legislation, court decision or a settled case law recognising those rights in someone’s favour, the concept of “legitimate expectation” comes into play⁴². Therefore, a judgment debt which is final and is enforceable on the basis of national law, constitutes a “possession”⁴³.

Very recently the Court has said that:

78. ... “the ‘legitimate expectation’ was thus based on a reasonably justified reliance on a legal act which had a sound legal basis and which bore on property rights (see Kopecký, cited above, § 47). Respect for such reliance follows from one aspect of the rule of law, which is inherent in all the articles of the Convention and which implies, inter alia, that there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by the Convention (see, as a recent authority, Karácsony and others v. Hungary [G.C.], no. 42461/13, § 156, 17 May 2016, with further references).”⁴⁴

Therefore, the question asked by the Montenegrin authorities depends whether the probate decision confers to the individual concerned a property right sufficiently established in conformity with national law. It is for the national authorities to determine the conformity of the probate decision with national law as far as statute of limitations is concerned and as to the finality of the decision. Once that decision which confers property rights has become final it does constitute a legitimate expectation under Article 1 of Protocol 1 and is protected by the ECHR.

41 See *Bijelic v. Montenegro and Serbia*, no. 11890/05, § 84, 28 April 2009, *Mijanović v. Montenegro*, no. 19580/06, §§ 66 & 90, 17 September 2013, *A. and B. v. Montenegro*, no. 37571/05, § 68, 05 March 2013. See also the comparison the Court makes amongst different applicants on that point in *Ramadhani and others v. Albania*, no. 38222/02, §§ 69-70, 13 November 2007. See as well *Prince Hans-Adam II of Liechtenstein v. Germany* [G.C.], §§ 82-83; *Gratzinger and Gratzingerova v. the Czech Republic* (dec.) [G.C.], § 69; *Kopecký v. Slovakia* [G.C.], § 35; *Centro Europa 7 s.r.l. and di Stefano v. Italy* [G.C.], § 172).

42 *Draon v. France* [G.C.], § 65

43 *Stran Greek Refineries and Stratis Andreadis v. Greece*, § 59; *Burdov v. Russia*, § 40; *Gerasimov and Others v. Russia*, § 179; *Yuriy Nikolayevich Ivanov v. Ukraine*, § 45; *Streltsov and other “Novocherkassk military pensioners” cases v. Russia*, § 58.

44 *Bélané Nagy v. Hungary* [G.C.], No. 53080/13, 13 December 2016.

Conclusion

Conclusions

At the end of this brief analysis the following conclusions can be drawn.

As far as the first question is concerned it can be concluded that the right to property as guaranteed by Article 1 of Protocol 1 of the Convention guarantees not only existing possessions but also legitimate expectations when they are sufficiently established to be enforceable under national law. It can be so for court decisions, arbitral awards, restitution of property, etc. when these have a basis under national.

Under these conditions, heredity is also protected by Article 1 of Protocol 1 when the right of heirs is clearly provided by national law⁴⁵ or the conditions of the will of the testator have been fulfilled⁴⁶. Therefore, as far as the second question of interest to the Montenegro authorities is concerned, it can be said that once the probate decision becomes final under national law, and that decision confirms the right of the heirs to inherit, Article 1 of Protocol 1 applies.

45 See *Mazurek v. France*, no. 34406/97, §§ 42-43, 01/02/2000 and *Merger and Cros v. France*, no. 68864/01, § 32, 22 November 2004

46 See *Molla Sali v. Greece*, no. 20452/14, [GC], §§ 128-132, 19/12/2018

FACTUAL EXPROPRIATION AND STATUTE OF LIMITATIONS

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In recent years (after the adoption of the ECHR) in Montenegro, the number of lawsuits for compensation for deprivation or restriction of ownership of real estate that has become state property for the general (public) interest has been increasing. The owners demand compensation because part of their land was turned into a street without an expropriation procedure; others demand compensation for the land on which substations were built, as well as compensation for the reduced market value due to transmission (and other) lines. Occasionally, lawsuits are still filed in Montenegro for payment of market compensation, even when there is a final decision on expropriation, claiming that the compensation has not been paid to them even after several decades. The attorneys (representatives of the defendants) point out that the compensation was paid, but that the documentation (evidence) was destroyed due to the short deadlines set by the Law on Archives, and they also file an objection to the statute of limitations established that is founded in Montenegro, but was previously unfounded.

Along with the increase in the number of disputes, the legislative activity is visible as regards amendments to the Law on Expropriation. The last amendments in Montenegro were made in 2018. The most significant amendment is: relocation of compensation determination from court proceedings to an administrative authority, formation of a commission as an advisory body and determination of market value in a new way while respecting the interests of previous owners and users of expropriation (compliance with the principle of proportionality).

The analysis of reasonings of judgments shows (in some, but not all of them) the different position of the Supreme Court of Montenegro on the one hand and the Constitutional Court of Montenegro on the other hand, especially regarding the statute of limitations. All of the above is accompanied by the disunity and contradiction of the case law of regular courts, especially in the initial periods of rendering judgments.

Compensation for factual expropriation as part of property rights

Factual expropriation (compensation) is one of the forms of property right (natural human rights) as a complex legal concept. The most common form of property is the right of ownership of movable and immovable property, but this also includes economic and other interests (the right of ownership is narrower term than the right to property). The protection of property was not a fundamental human right according to the original text of the Convention on Human Rights. It was established for the first time in 1952 by Protocol No. 1 (entered into force in 1954), and thus became an integral part of the Convention.

Protocol No. 1 reads:

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.

Content of the text of the Protocol shows that the Convention protects:

- a. the right to peaceful enjoyment of possessions;
- b. deprivation of property can be only in the public interest based on the law; and
- c. control of property is performed in accordance with the general interests or for collection of taxes, duties and penalties (restriction).

Based on the linguistic interpretation of Protocol 1, it could be concluded that it does not provide for the right to compensation (monetary compensation) because there is simply no such rule. It is a product of the case law (ECHR) based on systematic interpretation of the Convention, but also with partial reliance on the text of the Protocol. It is evident from the first paragraph that deprivation must be in accordance with the law. Constitutions and laws of all modern states provide for expropriation (forced transfer of private property as a rule to state ownership of real estate) only with the payment of market compensation in cash or, by agreement, in kind (Constitution and laws on expropriation). In addition to the legality (that deprivation or restriction of property is based on law or case law), a legitimate goal (general or public interest), the forced transfer of property rights requires proportionality (compensation and examination of whether deprivation and restriction of property was necessary), i.e. valuation of the interests of a social community and rights of an individual. Dozens of ECHR judgments have taken the position that no state interference in the rights of an individual may take place without payment of market compensation, except in justified cases. Let's look at them briefly:

- *S. Sporrog / L. v. Sweden* - In the case of a construction ban due to the announced expropriation, the court for the first time expressed its position on proportionality and the obligation to pay compensation for restricting the use of property by ordering a factual investigation. Due to the restriction of property rights, the owners were prevented from enjoyment of possession (property) because the buyers gave up after learning that the land would be expropriated in the future; a violation of rights was established, regardless of the fact that the restriction of property does not qualify as de facto expropriation;
- *James v. The United Kingdom*, where the principle of proportionality, legitimate aim and public interest is also emphasized. The judgment was negative was negative for the applicant because the legitimate goal (social justice) prevailed over the interests of the owner; it was rejected in terms of the compensating request (due to the reduction of the rent on the social apartments he owned). The general public interest prevailed over the right to property;
- *Papamichalopoulos v. Greece* is a typical example of de facto expropriation. The owner of the land obtained a permit to build a tourist complex. The state confiscated his land and handed it over to the navy for a military base, and no formal decision on expropriation was made. The request for land restitution was rejected, and an agreement on the amount of compensation was not agreed even after several years. A violation of rights was established, regardless of the fact that the court proceedings for compensation were not completed.

Protocol 1 corresponds to the constitutional rule in Article 58 of the Constitution of Montenegro.

When the European Court of Human Rights, respecting the principle of equality and legal certainty, rules on a disputed, significant, subjective violation of rights (a typical case), the principle of legal certainty requires that all the same and substantially similar future cases are to be treated in the same way (signal to the legislator to change or pass a law in order to govern the matter). This further means that the problem of de facto expropriation as part of property law must be adjudicated uniformly in accordance with the general binding character of the European Convention and the case law based on it.

In theory, starting from the quoted content of Protocol 1 (peaceful enjoyment of possessions, lawful deprivation, and control of property and payment of compensation), the European Court distinguishes three basic forms of deprivation of property⁴⁷: formal expropriation, de facto expropriation and indirect expropriation.

Formal (legal) expropriation is a forced administrative transfer of property rights to the state in accordance with a legally conducted procedure and payment of compensation. It is preceded by a planning document, determination of a general or public interest, adoption of a decision on expropriation and decision on com-

47 Dušanka Komnenić, PhD dissertation, "*The right to peaceful enjoyment of property in the case law of the European Court of Human Rights*", p. 74-75

pensation before an administrative authority or non-litigious court or before an administrative authority only (according to the amended Law on Expropriation in Montenegro in 2018).

In factual expropriation, no decision on expropriation is adopted (regardless of whether the general interest is determined on the basis of a planning document), and it is in fact executed through deprivation of property (dispossession) without payment of compensation. In the case law of both countries, this expropriation is recognized through construction of streets, substations and other infrastructure facilities without an expropriation procedure and without compensation, which will be discussed later.

Indirect expropriation exists in the case when a piece of real estate was confiscated from the owner and no compensation was paid, and within a special court procedure the state became the owner of the real estate mostly on the basis of law or usucaption (*Delvedere A. v. Italy*). In the former Yugoslav practice, there was a special privileged usucaption for the state and social legal entities (Article 268 of the former Law on Administrative Procedure).

For the analysis of our problem, it is important to distinguish complete and incomplete expropriation by the law. While in the case of complete expropriation the owner changes on the day the decision becomes final, in the case of incomplete expropriation, easement or lease of land can be established for a certain period of up to three years.

Factual expropriation - characteristic cases

Construction of streets and infrastructure facilities

Through its principled position and several judgments, the Supreme Court of Montenegro has recognized the right to compensation for owners of land turned into a street, regardless of the statute of limitations, because possessions cannot become time barred. The position is taken that limitation periods from the rules on construction on someone else's land cannot be applied either.

“Construction of a public road without adopting a decision on exclusion of the construction land from the possession is de facto dispossession, which is the basis for exercising the right to compensation in accordance with the provisions of the Law on Expropriation.

The right to this compensation does not have a statute of limitations, so the provisions on time limitations from the Law on Contracts and Torts do not apply to the claim of the former owners for the payment of compensation.” (From the HC of MNE Bulletin 1/2012 p. 14-16)

Incomplete expropriation

The Supreme Court of Montenegro pointed to the absence of limitations as regards the right to market compensation in the case of incomplete expropriation in the following way: "In the cases of construction of facilities of public and general interest, it is a matter of dispossession, which is the basis for compensation in the amount of market value of land, and to which the rules on periods of limitations for claims do not apply" (Supreme Court of Montenegro Rev 347/18 of 14 June 2018). In the case of incomplete expropriation, the reasoning of the judgment of the Supreme Court of Montenegro indicates that partial occupation of the land takes place when it was not expropriated or the owner was not paid any compensation (construction of a substation or electric poles or transmission lines passing over the land). In both cases, the new owner has the right to reduced market value of the property regardless of the statute of limitations.⁴⁸

The decision on expropriation has been adopted, but compensation has not been determined or paid

In the former Yugoslavia, at least in the last years before its dissolution, there were rare cases of forced transfer of private property to social or state property without an expropriation procedure and compensation payment. It is true that it was not always market-based and in some periods was devalued by the effects of inflation (especially hyperinflation in the period 1990-1993)⁴⁹. However, even when such cases occurred, disputes were resolved through the institute of damages, which resulted in unfair solutions because the users of expropriation invoked the statute of limitations for claims. Since time limitations in the matter of damages are very short (three and five years), the previous owners mostly remained without protection. In order to protect property rights, and from sociological point of view also to eliminate injustices, and after the judgment in the case L ... and S v. Sweden by the European Court of Human Rights (although the former Yugoslavia was not a member of the Council of Europe), the joint session of the Federal Court and all republican courts in 1986 reached a conclusion which read: "Statute of limitation of claims for fair compensation for real estate that have passed into social ownership on the basis of expropriation or nationalization or another legal basis where compensation is determined ex officio starts on the first day after the day when the previous owner of real estate had the right to demand compensation determined by a settlement or a court decision".

48 Contrary to this, the Serbian case law, after some hesitation and mutually contradictory judgments (whether it is damages, factual expropriation or sui generis compensation for legal and real easement), it took the legal position that a transmission line crossing over the land represents legal and real easement and that this compensation has statute of limitations within a general limitation period of 10 years. Regarding the land with a substation or a pole on it, there is no statute of limitations (legal position of the Civil Department of the Supreme Court of Cassation of 23 January 2017).

49 In this matter, the courts recognized the right to re-determine the compensation for expropriation, regardless of the objections filed for the "adjudicated matter".

The argument for this conclusion was: That the compensation is determined ex officio, so the previous owner cannot suffer any harmful consequences due to the failure of the state authorities; in the event that an agreement on the amount of compensation is reached before the municipal authority within the prescribed period, and that authority fails to submit the decision on expropriation with other documents to the non-litigious court, the previous owner also cannot suffer any consequences. Therefore, the user of expropriation cannot successfully present the objection to the statute of limitations, because the limitations do not even begin until the compensation is determined. Therefore, the submission of such a request by the previous owner is not related to any limitation time from the Law on Contracts and Torts. In the further course, the case law went even further than the cited conclusion. It declared absence of limitations in cases when the decision on expropriation was not adopted at all (or it was adopted, but for various reasons it was not delivered to the previous owners - it did not become final). The practice of the European Court of Human Rights also contributed to that, not only in the cited cases, but also in the later judgments against Portugal, Albania and Turkey.

A conclusion can be drawn from the Montenegrin case law that until the adoption of the principle position from 2014, the courts had a unique practice (position) that the expropriation compensation does not have statute of limitation until it is determined and that it is equivalent to property (monetary substitution for property)⁵⁰.

The practice has changed apparently after it was found out that the documentation on compensation payments was destroyed, and that the compensations were actually paid. The position was taken that due to the passive behaviour of the previous owner, there was the statute of limitations within the general deadline of five and 10 years and the plaintiff was to blame for not receiving the compensation. As it will be seen from the following paragraphs, the Supreme Court of Montenegro does not respect the positions of the Constitutional Court of Montenegro.

The Constitutional Court of Montenegro considers that the determined compensation for expropriation does not have statute of limitations. The key argument is the constitutional rule that there is no expropriation without compensation; decisions of the European Court of Human Rights and the position of the joint session of all courts from 1986. The reasoning of the decision of the Constitutional Court says:

"In the light of the above circumstances, it is indisputable for the Constitutional Court that expropriation is an administrative way of acquiring state property, a legal concept that allows forced transfer of real estate from private to state property for general interest, with compensation or acquisition of ownership of other real estate, while the previous owner, i.e. the real estate title holder ceases to be its holder. It is undisputed that expropriation as such is a measure of deprivation of property rights on real estate of natural

50 The right to demand compensation for land expropriation does not become obsolete. Valid only in the case when the fee has not been determined (decision of the Supreme Court of Montenegro Rev 218/12 of 7.11.2012)

or legal persons, which occurs in the public interest by means of a decision of the competent state authority. However, all these measures must be implemented in a non-discriminatory manner and must comply with the condition of proportionality. Any interference with the peaceful enjoyment of possessions must be reasonably proportionate to the aim pursued by the interference, and therefore the necessary balance will not be established if one or more individuals have to bear individual and excessive obligations (see James and Others v. The United Kingdom, of 21 February 1986, paragraph 50, series A, no. 98). The public interest in expropriation is not disputable, since it is a legal condition for expropriation of real estate. In addition, it is not disputed that expropriation is performed with compensation. In the specific case, the position of the courts that the determination of compensation is limited in time is disputable.

From the cited provisions of the Law it follows that the intention of the legislator is clear, which is that no one can be deprived of property rights without fair compensation. In that sense, the Law on Expropriation stipulated that the administrative authority is obliged to schedule and hold a hearing, without delay, for the agreed determination of compensation for expropriated real estate, and that if the compensation agreement is not reached in its entirety, within two, i.e. three months from the day the decision on expropriation becomes final, the municipal administrative authority shall submit the final decision on expropriation, with all documents, to the municipal court on territory of which the expropriated real estate is located (hereinafter the court), in order to determine compensation. If the administrative authority does not act in the stated manner, it may be done by the previous owner.

Therefore, if the agreement on compensation is not reached within the legally prescribed deadline and the administrative authority does not submit the case file to the court, only then the previous owner can address the court directly. Not before, as misinterpreted by regular courts. Because, it is a priority duty of the administrative authority to schedule a hearing regarding the agreed determination of compensation, which is recognized by the Law on Expropriation. This is primarily because the Constitution stipulates that no one may be deprived or restricted of property rights, except when required by the public interest, with a fair compensation. It is logical, when the state deprives somebody of their right of ownership, that it provides the right to compensation to the previous owner. This cannot be a priority obligation of the previous owner, since the Law leaves the possibility to the owner to address the court when the administrative authority does not submit the files to the court *ex officio* (which is certainly, not without reason, a terminological distinction from the duty of the administrative authority or the state to do so), only after the state has taken all possible measures to reach an agreement on the determination of compensation and no agreement is reached, which is not the case here." (Decision of the Constitutional Court of Montenegro U-III no. 196/19 of 22 January 2019)

Deciding again (for the second time), after the above-cited decision of the Constitutional Court, the Supreme Court of Montenegro did not change its previous position

From the reasoning

.... "Therefore, as the plaintiff had the opportunity to address the court directly after the decision on expropriation became final for the purpose of determining compensation, and he did not do so within five years from the validity of the decision on expropriation, but the proposal in relation to the opponent was filed with the court only on 3 April 2009, and in relation to the second petitioner on 9 October 2009, almost thirty years since he had the right to address the court directly, it is obvious that the claim is beyond statute of limitations upon expiration of the general limitation time from Article 371 LO ("Official Gazette of SFRY", 29/78, 39/85, 37/89 and "Official Gazette of SRY", 31/93).

... The claim in question, contrary to the allegations from the review and the position of the Constitutional Court of Montenegro, is subject to statute of limitations, because the claim for compensation for expropriated real estate is a contractual legal obligation.

In this regard, the second instance court rightly referred to the legal position of this court Su no. 62/14 of 11 July 2014 that the claim for compensation for expropriated real estate goes beyond statute of limitations within the general limitation time. The statute of limitations starts on the first day after the day when the previous owner had the right to apply directly to the court or other competent authority for the determination of fair compensation.

At the same time, it cannot be said, as it is unfoundedly indicated by the review, that the Supreme Court of Montenegro, with its principled legal position, Su. V no. 62/14 of 11 July 2014 questioned and violated the equality of the parties in court disputes of the same type from the period preceding this legal position and of the parties in disputes after taking the mentioned position. Because, the Supreme Court, as the highest court in Montenegro, while performing its constitutional function (Article 124 para. 1 and 2 of the Constitution of Montenegro - Official Gazette of Montenegro, 1/07) and ensuring the uniform application of the law by courts, in addition to its role in trials, it also performs its role outside trials, inter alia by taking principled legal positions, which is the official obligation of this court in terms of Art. 26 of the Law on Courts. The Supreme Court also exercises its constitutional role by monitoring and harmonizing the case law of all courts within the national framework. In this particular case, the principled legal position indicated by review is the result of the development of case law and its comparison, as well as interpretation of national regulations in the context of generally accepted legal standards of international law.

.... Change of the position of the Supreme Court of Montenegro on this issue after a long time does not imply unconditionally a violation of the Convention and the standards of the right to a fair trial and a segment of that right - equality of parties in court proceedings in the same legal situations. Because, the European Court of Human Rights ruled in the case of *Heiget Sahin and Perihan Sahin v. Turkey*, no. 13279/05, in the judgment of 20 October 2011, paragraph 58, that the conditions of legal security and protection of legitimate public trust do not confer the acquired right and consistency of case law, as previously stated in the case of *Unedic v. France*, no. 20153/04, paragraph 74, of 18 December 2005. Also, with the same position in the judgment for the mentioned case *Sahin*, the Court stated that the development of case law is not in itself contrary to the correct administration of justice, since failure to maintain a dynamic and evolutionary position would create a risk of preventing reform or improvement (progressive movement), as previously also stated by the Court in the case *Atanasovski v. the "former Yugoslav Republic of Macedonia"*, 36815/03, paragraph 38 of 14 January 2010.

Therefore, the specific principled legal position of the Supreme Court of Montenegro should be interpreted in the context of evolution of interpretation of law within the legal order of Montenegro and in accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms, without prejudice to the equality of procedure and legal safety as elements of the rule of law. (Supreme Court of Montenegro Už Rev 8/19 of 19 April 2019).

Comment on the position of the Supreme Court of Montenegro

From previous presentations, it follows that in terms of factual expropriation (construction of streets) there is a unity of practice and consistency, but that there is a difference in terms of compensation for expropriated real estate that is not paid even after several decades.

It is visible from the judgments of the European Court of Human Rights (Portugal, Turkey, Greece) that the statute of limitations is not mentioned.

Judgments of the European Court must be observed due to the content of Art. 35 and 46 of the European conventions as well as do to the decision of the Constitutional Court in line with the text of the Constitution. Nevertheless, if we disregard the formal obligation and hierarchical relationship of legal acts (international ratified conventions take precedence over domestic law and per their power come immediately after the Constitution), and starting from the constitutional rule that there is no expropriation without payment of compensation, let us consider the essential reasons for the statute of limitations.

The answer to this question (about absence of statute of limitations) can be given by the legal nature of expropriation compensation.

It is a *sui generis* claim and differs from contractual obligations in the area of damages and acquisitions without grounds. Regardless of the different definitions of property, the theory agrees on one thing - that it represents a whole. With the forced transfer to state ownership, a part of the whole is torn off (legally disappearing). The taken part can turn either into the same (substantially similar) thing (by agreement) or, as a rule, to money (movable thing) as an equivalent according to the principle of *subrogam capit naturum subrogate* (a new thing assumes the nature of the first kind)⁵¹. Since we have replaced one element of the legal relationship with another, i.e. the immovable thing has been replaced by a movable one, the legal nature of this compensation can be explained by realistic subrogation. There are no movables (money) until the amount of the compensation is determined, so the statute of limitations has not even begun.

Considering that the real subrogation is the replacement of one element with another, of an immovable thing with a movable one, and as the property should remain intact, and having in mind that the right of possession as a part of the right to property does not become statute-barred, therefore compensation in money does not become statute-barred. It is an equivalent of right to possession. What becomes statute/barred is the established expropriation compensation.⁵²

There is no equality between damage compensation and expropriation compensation because there is no illegality in expropriation; also, there is no equality with the acquisition without grounds because the state, as a legal entity, is not getting rich (the benefit is general, common, national).

The previous owner cannot suffer from the consequences of illegal actions of the state, which ex officio had to try to determine the compensation by mutual agreement or to refer the case to the non-litigation department of the court, which would determine the compensation ex officio. A careful analysis of the reasoning of the position from 2014 (judgment from 2019) explicitly mentions that the internal motive for changing the previous position on the absence of statute of limitations for the compensation was the suspicion of intentional elimination of evidence regarding the payment. Truly speaking, this cannot be seen from the judgement quoted in detail (it is established as an indisputable fact). It is not possible to deprive an individual of the right to compensation just because of the suspicion that there are cases of dual compensation, intentional destruction of evidence and the use of rules on the deadlines of keeping archival material, which obviously must be longer. In these situations, regular courts would have to establish the facts ex officio regardless of the rule on the burden of proof (according to which the debtor proves that the debt has been paid) and try to obtain registers, hear witnesses, documents on secured funds, hear the previous owner or his heirs, and discuss: why is

51 Obren Stanković, Vladimir Vodinelić, Introduction to Civil Law, Nomos, Belgrade, 2007 p. 140

52 The same position was taken in Bosnia and Herzegovina at the Panel on 30 January 2014

everyone silent sometimes even for more than 10 years? Did the previous owner forgive the debt in which case he would not be entitled to the compensation?

On the other hand, the argument of the Supreme Court of Montenegro that the change of position was made in 2014 in accordance with several cited judgments of the European Court in which the change of practice is allowed under exceptional circumstances seems unacceptable because it means a step backwards in respect of human rights (property rights) compared to the level of protection achieved in 1986. Case law changes if, under the influence of sociological, philosophical, and even political understandings, and especially justice, it is proved necessary in order to expand the scope of human rights or acquire new ones. That is not the case here.

Particularly in the case of “Nešić v. Montenegro”

The case of “Nešić v. Montenegro” was decided in accordance with the principles, practice and judgments of the ECHR as well as the example of indirect expropriation (D. v. Italy). When the right of disposal is lost, the property is “broken” because the most important attribute that distinguishes it from the state-owned property is taken away from it. In both the Italian case and the Nešić case, the ECHR states that the state became the owner not only on the basis of the law but also on the basis of a court judgment, which is given greater importance. However, unlike the Italian case, Nešić has the right to use and expropriation is not necessary because the transfer of ownership to the state has already been done through public books. In this case as well, and in accordance with the stated practice of the ECHR, the state must pay compensation. It is true that the compensation will not be the same as in the case of complete loss of property rights. It is obvious that this will be a huge financial burden for Montenegro and that it can be concluded “between the lines” from the judgement that this matter also needs to be governed by legislation. But, how to determine the market fee in these situations and evaluate the loss of the right of disposal in a situation when there is a prohibition of disposal on the entire seashore? In accordance with the principle of proportionality, it is necessary in each specific case to “weigh the interests of the state and the previous owner. With the amendments to the Law on Expropriation, Montenegro has normatively governed and concretized the principle of proportionality, emphasizing that the market value may be lower if the previous owner has some other benefits.

Concluding remarks

To summarise the above presented:

1. If no decision on expropriation was adopted, and the real estate has been confiscated in order to build facilities of public interest (factual expropriation), the previous owner has the right to market value of the real estate at the time of the court decision, regardless of the statute of limitations.

2. If a decision on expropriation is adopted, and no compensation has been determined because the competent state authority has not determined the compensation ex officio or by agreement, and the previous owner has not made such a request, the claim goes beyond statute of limitations within the general limitation time.
3. In case of incomplete expropriation (establishment of legally real easement) the claim for compensation does not have a statute of limitation.
4. When the state acquires the right of ownership according to the law, it is necessary to decide on the transfer of property in each specific case with a decision of a court or and administrative authority. Regardless of the fact that the previous owner retains the right of use, he is entitled to compensation due to the termination of the right of ownership. It is obviously necessary to amend the relevant law (Law on Coastal Zone Management) and govern the issue of compensation in line with the case law of the ECHR, with the rules on determining the market compensation used in the Law on Expropriation of Montenegro.

PROPERTY RIGHT AND CONTRACTUAL OBLIGATIONS

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The third chapter analyses two issues: nullity of a mortgage contract relating to the joint property of spouses in the event one of those spouses has not signed the contract and has not given his/her consent to its conclusion, and the right to damages for unlawful termination of an employment contract.

Is a mortgage contract relating to the joint property of spouses null and void if one of the spouses has not signed the contract and has not given his/her consent to its conclusion?

Case law of Montenegrin courts

The issue arose in the case law of Montenegrin courts whether a mortgage contract relating to real estate constituting the joint property of spouses was null and void if one of the spouses had not signed the agreement and had not given his/her consent to its conclusion. The first and second instance courts, and the Supreme Court of Montenegro (hereinafter: CCM) took a different position on the matter.

The position of the SCM on this issue is that one spouse may conclude a contract regarding property, including a mortgage contract, which is a joint property acquired during their marriage, with the consent of other spouse, which can be given orally, in writing or tacitly. Furthermore, in cases where spouses live together, it is assumed that the spouse is aware and must be aware of the actions taken by other spouse in relation to the item they are co-owners of, and thus tacitly gives consent, although does not formally participate in conclusion of a contract.⁵³

The cited SCM decision was annulled by the CCM, and the case was returned for repeated proceeding. It should be stressed that in its annulling decision⁵⁴, CCM does not enter into issues or opinions of lower instance courts or SCM on the validity

⁵³ SCM, Rev. no. 888/17 of 10 October 2017

⁵⁴ CCM, U-III no. 146/18 of 7 May 2018

of the contract (mortgage, gift, etc.) concluded in relation with the joint property acquired in marriage, or the manner in which one spouse gives consent to another, particularly in the event of an assumed tacit consent. In its decision, CCM presented arguments in relation to the right to a reasoned decision, as an integral part of the right to a fair trial. In the case at hand, CCM found that the constitutional complaint raises an issue of the reasoning of the respective decision rendered by SCM and the conclusion of the review court on determining facts, on the basis of which the court concluded that the plaintiff's appeal was unfounded (in this case, the constitutional appellant's).

With regard to the prominent issue of validity of the property related contract, including mortgage contract, which represents joint property of spouses, it should be pointed out that in another case which concerned a mortgage contract, SCM took the position according to which in order to assess the legal validity of a mortgage contract and proper application of the material right, it is important to assess conscientiousness of parties to the contract from the aspect of right abuse. Furthermore, it also upheld that the motif to conclude the contract as a rule does not affect its legal validity; however, if it contradicts the principle of conscientiousness and fairness, it can result in contract annulling.⁵⁵

Legislative framework

Provisions of the Family Law (FL) are relevant for the discussion on the issue when a property is considered to be the joint property of spouses, on the effects of joint property registration or the fact that it is not entered the real estate register and other appropriate registers, on the conclusion of a contract regarding the property (mortgage, gift...), which is the joint property acquired during their marriage and the manner in which one spouse gives consent to the other.

Spouses may have separate and joint property (Article 285 of the FL). According to Art. 288 of the FL, joint property includes the property that spouses acquire through work and as a result of work during their marriage, as well as the income generated by that property. The joint property also includes income from separate property generated by work of spouses, property acquired through the use of intellectual property rights, property acquired through insurance as well as games of chances in the course of their marriage. These rights of the spouses to joint property are registered in the real estate register and other appropriate registers under the name of both spouses as their joint property, without determining the ownership over parts of it (Article 289, paragraph 1 of the FL). If only one spouse is entered in the real estate register and other appropriate registers as the owner of the joint property, this is deemed as if the entry is made under the names of both spouses, unless the entry is made on the basis of a written contract concluded between the spouses (Art. 289 paragraph 2 of the FL). If both spouses are entered in

⁵⁵ Rev. br. 400/17 od 14. 9. 2017

the real estate register and other appropriate registers as co-owners of determined parts, it is deemed that they have thus divided the joint property (Article 289, paragraph 3 of the FL).

According to the specific provisions of Art. 291 and Art. 292 of the FL, the joint property is administered and disposed of jointly and severally by the spouses during their marriage. The FL, however, does not lay down explicitly the manner, i.e. the form of agreement the spouses need to reach to administer and dispose of their joint property.

Spouses may reach an agreement that one of them administers and disposes of all or part of their joint property. According to Art. 292, paragraph 2 of the FL, the agreement may be limited only to administration or disposition. Unless otherwise agreed, the administration also includes disposition within regular business operations. The agreement may refer to all administration activities and dispositions or only to regular administration activities or only to some specific activities.

Furthermore, provisions of Art. 101 of the Law on Contracts and Torts (LCT), which are used to determine whether a legal transaction is null and void, should be highlighted. A contract that is contrary to binding legislation or morals of the society is null and void unless the purpose of the violated rule refers to another sanction, or unless the law provides for something else in that specific case. In addition, if conclusion of a certain contract is prohibited to one party only, the contract remains in force.

As regards the effects of registration of a piece of property that constitutes the joint property of spouses and its disposal or the issue of protection of a third party, the provisions of the Law on State Survey and Real Estate Cadastre should also be highlighted. According to the provisions of Art. 10 of the LSSREC on the principle of reliability, data on real estate and titles, entered in the real estate cadastre, are considered accurate and no one can suffer harmful consequences in real estate transfers and other contractual obligations for which these data are used.

Comparative legal sources and practice

When reviewing comparative legal framework and practices in relation to the issue if the mortgage contract relating to immovable property that is the joint property of spouses is null and void if one of them had not signed the contract thus giving consent for its conclusion, it is interesting to highlight the case law of Croatian courts. In Croatian practice, there have been different opinions as regards the situation when one spouse disposed of real estate constituting the matrimonial property, which is registered in the land register only under his name, without other spouse's consent and participation in legal transactions. Opinions were divided on whether to protect the right of the spouse's (co)ownership or to protect the principle of trust in the land register, and consequently, the third honest person for whose benefit the disposition is initiated.

The Constitutional Court of the Republic of Croatia (hereinafter: CCRC) took the position of absolute nullity of a legal transaction concluded by (only) one spouse, the subject of which is joint property of spouses, as a result of which (the nullity) the principle of trust in land registers for the benefit of third parties is not valid (is derogated) for such dispositions. However, the CCRC partially deviates from that position in its Decision U-III-103/2008 of 14 June 2011. In that Decision of 2011, the CCRC is of the opinion that in each specific case, taking into account specific circumstances of each specific case, the validity of a legal transaction must be assessed depending on the conduct, conscientiousness and good faith of all participants in a particular legal relation, including a spouse who (possibly) was not a participant in such relation.

The position of the Supreme Court of the Republic of Croatia (hereinafter: SCRC) also supported the protection of spouse's property rights, regardless of the fact that the real estate is registered only to one spouse. However, in a recent SCRC judgment⁵⁶, according to that Court, the third conscientious party that invokes the principle of protection of trust in land registers has the advantage in protecting acquired rights (in this specific case, it is the bank for the benefit of which the mortgage was created). Therefore, according to the SCRC, this rule also applies when the spouse was conscientious and did not know about the dispositions of the other spouse, i.e. when the acquirer and such spouse were *bona fide* at the same time. It should be noted that the Supreme Court, in line with the new organisation of the review, with its recent judgment, allowed a review of the judgment rendered by the Zadar County Court⁵⁷, due to legal issue if the right of (co)ownership of spouses should be protected, or the principle of confidence in the land registers, and consequently, the third party who acted in good faith and who acquired the property in question. Therefore, it will be interesting to see whether the SCRC will stick to its last position or modify it.

In order to eliminate described issues that arose in Croatian case law regarding the disposal of real estate constituting matrimonial property, and consequently the protection of a third bona fide party, the new family law (FLRC 15) simplified the procedure for registration of spouse's property rights acquired based on matrimonial property provisions (Article 36, para 4 and 5 of the FLRC). The FLRC 15 introduces innovations as regards administration and disposal of matrimonial property, by defining regular administration activities and extraordinary activities.

Unless proven otherwise, it is deemed as if a spouse had given consent to the other spouse in connection with matters of regular administration of joint assets such as regular maintenance, exploitation and utilization of assets for their regular purposes (Art. 37 paragraph 1 of the FLRC 15). On the other hand, joint completion of an activity or written consent of the other spouse certified by a notary public is required for an extraordinary activity related to real estate and movables registered with public registers, such as repurpose, major repairs, building extension, upgrade, refurbishment, alienation of a whole item, renting or leasing a whole item for a period longer than a year, creation of a mortgage on a whole item, pledging

56 Rev. 1867/12-2 of 29 October 2013

57 Gž-280/2019-2 of 5 September 2019

a movable item, creation of real and personal easements, real encumbrance or the right to build on a whole item (Art. 37. paragraph 2 of the FLRC 15). However, a lack of consent for regular administration activities and extraordinary activities does not affect the rights and liabilities of a bona fide third party. Spouses who have not given consent for a completed extraordinary activity (such as alienation of a whole item, creation of a mortgage on a whole item, etc.) has the right to damages arising from such an action of the other spouse (Art. 37 paragraph 3 of the FLRC 15).

Final findings and observations

The position of the SCM on this issue is that one spouse may conclude a contract regarding property, including a mortgage contract, which is a joint property acquired during their marriage, with the consent of other spouse, which can be given orally, in writing or tacitly. Furthermore, in cases where spouses live together, it is assumed that the spouse is aware and must be aware of the actions taken by other spouse in relation to the item they are co-owners of, and thus tacitly gives consent, although does not formally participate in conclusion of a contract.⁵⁸ It should be noted that the SCM, in its reasoning of the judgment in question, did not indicate the relevant provisions of substantive law that were violated and due to which it upheld the review, and based on which, consequently, such position is based, while in the second judgment, which it renders in relation to the CCM decision, it cited (only) the regulation, which is the Family Law.

We should underline that the CCM in its decision U-III no. 146/18 of 7 May 2018, does not elaborate on issues, and thus on the SCM's position neither, regarding validity of the contract (mortgage, gift ...) concluded in relation to the property constituting the joint property of the spouses acquired during their marriage, and on the way in which one spouse gives consent to the other, especially when it is deemed that it tacitly exists. The CCM does not state its opinion on the significance of the fact that the joint property of spouses was registered in the real estate register and other appropriate registers under the name of one of spouses only, especially in relation to the principle of protection of a bona fide third party. The CCM, namely, in its decision presents only arguments in relation to the right to a reasoned court judgment, as an integral part of the right to a fair trial.

The position presented by the SCM is based on presumptions. First, according to the explicit provision of Art. 289 paragraph 2 of the FL, if only one spouse is entered in the real estate register and other appropriate registers as owner of the joint property, this is deemed as if the entry is made under the names of both spouses. This provision of the FL would be a *lex specialis* in relation to the LSSREC. Also, according to the specific provisions of Art. 291 and Art. 292 of the FL, the joint property is managed and disposed of jointly and severally by the spouses during their marriage. To that effect, it is important to determine whether the disposition of property occurred based on

58 Rev. no. 888/17 of 10 October 2017

the consensual will of the spouses, since contracts, such as the mortgage contract, the gift contract, etc. would certainly represent a disposition of joint property, an activity that would go beyond regular administration. In addition, the FL does not explicitly determine in what way or in what form the spouses should reach an agreement on administration and disposal of joint property. However, within its case law, the SCM has developed a position according to which they can do so orally, in writing or tacitly. Therefore, and this is the second presumption, it is deemed that the spouse is aware and must be aware of the actions taken by the other spouse regarding the item of which they are co-owners, and has thus given a tacit consent, although he/ she has not formally participated in conclusion of the contract, if the circumstances in their lives indicate so. As for the circumstances of spouses' lives, to which the presumption of the existence of (tacit) consent of one spouse is connected, within the SCM case law it is sufficient to prove the existence of marriage and the fact that the spouses live together, from which the Court (also) concludes that spouses enjoy harmonious marital relationship and life circumstances.

Therefore, based on the current SCM case law, the mortgage contract is not null and void, irrespective of the fact that the spouse did not directly participate in its conclusion and give his/her consent explicitly, if there are circumstances from which one can draw a conclusion (presume) that he/she gave his tacit consent for such disposition. The SCM, in addition, in its judgments does not discuss the issues of conduct, awareness and good faith of all participants in the legal transaction (of the spouse who disposed of the property and of the third party) and of the spouse whose consent is presumed. On the other side, in a different case concerning validity of a mortgage contract concluded by a person who was not the owner of the property in question (but was using it based on a loan agreement), and a third party, SCM took a standing according to which lower instance courts were obliged to reliably determine if there had been an abuse of right and an illegal motif of the person who participated in this legal transaction, and if the third party with whom the mortgage contract was concluded had shown a lack of conscientiousness in this matter, that is – if s/he knew or could now that the registered owner is not the real owner of the property, which affects the assessment of the validity of the controversial contract.⁵⁹

In order to ensure legal certainty and guarantee the right of ownership, as well as the protection of a third *bona fide* person, the Montenegrin legislator should consider making proper amendments to the legislation, where new solutions from the Croatian FLRC 15 regarding administration and disposal of matrimonial property, and especially regarding the explicit, written consent of the other spouse allowing dispositions of property that involve extraordinary activities, could serve as a model. Also, proper legislative interventions should, consequently, lead to changes in the case law, which should certainly determine the conduct, conscientiousness and good faith of all participants in the legal transaction (of a spouse who initiates the disposition and of a third party), and of the spouse who does not participate in legal transactions.

59 Rev. no. 400/17 of 14 September 2017

The right to damages due to unlawful termination of the employment contract

The case law of Montenegrin courts

Within the case law of the first and second instance courts and the SCM, there are different positions on the question whether an employee is entitled to damages (in this case, specifically for lost salary and holiday bonuses) when the court finds that the employee's employment contract was unlawfully or unjustifiably terminated.

According to the position of the first and second instance courts, there was in principle a positive answer to this question if the decision to terminate employment was annulled as unlawful by a court judgment and if an order was issued to reinstate the employee back to work, while the SCM is of the opinion that the reasons for annulment of the decision to terminate employment as unlawful should be taken into account⁶⁰. In addition, we should also emphasize the position of CCM, which in its decision pointed out that the relevant provisions of Art. 143d of the Labour Law, which should apply to the specific case, do not prescribe the division of reasons into formal and substantive reasons as regards legal consequences of annulment of a decision to terminate employment.⁶¹

According to the SCM, the lower courts correctly conclude that the decisions on the disciplinary responsibility of the plaintiff are illegal because they were made contrary to the provisions of the Rulebook on Labour Relations of the defendant. However, while lower courts concluded that the decisions based on which the plaintiff's employment was terminated were annulled as unlawful, which, according to those lower courts, was a sufficient reason for the defendant to pay lost salary to the plaintiff for the disputed period, SCM found that the plaintiff had no right to claim the lost salary, irrespective of the decision on employment termination being annulled as illegal by a final judgment.

It is important to stress the position of the CCM in the context of the requirement for the court proceedings to be conducted in line with the constitutional principle of the rule of law, which states that "the interpretation of the applicable law in each specific case must not result from its arbitrary and random application, but must respect the requirements of the right to a fair trial." In addition, the CCM stated that, "when it applied the applicable Law to the facts established in the proceedings, the Supreme Court was required to take into account the provisions of Article 143 d of the Labour Law that, as a *lex specialis*, had to be applied to the specific case and as such do not prescribe the division of reasons into formal and material, when it comes to the legal consequences of the annulment of the decision on employment termination." In that sense, the CCM concluded that the position of the SCM that the appellant was not entitled to the compensation in the form of less paid

60 Rev. no. 479/15 of 29 April 2015.

61 Uš-III no. 625/15 and 634/15 of 29 March 2018.

and unpaid salaries, was “arbitrary to the detriment of the appellant.” Furthermore, the CCM emphasized the constitutional guarantee of the right to a fair trial, which, inter alia, “means that a court judgment on someone’s right or obligation must be rendered within a procedure conducted in accordance with applicable procedural law, through application of relevant substantive law and reasoned in a constitutionally and legally acceptable manner, because otherwise it could be seen as result of arbitrary actions and decisions of the competent court.”

Legislative framework

According to LL 08, the decision on termination of an employment contract is made by the employer’s competent body, i.e. by the employer, in the form of a written decision and delivered to the employee (Article 143c, paragraph 1 of the LL 08). In addition, the provisions of the Law on General Administrative (Art. 143c, paragraph 3 of the LL 08) apply accordingly to the delivery of warnings, notices and written decisions, unless otherwise provided for by the LL 08.

According to Art. 143d paragraph 1 of the LL 08, an employee who is discontented with the decision to terminate his employment contract has the right to initiate proceedings before the competent court to protect his rights, within 15 days from the date of receipt of the written decision, and may also initiate a procedure before the Agency for Peaceful Settlement of Labour Disputes. If it is determined during the proceedings that the employee’s employment contract was terminated unlawfully or unjustifiably, he is entitled to damages in the amount of lost salary and other income that he would have earned if he had been employed, in accordance with the law, collective bargaining agreement and his contract, as well as entitled to the payment of contributions for mandatory social insurance (Art. 143d paragraph 4 of the LL 08).

We should emphasize that a new Labour Law has been enacted and that it prescribes certain innovations in exercising judicial protection due to violation of employment rights, unlawful or unjustified termination of employment contracts (see Art. 139 - Art. 143, Art. 166, Art. 172, Article 175, Article 176, Article 180 of the LL 19). Irrespective of this, the question whether an employee is entitled to damages for unlawful termination of his employment contract in the amount of lost salary and other income he would have earned if he had been employed may also be relevant in the context of the new regulation (see Art. 180 paragraph 6 of the LL 19).

Comparative legal sources and practice

Within the analysis of comparative legal framework and practice concerning the question whether an employee is entitled to damages for lost salary and other income that he would have earned if he had been employed, if the court determines that the employee’s contract was unlawfully terminated, the case law of the high-

est instance, the Supreme Court of the Republic of Croatia, should be highlighted.

According to the SCRC, the employee is entitled to damages from his employer for the lost salary for the period in which he did not receive the salary due to inadmissible dismissal, i.e. due to an unlawful decision to terminate his employment contract.⁶² In addition, it was pointed out that when an employer terminates the employment contract due to employee's breach of work duties, he assumes the risk that he may have to fulfil the contract by returning the employee to work and paying him salary compensation, if the decision on termination is proved to be unlawful before the court.⁶³ When the employer's decision on termination of employment contract is found to be inadmissible by final (enforceable) judgment, it means that the plaintiff's employment was not terminated by the decision on termination.⁶⁴ Therefore, according to the SCRC, the employee enjoys all the rights as all other employees employed by the same employer, including the rights to his salary, holiday bonus, Christmas bonus, jubilee awards, because the employee must not suffer the consequences of unlawful employer's actions.⁶⁵ Also, another position of the SCRC should be emphasized, according to which the court may not decide on the unlawfulness of a dismissal within a previous matter (but within a separate litigation as the main matter), and employment related right, such as return to work and payment of compensation for salary, may be exercised.⁶⁶

Final findings and observations

In one SCM case⁶⁷, there was a position, which is also present in the context of the new LL 19, when an employee commits a serious breach of duty, and decisions establishing his disciplinary responsibility are annulled due to violation of rules while conducting the disciplinary procedure, and thus the decision to terminate his employment contract is determined to be unlawful, the employee has no right to claim damages for lost salary. At the same time, it should be noted that the final judgment ruled that the termination of the employment contract was unlawful. Despite this final judgment on the unlawfulness of the employment contract termination, within the damages for lost salary litigation the SCM entered into discussing matters and reasons for the (unlawful) decision on dismissal, which are present as previous matter within this litigation for damages for lost salary (Art. 14 paragraph 1 of the Law on Civil Proceedings).

In this context, it should be noted that the court is bound by final court judgments rendered in other proceedings, inter alia, on matters whether there is a right or a legal relation involved, such as whether or not a decision to terminate an employ-

62 See SCRC, Revr-1380/12-2 of 14 July 2015; Revr-454/14-2 of 2 April 2014; Revt-125/12-2 of 2 September 2014; Revr-486/12-2 of 11 December 2013; Revr-1870/09-2 of 19 May 2010.

63 See SCRC, Revr-602/15-2 of 22 February 2017.

64 See SCRC, Revt-125/12-2 of 2 September 2014.

65 See SCRC, Revr-486/12-2 of 11 December 2013.

66 See SCRC, Revr-454/14-2 of 2 April 2014.

67 Rev. no. 479/15 of 29 April 2015

ment contract is unlawful or whether there is a labour relation or not, within the limits of their (objective, subjective and temporal) finality (Art. 352, Art. 353 of the LCP, arg. ex Art. 14 paragraph 1 of the LCP). Therefore, within a different procedure in which this matter appears as a previous one, such as the litigation for payment of lost salary, the court could not decide on the matter itself because it is bound by a final judgment rendered on that matter (arg. ex: Art. 14 paragraph 1, Article 352, Article 353 of the LCP). The court could decide on the previous matter on the existence of a right or a legal relation only if that matter has not been decided by a court or other competent body yet (previous matter), unless otherwise provided by special regulations (Article 14, paragraph 1 of the LCP). Based on this, a conclusion should be drawn that the court is bound by a final judgment that determined the decision on dismissal to be unlawful, which means that the plaintiff's employment was not terminated by the decision on dismissal. Therefore, the plaintiff would be entitled to damages for lost salary and other income arising from employment.

It should also be noted that if the previous final judgment ruled that such deficiencies of a formal and substantive nature were committed while conducting the disciplinary procedure against the employee that they reasonably lead to suspicion that the employee committed a breach of duty,⁶⁸ then not only the disciplinary procedure before the employer was unlawful, but consequently the result of that procedure was also unlawful, as well as the decision made in that procedure, and the decision on employment contract termination.

68 Finding from the Decision of the CCM Už-III no. 625/15 and 634/15 of 29 March 2018, p. 4.

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