

PROTECTION OF OWNERSHIP ACCORDING TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE CONSTITUTION OF GEORGIA

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Abstract

According to John F. Kennedy: “the right of each human being shall be violated when there is a danger of violating the right of a single human being” - call for the nation, June 11, 1963. Nowadays, in Georgia as well as in the whole modern world, the rights to property is one of the most important rights, as this is one of the basis of the development of the country; this is why it is essential that such right be respected. The right to property is being regulated by the National Law of almost every country and by international treaties. Protection of private property is one of the main issues in the development of the liberal economy and in ensuring sustainable democratic, political and legislative systems, which shall serve the interests of the modern civilized society and the individual members of this society. In such system, the state has a role of guarantor to effectively use the right to property and it is not involved in free turnover of the property among the individuals. To put it otherwise, the function of the modern state is protection of property. Such modern state shall not fix useless restrictions and limitations on the rights of using property in a peaceful and effective manner, except for the cases, such restrictions and limitations are extremely necessary, proportional and are based on the law principles, which is a background for the effective use of the right to property.

Keywords: Right to property, State, Constitution, European Court on Human Rights, Decision

Introduction

In accordance with the Article 21 of the Constitution of Georgia, based on the amendments and additions enacted in 2006, the principles defined under the first Article of the Act №1 were developed and the following was determined:

“1. The right to own and inherit property shall be recognized and inviolable. Abrogation of the universal right to ownership, acquisition, alienation, or inheritance of property shall be inadmissible.

2. The rights listed in the first paragraph of this Article may be restricted for pressing social needs in the case and under the procedure provided for by law so that the essence of property right is not violated.

3. Property may be deprived for pressing social needs as provided for by law, by court decision, or if urgently necessary under an organic law, provided that preliminary, full, and fair compensation is made.”

Thus, the Constitution of Georgia considers the precedent law approaches of the European Court on Human Rights in relations with protection of the ownership and sets the higher standards of protecting rights to ownership. Namely, according to the Article 21 of the Constitution - Abrogation of the universal right to ownership, acquisition, alienation, or inheritance of property may be admissible only in the case when there is a “necessary public requirement” and “in the cases directly provided for in the legislation”. It is inadmissible to

deprive the property in any form without a court decision or without a proper compensation, though there are cases in the European Court on Human Rights when such issue is not solved in such way. Internal legislation strictly prohibits deprivation of the property without compliance with material and procedural law requirements and without payment of the proper compensation. The similar approach was used for the especially sensitive spheres of ownership right protection in Georgia, for example, in relations with the issues related to the restoration of the dwelling and property to the victims as a result of conflict between Georgia and Ossetia, as it has been analyzed by the experts of the Commission of Venice. One of the experts of the Commission was a member of the European Committee on Human Rights who stated that: “A proper lawful balance should be maintained for each concrete case of property protection. Maintaining a lawful balance depends on many factors and it is most essential that the procedures applied consider all relevant factors... despite of the fact, that the first Article of the Act π1 does not directly require payment of the compensation in the cases of limiting (or depriving) of property, compensation here, as a rule, is implied. Deprivation of the property without paying the amount considering the value of property shall be disproportional abrogation that is unjustifiable in accordance with the first Article. Besides, the first article does not always guarantee a full compensation, as long as the lawful principles of public interest, such as the measures necessary for the economic reforms, aiming at expanding social law, may imply compensation of the amount which is less than the total market value. Finally, abrogation of the ownership right shall meet the requirements of law and lawfulness ... confiscation of the property shall be carried out according to the requirements determined under the Law.

The State (or public authorized body) shall act in accordance with available and precise regulations under the Law which meets each essential requirement of the concept of Law. This does not mean that the mentioned abrogation should be based on certain regulations of the National Law, but shall be based on the fact, that there should be a legal and proper procedure and the proper activity shall be determined and performed by the duly authorized body and shall be impartial”.

Approaches to the protection of property according to the precedent law of the European Court on Human Rights

The court has developed a system for evaluating claims for reviewing the claims related to the first Article of the Act 1 for the compliance with three determined rules which are considered to involve the following principles: Everyone has a right to use his/her property peacefully; deprivation of the property shall be subject to certain conditions (abrogation of the property shall be carried out based on interests of the public registry and/or on the international law principles); the states shall be also authorized to adopt such laws which they may deem necessary for certain purposes (for the purposes of reaching general interests, for the guarantees of paying taxes, levies and penalties). The principle of supremacy of court and the principle of legal definiteness stipulated under the Convention, requires the laws which had been used as the basis for abrogation, to be available and foreseeable enough.

The above mentioned approaches are reflected in the precedent law of the European Court on Human Rights in relations with Georgia. For example, under the court decision of September 27, 2005, on the case “Amat-G LLC and Mebaghishvilivs Georgia”, which was taken in favor of applicants, “granted the claimant company the right of determined and enforceable claim which is a property for the purposes of the first Article of the Act π1. The first and the most important requirement of the first Article of the Act 1 is that any abrogation by the public authorized body in the use of property should be legal, the second sentence of the first paragraph confirms the deprivation of property “in the cases determined by law”,

which is followed by the issue of maintaining legal balance between the common interests of the public and protection of the main rights of individuals that shall be confirmed by the fact; the abrogation should meet the legal requirement and shall not be arbitrary... ”

Non-enforcement of the final court decision during the long time period represented abrogation of their rights to use the property and violated proportional legal balance between the legal expectations of the applicants to reach enforcement of decisions and between those reasons, due to which the state in the given case was not able to enforce the court decision. The state has paid compensation to the applicants for the monetary and non-monetary loss, which was caused by the violation of their rights to use their property in a peaceful manner. The court has presented quite interesting grounds for its decision.

The same principles on respecting the property rights were underlined in other cases against Georgia in the decision taken on September 27, 2005 (“Iza” and Makrakhidze LLS vs Georgia), where the court ruled the following: the fact that the claimant companies were not able to enforce the final decision in their own interests against the state and those legal persons acting on behalf of the state and thus abrogated their rights to use their own property in a peaceful manner.

One more court decision against Georgia (Claus and IuriKiladzevs Georgia) on February 2, 2010 was that the European Court should have decided at what extent the claimants’ ownership right was breached by the National authorized bodies. The mentioned bodies refused the brothers, who were the victims of political repressions during the Soviet Union period, for the compensation of the loss incurred which should have been implemented based on the Law on the Status of the Victims of Political Repressions. The court should have decided how lawful the claimants’ expectations were regarding the monetary and non-monetary compensation in accordance with the regulations of the internal law, though they randomly refused such compensation. The court ruled the following: “It should be pointed out that according to the judicial practice, the concept of “property” may imply “the existed property” or the assets, which should be obtained by the person, accordingly, the claimant may have a little “lawful expectation” to effectively use his/her ownership right.....”

Considering the circumstances mentioned above, the court considers that when applying to the internal courts, the applicants, according to the Article 9 of the Law issued on December 11, 1997, had a claim that was regulated enough for the enforcement and provided fair grounds for them to claim compensation of the loss from the State. This leads us to the conclusion that in this part of claim, the first Article of the Act π1 may be applied.

The court considered that the applicant had an ascertained claim to obtain compensation for the moral damage and the fact that they were not able to obtain damage compensation due to a long-term inaction from the State cannot be considered along with the rights of the applicants to use their own property without any obstacle. The court allowed a part of the claim in accordance with the regulation of the Article 9 of December 11, 1997, regarding the compensation which verified the claimants’ rights to obtain compensation in the amount of EUR 4000 each for the damage incurred.

In another case, Saghinadze and et.al vs Georgia, regarding the violation of ownership right of the applicants in relations with the house in their ownership, the decision was made on May 27, 2010 and the disputable house was bestowed to them as to the refugees in their own country (from Abkhazia) based on the administrative decision. The persons had lived in this house for more than ten years.

The European court denoted that the forced eviction of the claimants from the cottage did not comply with the procedures determined under the internal legislation, as they had been evicted not based on the court decision, but based on the verbal ordinance of the Ministry of Internal Affairs, supported by special police forces. Besides, the local courts did not acknowledge the fact that the applicants had been using the house continuously and

besides, they ignored the practice of the supreme courts in this regard. Thus, the court decided that such type of deprivation of the property was a self-practice and instructed the State of Georgia to restore the rights of claimants to use the house or provide them with another proper dwelling or give them a reasonable monetary compensation.

Protection of ownership right in the precedent law of the Constitutional Court of Georgia

Approaches for identifying property in the precedent law of the Constitutional Court of Georgia like the approaches adopted in the practice of the European Court on Human Rights, the Constitutional Court of Georgia delivered decisions on several cases related to the economic interests regarding the ownership. For example, in the case of “Rusenergосervice LLC, PataraKakhi LLC and JSC Gorgo-Ta, GiviAbalak’s individual company Farmer and Energy LLC vs the Parliament of Georgia and the Ministry of Energy”, the Constitutional Court underlined the fact that the ownership right and the right of inheritance was acknowledged by the Constitution and thus they cannot be alienated. It mentioned that the ownership rights may be restricted only in the case of public necessity determined by law. Restriction of constitutional right may be justified only in the case when it is necessary to separate the property and the owner for the purposes of achieving legal target. In this case, the court decided that restrictions implied legal balancing of interests and not replacing one interest with another.

Both the precedent law of the European court and the practice of the Constitutional Court of Georgia respect different rights of ownership, which includes economic interests considering the right to use the property without any restriction. The tests determined by the convention, the precedent law of Georgia, the Constitution of Georgia and the practice of the Constitutional Court of Georgia are different. The convention uses the concept of “fair balance” for the means applied and targets planned. The practice of the Constitutional Court of Georgia considers the criteria for necessary public needs from the point-of-view of abrogating ownership rights. Besides, the practices of the European Court and of the Constitutional Court of Georgia consider unambiguous criteria, which comply with the legal requirements regarding abrogation of ownership rights and for avoiding arbitrary abrogation. Besides, procedural and material laws shall be considered. In addition, in the cases related to deprivation of the property the courts shall consider the circumstance at what extent the compensation was present during such deprivation for those persons whose ownership was subject to confiscation.

Thus, we may conclude that adequate approaches are approved by the European Court and by the Constitutional Court of Georgia in the cases related to the abrogation of ownership rights and to the protection of ownership rights despite the fact, that the first Article of the Act π1 of the Convention and the Article 21 of the Constitution of Georgia have different criteria in ascertaining at what extent the ownership rights were violated by the State authorized bodies and how arbitrary such violation was.

Conclusion

The European Court on Human Rights and the Constitutional Court of Georgia treat the issue of protecting ownership rights with great care, analysing the circumstance, how legal the abrogation in the ownership right is and in this case how the legal balance during the abrogation is maintained between the ownership right and the public interest. Despite the different approaches, the practice of both courts is similar according to the results achieved. Activity of both courts ensure respecting ownership rights. Co-existence of similar practices is an important proof of the fact that both of the courts act within the united European legal scope and are guided by unique legal standards. The roles of both courts should be properly

appreciated from the point-of-view of protecting ownership rights on the national and international levels, and this represents a good example of integrity while protecting the right of using property without any restriction on the European and national levels.

References:

Comment to the Constitution of Georgia. Tbilisi, 2013.

Korkelia K. (Editor). European Standards of Human Rights and their influence on the legislation of Georgia and its practice. Collection of articles, gtz, Tbilisi, 2006.

Korkelia K., Kurdadze I., International Law on Human Rights, according to the European Convention on Human Rights.

Totladze L., Ganrichidze G., Tumanishvili G., Turava P., Chachanidze E. 2012, publishing house of explanatory legal dictionary.

The right to ownership and the right to fair court, Tbilisi: publishing house of the Constitutional Court of Georgia, 2005.

Young Lawyers' Assosiation of Georgia. Ownership right in Georgia. Tbilisi, 2007.

Law of Georgia on the Procedure of Deprivation of the Property for Necessary Public Needs. 23.07.1999.

Decision of the Constitutional Court of Georgia, #1/51 (Constitutional Court of Georgia, 21/07, 1997).

Decision of the Constitutional Court of Georgia, #1/2/384 (Constitutional Court of Georgia, 02/07, 2007).