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THE RIGHT TO PROPERTY UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS: CONCEPT AND SCOPE OF THE RIGHT

Abstract

The right to property protects the fundamental values of human rights as well as it has come to establish and ensure the freedom of economic and other relations in society within the framework of human dignity and justice. For this reason, the right to property has always taken its place in human rights declarations.

Throughout history, those involved in legal systems and jurisprudence have sought an unchangeable concept and definition of "property" that is valid for all times, places, and societies. However, they could not achieve it. The constant change and development of traditions and conceptions from the earliest civilization to the present day is the main reason.

Despite the divergent opinions of the drafters, the inclusion of the right to property in the text of the Convention was ultimately achieved by Article 1 of Protocol No. 1 to the Convention, signed on 20 March 1952.

It is clear from the case law of the ECHR that the concept of "possessions" extends beyond the mere ownership of physical goods; certain other rights and interests constituting assets can also be regarded as "property rights" and thus as "possessions", in respect of which the applicants may assert that they have at least a "legitimate expectation".

Keywords: *right to property, posession, Article 1 of Protocol № 1, European Convention on Human Rights, existing possession, legitimate expectation*

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Avropa İnsan Hüquqları Konvensiyasına əsasən mülkiyyət hüququ: hüququn anlayışı və əhatə dairəsi

Xülasə

Mülkiyyət hüququ həm insan hüquqlarının əsas dəyərlərini qoruyur, həm də insan ləyaqəti və ədalət çərçivəsində cəmiyyətdə iqtisadi münasibətlərin və digər münasibətlərin azadlığının qurulması və təmin edilməsi üçün mühüm əhəmiyyət kəsb edir. Bu səbəblə mülkiyyət hüququ, insan hüquqlarına dair beynəlxalq sənədlərdə həmişə öz yerini tutmuşdur.

Hüquq elmi və hüquq sistemləri ilə məşğul olanlar tarix boyu bütün zaman, məkan və cəmiyyətlər üçün keçərli olan dəyişilməz bir mülkiyyət anlayışı və tərifini axtarmışlar. Lakin buna nail ola bilməmişlər. Ən qədim sivilizasiyadan bu günə kimi adət-ənənələrin və konsepsiyaların daim dəyişməsi və inkişafı buna əsas səbəblərdən biridir.

Konvensiya tərtibatçılarının fərqli fikirlərinə baxmayaraq, son nəticədə mülkiyyət hüququnun Konvensiya mətninə daxil edilməsinə 20 mart 1952-ci ildə imzalanmış Konvensiyanın 1 saylı Protokolunun 1-ci maddəsi ilə nail olunmuşdur.

AİHM-in presedent hüququndan aydın olur ki, "mülkiyyət" anlayışı sadəcə maddi sərvətlərə sahiblikdən kənara çıxır; aktivləri təşkil edən bəzi digər hüquq və maraqlar da "mülkiyyət hüququ"

və beləliklə, ərizəçilərin ən azı "qanuni gözləntiləri" olduğunu iddia edə biləcəkləri "sahiblik" anlayışını təşkil edə bilər.

Açar sözlər: *mülkiyyət hüququ, sahiblik, 1 saylı Protokolun 1-ci maddəsi, Avropa İnsan Hüquqları Konvensiyası, mövcud mülkiyyət, qanuni gözlənti*

Introduction

The Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention on Human Rights", "ECHR" or just "Convention") was opened for signature by the member States of the Council of Europe and for accession by the European Union in Rome on November 4, 1950, and entered into force on September 3, 1953, when ten member states of the Council of Europe signed and completed the ratification process. Negotiations regarding the European Union's ("EU") becoming a party to the Convention are currently ongoing. If the EU becomes a party to the Convention as a result of these negotiations, the number of party countries and international organisations will be 48.

With the European Convention on Human Rights, a number of fundamental rights and freedoms such as right to life, prohibition of torture, prohibition of slavery and forced labour, right to liberty and security, right to a fair trial, no punishment without law, right to respect for private and family life, freedom of thought, conscience and religion, freedom of expression, freedom of assembly and association, right to marry, right to an effective remedy, prohibition of discrimination are regulated. However, those who drafted the European Convention, in 1949 and 1950, never intended it to be an exhaustive codification of fundamental rights. This can be seen in the final recital of the Preamble to the Convention, which speaks of the inclusion of 'certain of the rights stated in the Universal Declaration'.

Since its first reception, 16 protocols have been amended to the Convention. With some of the mentioned amendments, new rights and freedoms have been protected within the framework of the Convention, and with the other part, either the structure of the European Court of Human Rights ("EctHR" or the "Court") or some procedural rules or other provisions have been altered. The catalogue of substantive rights that it sets out has been supplemented by six Protocols.

The most important of the new rights and freedoms protected under the Convention with the Additional Protocols include the right to property (Article 1 of Protocol No. 1), the right to education (Article 2 of Protocol No. 1), the right to free election (Article 3 of Protocol No. 1), freedom of movement (Article 2 of Protocol No. 4) and the abolition of the death penalty (Article 1 of Protocol No. 6 and Article 1 of Protocol No. 13 (absolute abolition)).

The six protocols that set out new rights within the Convention system are additional in nature in that they require ratification by States that are already party to the Convention. They do not amend the Convention as such. They have entered into force after acceptance by a relatively limited number of States Parties. Even Protocol No. 1 has not been ratified by all of the States Parties to the Convention (Schabas, 2015: 136).

As demonstrated above, the ECHR did not originally include property rights. This right was included subsequently in the First or Additional Protocol. The reason for this late introduction was not the rejection of property rights during the drafting process. Just the opposite - property rights were one of the most controversial issues for the drafters, and it was quite a process to reach an agreement on the formulation of the right to property.

The states that expressed the most objections to the inclusion of this right in the Convention were those with socialist-leaning governments, who doubted that the right to property was a fundamental human right.

"Certain members of the Committee of Ministers thought that there was no reason to differentiate between the right to own property and the social and economic rights, and that it would be preferable, therefore, to exclude it from the guarantee, since in principle the latter did not cover rights of this nature" (2; 3).

According to supporters of this approach, the right to property was considered a fundamental social and economic right that was inseparable from other social and economic rights. As the ECHR was not intended to address rights of this kind, the right to property should be excluded.

"In the opinions of other members of the Committee, it would not be possible at present to confer on any international organisation the protection of the right to own property, because it would not be possible to make such an organisation responsible for evaluating the legitimacy of the charges and the restrictions of various kinds which, according to the economic or social conditions of a country, might be imposed on private property, on account of its social function or general utility" (2; 4).

Members who held this view thought that the capacity to oversee the lawfulness of property restrictions could not be transferred to an international organization due to the fact that such restrictions depended on the economic and social conditions of the country in question.

It is noteworthy to mention that despite Germany's participation, its contribution to the negotiations was comparatively insignificant. The historical events of Germany had an impact on what was considered important to be included in the European Convention on Human Rights, yet the winners of the World War II had a significant influence on the discussions.

Although the ECHR was opened for signature by the state parties, Protocol No. 1 was drafted before the signing and ratification processes were completed, and the ECHR entered into force on September 3, 1953 (Açıkgül, 2021: 121).

The following questions were at stake during the drafting process:

• Should the protection be offered only for personal belongings, or should it be extended to all the property rights with respect to any kind of property?

• Should member states be allowed to take private property? If yes, under which conditions such power can be exercised?

• When private property is expropriated, does the owner have the right to compensation? If yes, according to which standards should such compensation be calculated?

• If a right to compensation in the case of deprivation is guaranteed, should the level of compensation be the same for nationals and foreigners?

• Within which period of time should states be obliged to pay the compensation to the dispossessed owner?

• To what extent should member states be afforded a right to impose limitations on the use of property? (Aronovitz, 1997: 91).

The final text was adopted following extensive deliberations and formed Article 1 of the First Protocol to the ECHR, signed on 20 March 1952. It entered into force on May 18, 1954, after 10 ratifications by member states. Article 1 Article 1 of the First Protocol reads as follows:

"Every natural and legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interests 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 and or to secure the payment of taxes or other contributions or penalties" (Marckx, 1979: 18).

The Convention fails an exact definition of property rights. Instead, the phrase "peaceful enjoyment of possessions" is used in its language. Only in the second paragraph of the article is the term "property" exclusively mentioned. Nevertheless, the ECtHR pointed out in the *Marckx v. Belgium* case that "by recognising that everyone has the right to the peaceful enjoyment of his possessions, Article 1 (P1-1) is in substance guaranteeing the right of property. This is the clear impression left by the words "possessions" and "use of property" (in French: "biens", "propriété", "usage des biens"); the "travaux préparatoires", 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 (P1-1). Indeed, the right

to dispose of one's property constitutes a traditional and fundamental aspect of the right of property" (Marckx, 1979: 63).

The concept of property is defined variously throughout different countries. Hence, it is essential to clarify an autonomous meaning for the concept of "possession" that is not reliant on the formal classification in domestic law.

In several rulings, the Court has established that the absence of recognition of a specific interest as a "property right" in the domestic laws of a State does not automatically exclude the interest in question, in some circumstances, from being considered a "possession", as defined in Article 1 of Protocol No. 1.

For example, in the case of Matos e Silva, Lda and Others v. Portugal (1996), in which the Government asserted that Matos e Silva's legal position as owner of the land in question was ambiguous in accordance with domestic law, and as such, the applicants did not have any "possessions" within the meaning of Article 1 of Protocol No. 1 (P1-1), the Court has stated 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 (P1-1) 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 (P1-1)" (Matos e Silva, Lda and Others v, 1996: 75).

However, it is often argued that the concept of "possessions" is very broadly interpreted in the Court's case-law because it does not include only the right of ownership but also a whole range of pecuniary rights such as rights arising from shares, patents, arbitration award, established entitlement to a pension, entitlement to a rent, and even rights arising from running of a business (Grgic, Mataga, Longar, Vilfan, 2007: 7). Thus, even due to the long-standing tolerance on the part of the authorities, applicants have also been granted property rights in respect of a disputed plot of land (Kosmas and Others v, 2017: 68-71).

Rights that indicated in European Convention on Human Rights are short and frame. Since it was established, the European Court of Human Rights has been in charge with assessing the scope of that rights. In its recent decisions, the ECtHR has examined the scope of the right to property from a much broader perspective compared to the decisions given by domestic courts. In this sense, the issue of people being deprived of the powers granted by the right to property is evaluated from many different aspects.

As follows from the ECtHR case-law, the term "possession" included in Article 1 of Protocol No. 1 encompasses all types of tangible or intangible assets of monetary worth. All kinds of movable and immovable goods with material existence, intangible assets such as rights and interests are included in the scope of property rights.

The precise limits of P1-1 protection cannot be held definitively established due to the ongoing development of case law on the subject. However, existing case-law provides a number of general guidelines.

Article 5 of Protocol No. 1 is to the effect that "as between the High Contracting Parties the provisions of four articles of the Protocol, including Article 1, shall be regarded as additional articles to the Convention and the provisions of the Convention shall apply accordingly" (5). The High Contracting Parties have undertaken to secure for everyone within their jurisdiction the right stipulated by Article 1 of the Protocol, as revealed by Article 1 of the Convention and Article 5 of Protocol No. 1. The question may arise as to whether the text of Article 1 of the Protocol contains any provisions that, in spite of its Article 5, would take that Article out of the scope of Article 1 of the Convention. In this regard, it can be asserted that not only does Article 1 of the Protocol provide no indication that Article 1 of the Convention shall not, or not fully, apply to it, but that, on the contrary, it does uphold the principle of universal application that underlies Article 1 of the Convention.

The provision comprises the normal population of a State, which consists overwhelmingly of nationals and, in addition, also of foreign and stateless residents who are "within the jurisdiction" of

the State concerned. If a distinction on the basis of nationality can be read into Article 1 of the Protocol in connection with Article 1 of the Convention, then it might rather be claimed that the provision does not cover non-resident aliens because they are not “within the jurisdiction”.

It is the purpose of the European Convention to protect the rights of nationals and foreigners alike. Where the Convention intends to exclude a certain group from its benefits or to confer lesser benefits on its members it provides so expressly: Its Article 16 is to the effect that "nothing in Articles 10, 11 and 14 [which deal, respectively, with freedom of expression, assembly and association, and with the prohibition of discrimination] shall be regarded as preventing the High Contracting parties from imposing restrictions on the political activity of aliens."

Apparently, the terms "every natural or legal person" do not limit the provision's applicability to foreign nationals or aliens.

Still less is it admissible to argue that paragraph 2 is a limitation upon the general principles of international law as applied to aliens. The States Parties cannot possibly have had the intention to abrogate or to limit those general principles vis-a-v third Parties. To assume that they intended a limitation of these principles inter se would lead to the result that they have concluded an international convention which discriminates against States Parties and their nationals, while it leaves unimpaired such rights as may be vested in States not parties to the Convention and in their nationals. There is no doubt, however, that the States Parties could validly limit by paragraph 2 the rights of their own nationals under the general principles of international law. The freedom of States to introduce such limitations of the rights of their own nationals is the only reasonable justification for the inclusion of paragraph 2 in the text.

The protection of that article does not apply unless and until it is possible to lay a claim to a certain property. If the claim in question does not pertain to a particular property right, the protection provided in this article shall not apply. That is, as a rule, Article 1 of Protocol No. 1 applies only to a person’s existing possessions and does not grant a person the right to acquire possessions whether on intestacy or through voluntary dispositions.

In certain circumstances, a “legitimate expectation” of obtaining an asset may also enjoy the protection of Article 1 of Protocol No. 1. For an “expectation” to be “legitimate”, it 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, bearing on the property interest in question (Kopecky v, 2003: 49-50). The concept of “legitimate expectation” in the context of Article 1 of Protocol No. 1 was first developed by the Court in Pine Valley Developments Ltd and Others v. Ireland, § 51. In that case, the Court found that the issuance of outline planning permission, in reliance on which the applicant companies had acquired land for the purpose of its development, gave rise to a “legitimate expectation”.

Furthermore, even though in the case of Aliyeva and Others v. Azerbaijan, the Supreme Court had departed from its findings in similar cases of expropriation for State needs, the Court held that the applicants´ claim that they were entitled to statutory additional compensation had been sufficiently established by a clearly identifiable line of Supreme Court case-law. While the applicants’ requests for additional compensation had been refused by final decisions of the Supreme Court on the grounds that their properties had not been expropriated for state needs, in a number cases like this, the Supreme Court had upheld the lower courts’ judgments allowing additional compensation claims lodged by other individuals living in the same neighbourhood as the applicants who had similarly been affected by the BCEA’s order and had claimed the same compensation relying on the same grounds. In those latter cases, the Supreme Court had concluded that, despite the authorities’ failure to follow the relevant expropriation procedure and, in particular, the absence of an expropriation order by the Cabinet of Ministers, the property in question had indeed been expropriated for State needs. Thus, the applicants’ claim to additional 20% compensation had been supported by a clearly identifiable line of Supreme Court case-law (Aliyeva, 2018: 109-111).

Article 1 of Protocol No. 1 is the only article of the Convention that explicitly refers to “legal persons”. Every the applicant, whether an individual or a legal person, must prove ownership of the property in question to be considered a "victim" under the Convention. It follows that companies fall within the scope of this right.

The doctrine defines three types of duties to the state regarding the guarantee of property rights. The first of these is referred to in the doctrine as the "(state) negative liability theory (negative Obligationenstheorie, la théorie des obligations negatives)". Accordingly, the state will respect the owner's right to property with all its institutions and ensure it is not infringed. Here, the state's obligation consists only of remaining passive and watching by assuming the role of gendarmerie. Because the main purpose of the provision that imposes the obligation here is to protect the individual against unfair interventions on her property by the state (Başpınar, 2016: 635). Negative obligations have been held to include, for example, expropriation or destruction of property as well as planning restrictions, rent controls and temporary seizure of property (8; 9).

On the other hand, the effective exercise of the right protected by Article 1 of Protocol No. 1 does not depend merely on the State’s duty not to interfere, the state also has a positive obligation to protect the right to property from third-party interference and to enforce sanctions against individuals who infringe upon this right. This is called the state's obligation to protect. Furthermore, normative measures must also be taken by the state to ensure that property rights are exercised and utilised effectively. This last duty is referred to as “obligation to implement”.

However, the European Court of Human Rights has settled on a simpler, two-pronged approach, dividing states’ obligations into two categories: (a) negative obligations and (b) positive obligations. While different, this approach contains many similarities with the previous one. On this basis, the Court today provides broader protection for the rights specified in the Convention, of which it is the ultimate guardian (Francois, Kombe, 2007: 5).

Conclusion

Like other rights enshrined in the Convention and its Protocols the protection of property also has positive dimensions. This is underscored by the phrase ‘shall secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention’. According to the Grand Chamber, ‘this general duty may entail positive obligations inherent in ensuring the effective exercise of the rights guaranteed by the Convention. In the context of Article 1 of Protocol No. 1, those positive obligations may require the State to take the measures necessary to protect the right of property.’ In a very broad and general formulation, the Court said:

When an interference with the right to peaceful enjoyment of possessions is perpetrated by a private individual, a positive obligation arises for the State to ensure in its domestic legal system that property rights are sufficiently protected by law and that adequate remedies are provided whereby the victim of an interference can seek to vindicate his rights, including, where appropriate, by claiming damages in respect of any loss sustained. Such measures may be either preventive or remedial.

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