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The Human Rights Dimension of Creditors' Position in Enforcement and Insolvency Procedures: Lessons to Be Learned From ECtHR Case Law

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Abstract

The protection of creditors' human rights and procedural guarantees is important and necessary in both enforcement and insolvency procedures. They are guaranteed in national constitutions and international treaties, in particular the European Convention of Human Rights and Fundamental Freedoms. The purpose of this paper is to compare the position of the creditor in both types of procedures from a human rights perspective. In particular, it focuses on the procedural right to a fair trial (Article 6) and the substantive right to peaceful enjoyment of one's possessions (Article 1 of Protocol No. 1) as understood by the European Court of Human Rights. The article critically analyses its relevant case law, which, by interpreting both rights, defines the limits of national rules on enforcement and insolvency procedures.

Keywords

Enforcement Procedure, Insolvency Procedure, Right to a Fair Trial, Right to Property, European Court of Human Rights

I. Introduction

Human rights are universal, inalienable, and inherent to every individual without discrimination. This is also true for creditors and debtors in insolvency and enforcement procedures. The respect for fundamental rights, such as personal dignity, the right to a minimum subsistence level, and the protection of property, is often compromised by these coercive procedures. Especially in enforcement procedures, the emphasis is typically placed on the human rights of the debtor. Although he or she[3] is the weaker party and their position should be protected in both procedures, it is rather challenging to compare the position of a debtor in an enforcement procedure with that of a debtor in an insolvency procedure.

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[3] Herein, in addition to plural pronouns, singular male pronouns will be used to refer to all genders for the sake of readability.

Debtors in enforcement procedures are usually natural persons as opposed to debtors in insolvency procedures, who are mostly legal entities enjoying only a limited protection by the European Convention of Human Rights and Fundamental Freedoms (ECHR) (for details on legal persons as holders of human rights see: Dopplinger, 2021). In addition, these coercive procedures may affect the debtor's position to a different extent. While enforcement procedures aim at repaying the debt out of debtor's property, insolvency procedures may also lead to the termination of debtor's existence (in case of liquidation, which this article focuses on).

On the other hand, the creditor's position in such procedures is more comparable but nonetheless specific. Creditors generally exert minimal, if any, influence over the (in)solvency of their debtors. Consequently, they typically have no control over whether they will be involved in an insolvency proceeding concerning their debtor or merely subject to an enforcement procedure against them. Their position and the procedural actions required of them differ between these two types of proceedings; however, the outcomes are generally similar in both scenarios – partial payment of their claims, with full payment being achieved in the most favourable circumstances. However, both procedures require the protection of the creditor's human rights and procedural guarantees as laid down in national constitutions and international treaties, in particular the ECHR.

This paper aims to compare the position of the creditor in both types of procedures from a human rights perspective. Since human rights are not absolute and may be limited by the rights of others respecting the principle of proportionality (for details see: Gerards and Brems, 2014 and Lavrysen, 2014), this paper aims to define the boundaries of such limitations affecting the national rules of such procedures. The primary focus is an analysis and comparison of the relevant human rights of the creditor that need to be respected in both coercive types of court procedures. We especially target the procedural right to a fair trial and the material right to the peaceful enjoyment of one's possessions, as they are understood by the European Court of Human Rights (hereinafter: the ECtHR or the Court). These two seem to be the most violated of all Convention rights, as more than half of all of ECtHR cases deal therewith (Horvat and Igličar, 2016). In contrast to enforcement procedures, the ECtHR case law dealing with alleged breaches of human rights in insolvency procedures is rather scarce. To some extent, this may be explained by the fact that such complaints are – according to the statistics – usually held to be inadmissible (Puschner, 2000) and are not dealt with in terms of content by the Court.

After giving a brief overview of the main features of enforcement and insolvency procedures (Section II), the article critically analyses the relevant ECtHR case law establishing the boundaries of the national rules on enforcement and insolvency procedures in relation to the right to a fair trial (Section III) and the right to property (Section IV). Through individual court decisions, the ECtHR is thus slowly building up a body of knowledge and legal views on where the boundaries of individual rights and their role in (enforcement or insolvency) law lie. Although the ECtHR's assessment of an interference with these rights is relative and depends on all the circumstances of the case, its case law provides important guidance to national legislatures in drafting or changing the rules on enforcement and insolvency procedures. After all, due to the growing trend of the constitutionalisation of European private law (Micklitz, 2014), the lessons learned from the ECtHR case law help to co-create and co-shape national regimes of enforcement and insolvency procedures across Europe.

II. The Right to a Fair Trial (Art. 6 ECHR)

Enforcement Procedure

In the determination of one's civil rights and obligations, everyone enjoys the right to a fair trial. This is one of the basic procedural rights guaranteed by Article 6 of the ECHR. Even if Article 6 does not explicitly lay out its reach in this direction, there is no question that it also protects the possibility of requiring the enforcement of a court decision (Lemmens, 2014), which is regarded "as an integral part of the 'trial' for the purposes of Article 6."[4] If the state does not provide for an (effective) enforcement procedure, the state does not truly ensure access to its courts (Kinsch, 2014).

The State has a (positive) obligation to ensure an effective system for the enforcement of court decisions, i.e. a system effective in law and in practice.[5] It carries this burden "from the date on which the judgment becomes binding and enforceable."[6] It has to ensure the existence of such a legal system[7] wherein "the competent authorities can meet their obligation"[8] and therefore the "effective participation of its entire apparatus."[9] This obligation includes the activities of all the parties responsible for an enforcement procedure (Galič, 2013), which may involve acts of court bailiffs,[10] police assistance for court bailiffs when needed (Harris et al., 2018), and third persons or other institutions that have certain tasks in an enforcement procedure and by which the State supports the creditor seeking enforcement. The ECtHR considers the circumstances of each individual case and decides whether the State authorities have fulfilled all the necessary tasks needed for the enforcement of the specific court decision (Harris et al., 2018), i.e. whether the State's measures in a specific enforcement procedure were adequate and sufficient[11].

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[4] *Hornsby v. Greece* No. 18357/91, para. 40; *Molnar Gabor v. Serbia* No. 22762/05, para. 45; *Marinković v. Serbia* No. 5353/11, para. 36; *Dashamir Uruçi v. Albania* No. 6491/06, para. 38; *Burdov v. Russia (No. 2)* No. 33509/04, para. 65; *Gulmammadova v. Azerbaijan* No. 38798/07, para. 35; *Omerović v. Serbia* No. 72470/16, para. 7; *Dimitar Yanakiev v. Bulgaria (No. 2)* No. 50346/07, para. 69; *Panorama Ltd and Miličić v. Bosnia and Herzegovina* No. 69997/10, para. 62; *Tonyuk v. Ukraine* No. 6948/07, para 38; *Velkova v. Bulgaria* No. 1849/08, para. 41; *Jasiūnienē v. Lithuania* No. 41510/98, para. 27; and *Popov v. Moldova (No. 1)* No. 74153/01, para. 53.

[5] *Vukelić v. Montenegro* No. 58258/09, para. 95; *Dashamir Uruçi v. Albania*, para. 38; *Raguž v. Serbia* No. 8182/07, para. 25. See also: 'Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights', 2022.

[6] *Burdov v. Russia (No. 2)*, para. 69.

[7] There might also be another aspect. National regulations can provide for different enforcement rules. Whatever these are, the referral to the complexity of the national legislation itself cannot be an excuse for a State not to "guarantee to everyone the right to have a binding and enforceable judicial decision enforced within a reasonable time" (*ibid.*, para. 70).]

[8] *Ibid.*, para. 70.

[9] *Vukelić v. Montenegro*, para. 96.

[10] *Yuriy Nikolayevich Ivanov v. Ukraine* No. 40450/04, para. 55. In the case *Dashamir Uruçi v. Albania*, para. 40, the ECtHR emphasised that the bailiff's actions need to be adequate and sufficient and that his actions in the enforcement procedure have to be diligent.

[11] *Dashamir Uruçi v. Albania*, paras. 38–39; and *Marinković v. Serbia*, para. 38.

Length of enforcement procedures

Since enforcement forms a part of the right to a fair trial, its postponement or a too long an enforcement procedure may violate this right of a creditor.[12] National law may provide grounds for postponing an enforcement procedure, but such a possibility should be limited as it may hinder the creditor's right to a fair trial. When considering the length of a specific enforcement procedure, the ECtHR does not consider whether such a postponement is in line with the national legislation or to not be an essential factor, but rather only decides the specific case under ECHR standards.

The ECtHR has dealt with numerous cases in which creditors claimed that the long duration of the enforcement procedure violated their procedural right to a fair trial and often also one of their material rights. As held by the ECtHR on several occasions, the "reasonableness" of the length of proceedings under Article 6 §1 of the Convention must be assessed in each individual case in the light of the circumstances of the case and having regard to the criteria established by the Court's case-law.[13] There is no general rule on when an enforcement procedure is too long. The starting point is that such a procedure has to be expeditious and effective.[14] When considering the potential breach, the essential factors are "the complexity of the enforcement proceedings, the applicant's own conduct and that of the competent authorities, and the amount and nature of the court award."[15]

A violation of Article 6 (1) ECHR was established when the judgment was not enforced for the eight years prior to the applicant filing a complaint with the ECtHR,[16] when (in different cases) the judgment was not enforced for eight and almost ten years,[17] for seven years,[18] and for nine years[19] in a case in which after that period the official order on the postponement of the enforcement was issued. A violation was also established in a case in which one judgment was not fully enforced for seven years and ten months and another judgment for five years and eleven months, for which the State did not provided any justification.[20] The ECtHR also decided that the inactivity of State institutions for over twelve years "cannot be regarded as 'reasonable'."[21] Article 6 was also violated when delays in the enforcement of several court decisions regarding outstanding wages were stretched out between four and seven years[22] and when delays in the enforcement of several court decisions regarding unpaid work-related benefits were stretched out between seven and almost eleven years[23]. Furthermore, "a formal

[12] When calculating the duration of court proceedings, the duration of the enforcement proceedings must also be taken into account. (Grabenwarter, 2014).

[13] See, among many other authorities, *Comingersoll v. Portugal* No. 35382/97.

[14] *Vukelić v. Montenegro*, para. 97.

[15] *Burdov v. Russia (No. 2)*, para. 66; *Kopnin and others v. Russia* No. 2746/05, para. 25; *Yuriy Nikolayevich Ivanov v. Ukraine*, para. 53.

[16] *Dimitar Yanakiev v. Bulgaria (No. 2)*, para. 71.

[17] *Panorama Ltd and Miličić v. Bosnia and Herzegovina*.

[18] *Popov v. Moldova (No. 1)*.

[19] *Gulmammadova v. Azerbaijan*, para. 39.

[20] *Yuriy Nikolayevich Ivanov v. Ukraine*, para. 55. Similar in *Humbatov v. Azerbaijan* No. 13652/06.

[21] *Immobiliare Saffi v. Italy* No. 22774/93.

[22] *Spahić and others v. Bosnia and Herzegovina* Nos. 20514/15 and 15 others.

[23] *Kunić and others v. Bosnia and Herzegovina* Nos. 68955/12 and 15 others.

postponement of execution of a final judgment for an indefinite period of time without compelling reasons is incompatible with the principle of legal certainty," and regardless of exceptional circumstances that disable or hinder the enforcement procedures in a specific State, the total inactivity of the State authorities in the field of enforcement entails a violation of the Article 6 (1) of the ECHR.[24]

However, a violation of a specific right has also been found in substantially shorter enforcement procedures. This was the case when enforcement measures were suspended for more than three years,[25] when a delay in an enforcement procedure lasted between two years and four months and three years and eight months,[26] when an enforcement was prolonged for a nearly four-year period, which was entirely the State's responsibility,[27] and when the relevant authorities did not attempt to enforce the judgment for two years, seven months, and twenty-nine days, with an additional period of more than nine years during which the enforcement procedure was pending before the court.[28]

One of the rare occasions where the ECtHR explicitly mentioned an acceptable delay in the enforcement procedure is the case *Vladimirova v. Russia*. Therein, the ECtHR clearly stressed that "a delay of less than one year in payment of a monetary judicial award is in principle compatible with the Convention, while any longer delay is *prima facie* unreasonable."[29] Furthermore, a period of one year and seven months that was needed for the enforcement procedure in another case seems tolerable.[30] On the contrary, a delay of nine months is at first sight not excessive; however, that does not entail that an assessment of the circumstances of the specific case is not needed.[31] When considering the specific procedure, it is necessary to acknowledge that the enforcement of a judgment of a non-pecuniary nature might need longer to be completed in comparison to judgments of a pecuniary nature.[32] With regard to the ECtHR, even a one-year delay in an enforcement procedure is incompatible with the ECHR when a judgment concerns "a basic necessity for a person in need."[33]

In assessing whether a lengthy enforcement procedure violates the right to a fair trial, the entire period during which the State failed to carry out a particular enforcement procedure must be taken into account. If a State whose responsibility is being considered by the ECtHR in a specific case ratified the ECHR in the time-period in which the enforcement of the court decision was already delayed, only a time-period "which falls within this Court's competence *ratione temporis*" is considered.[34]

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[24] *Gulmammadova v. Azerbaijan*, paras. 39, 40.
[25] *Pini and others v. Romania* Nos. 78028/01 and 78030/01, para. 188.
[26] *R. Kačapor and others v. Serbia* Nos. 2269/06 and 5 others, para. 115.
[27] *Sivograk and Zenov v. Russia* No. 14758/08, para. 26.
[28] *Vukelić v. Montenegro*, paras. 98–102.
[29] *Vladimirova v. Russia* No. 21863/05, para. 56.
[30] *Bakhtiyar Osmanov v. Azerbaijan* No. 4582/06.
[31] *Burdov v. Russia (No. 2)*, para. 67.
[32] *Komnatskyy v. Ukraine* No. 40753/07, para. 19; *Kopnin and others v. Russia*, para. 33; *Tonyuk v. Ukraine*, para. 38.
[33] *Kopnin and others v. Russia*, para. 33.
[34] *Ibid.*, para. 115.

Not every deadlock in an enforcement procedure is regarded as a violation of the creditor's right to a fair trial. The State can justify a delay in specific exceptional circumstances.[35] However, such a setback shall not "impair the essence"[36] of the right to a fair trial.

Other circumstances

Several other requirements, rules and factors of the enforcement procedure may violate the creditor's right to fair trial.[37] These include, for example, a requirement for the creditor to have to pay costs for the bailiff or a (too high) court tax prior to an enforcement procedure[38] (and potentially without the possibility of its reimbursement).

It is also necessary to emphasise that in general, the creditor cannot require that the State pays the debtor's debt, i.e. the State is not liable for failure to enforce in case the debtor does not have (enough) property.[39] The only situation where the creditor is protected in such a case is when the State is held liable for a delay in enforcement which resulted in the debtor having no assets when the judgment was finally enforced.[40]

Insolvency Procedure

In comparison to enforcement procedures, ECtHR case law dealing with the infringement of the right to a fair trial in insolvency procedures is rather scarce. It follows that the adjudication of bankruptcy does not necessarily fulfil the condition of the "determination of [an applicant's] civil rights and obligations" laid down in Article 6 of the ECHR and consequently this Article is not applicable. For instance, in an older decision[41] dealing with a Belgian insolvency procedure, the European Commission of Human Rights found the applicant's complaint as to the national proceedings before the court that found him bankrupt to be inadmissible. In that case, the applicant complained that he had not been given a chance to defend himself and present his case to the Antwerp Commercial Court before the latter found him bankrupt. The applicant alleged a violation of Article 6 (1) of the ECHR. The Commission held that although the adjudication of bankruptcy was subsequently set aside and that it had temporarily affected certain "civil rights and obligations" within the meaning of Article 6 (1), at that stage the requirements of a fair trial had not applied and thus no violation of Article 6 of the ECHR occurred. The Commission stressed that the court that found the applicant to be bankrupt was acting *ex officio* by virtue of the powers conferred on it by the Belgian Act, which constitutes an exception from the ordinary procedure. For this reason, the Commission concluded that the court could not be considered as having been engaged in the "determination" of the applicant's civil rights

[35] *Marinković v. Serbia*, para. 36; *Vukelić v. Montenegro*, paras. 98–102. See also: Harris et al., 2018, 397, and *Dimitar Yanakiev v. Bulgaria (No. 2)*, para. 70.

[36] *Humbatov v. Azerbaijan*, para. 29; *Burdov v. Russia (No. 2)*, para. 67; *Komnatskyy v. Ukraine*, para. 20; *Gulmammadova v. Azerbaijan*, para. 36; *Spahić and others v. Bosnia and Herzegovina*, para. 25; *Kunić and others v. Bosnia and Herzegovina*, para. 26; *Jasiūnienē v. Lithuania*, para. 27; *Popov v. Moldova (No. 1)*, para. 54.

[37] Due to the publication limitations, this aspect is not in detail covered in this article.

[38] See: *Apostol v. Georgia* No. 40765/02.

[39] *Marinković v. Serbia*, para. 38, *Sanglier v. France*, para. 39.

[40] *Vukelić v. Montenegro*, para. 96.

[41] Decision of the European Commission of Human Rights No. 8988/80.

and obligations. Its function was namely – as emphasised by the Commission – not to settle a dispute, but to provide a safeguard in the interests of the existing or potential creditors. Furthermore, in another case the Commission held that Article 6 (1) of the ECHR is not applicable to cases that deal only with the distribution of a bankruptcy estate (namely, as explained by the Commission, this shall not fall within the concept of "deciding on civil law claims").[42]

Length of procedures

It is well known that insolvency procedures are among the most complex in private law. While the complexity of such procedures may explain their length, they should have certain time-limits in order to sufficiently protect the creditor's rights as enshrined in Article 6 of the ECHR. In a relatively recent case decided by the ECtHR – *Cipoletta v. Italy*[43] – the Court acknowledged the particular complexity of insolvency procedures but nevertheless decided that the length of the administrative liquidation proceedings in question, i.e. nearly twenty-five years and six months, had been excessive and did not meet the "reasonable time" requirement under Article 6 (1) ECHR. Such decision was met as the Italian Government had not submitted any argument capable of justifying such a duration. Similar was decided in *Bertolini v. Italy*[44] (the bankruptcy proceedings have lasted for twenty years and seven months). In *Ceteroni v. Italy*[45] and *De Blasi v. Italy*[46] even the ten-year duration of the insolvency procedure (however, in the latter case still pending at the time of the ECtHR's ruling) was considered unacceptable (see also: Puschner, 2000).

The State's liability for a debtor's debts

As in enforcement procedures, the State is generally not liable for the unsuccessful enforcement of a creditor's claims against private individuals and for their unpaid debts in the event of insolvency. It has been stressed by the ECtHR on many occasions that where the debtor is a private individual, the State cannot be liable for the non-payment of an enforceable debt as a result of the insolvency of such a debtor.[47] However, similar as in enforcement procedures, the State has a positive obligation to provide for an (as much as possible) effective debt repayment system even in the event of the debtor's insolvency.

On the other hand, the State might be held liable for the debts of a state-owned company. In such cases, additional factors have to be taken into consideration, such as the role played by the State with respect to the difficult situation which the company found itself in (i.e. insolvency), or whether the State can be assumed to have accepted liability for the debts of the company fully or in part.[48] These issues often arise when creditors claim an interference

[42] Decision of the European Commission of Human Rights No. 6916/75.
[43] *Cipoletta v. Italy* No. 38259/09.
[44] *Bertolini v. Italy* No. 14448/03.
[45] *Ceteroni v. Italy* No. 22461/93.
[46] *De Blasi v. Italy* No. 1595/02.
[47] See, e.g., *Sanglier v. France* No. 50342/99, para. 39. For more, see: 'Guide on Article 6 of the European Convention on Human Rights', 2022, 52 and 53.
[48] *Liseytseva and Maslov v. Russia* Nos. 39483/05 and 40527/10, paras 191 and 192.

with their right to property as enshrined in Art. 1 of Protocol No. 1, which is further discussed below.

A related issue arises with regard to the State's responsibility for insolvency liquidators. More precisely, the question arises whether the State might be held liable to creditors for their wrongful acts (which may also result in the non-repayment of creditors and affect their right to property as enshrined in Art. 1 of Protocol No. 1). The answer to this question depends on various factors that help to define whether the insolvency liquidator can be considered to have acted as a State agent (i.e. appointment, supervision and accountability, objectives, powers, functions).[49] However, in *Kotov v. Russia*[50] the Court denied such liability, since the liquidator was rather independent, while the State authorities were not in a position to give him instructions or otherwise directly interfere with his activities.

III. The Right to Property (Art. 1 of Protocol No. 1)

A creditor's pursuit of his claims in an enforcement or insolvency procedure is furthermore secured by the human right to property as enshrined in Article 1 of Protocol No. 1. This Article specifically emphasises that restrictions and interferences with the right it protects are permitted where this is in the public interest, in accordance with the conditions provided for by law and in compliance with the general principles of international law. While it does not explicitly mention proportionality as a criterion for assessing the permissibility of an intervention, the ECtHR's interpretation of its structure requires that interference with the right to property is permissible only if it is in accordance with the principle of proportionality.

With regard to enforcement and insolvency procedures, there is a significant interconnection between the right to a timely proceeding (within the right to a fair trial), and the substantive right to property. Namely, the issue of refusal or delay by national authorities in complying with binding decisions might also be looked at through the lens of the right to a court and or length of proceedings. Since "claims" fall within the scope of "possessions" that are protected by Article 1 of Protocol No. 1, excessive delays in enforcement and insolvency procedures can also violate creditors' right to property.[51] A closer look at the ECtHR case law reveals that the excessive length of enforcement or insolvency proceedings usually results in the disruption of the balance between interests at stake and affects the requirement of proportionality resulting in a violation of Article 1 of Protocol 1 No. 1.[52] In some cases, the ECtHR decision finding a violation of the right to timely procedure is almost automatically followed by the decision finding also a violation of the right to property.[53]

Insolvency regimes might also interfere with creditors' property rights by offering generous options for debt relief in consumer insolvency procedures, either in terms of access to relief or the quality of the relief (see also: Omar and Jennifer L. L. Gant, 2021). Consumer

[49] *Kotov v. Russia* No. 54522/00, paras. 38–44.

[50] *Ibid.*, para. 45.

[51] See also: The right to trial within reasonable time under Article 6 ECHR A practical handbook (2018), available at: https://rm.coe.int/the-right-to-trial-within-reasonable-time-eng/16808e712c.

[52] See e.g. *De Blasi v. Italy*, paras. 47–50.

[53] *Jurevičius v. Lithuania* No. 30165/02, paras. 32–41.

insolvency procedures aim to resolve the debts of an individual and often offer a debtor the chance to obtain debt relief.[54] Since such relief is not only in the interest of a debtor but also serves a public interest, it is usually widely recognised in numerous national jurisdictions.[55] Nevertheless, a proper balance between the debtor's rights and the creditor's rights should be found. Furthermore, creditors' property rights might also be violated in business insolvency procedures that either strive to liquidate the business or restructure its debts over time (e.g. by the arbitrary classification of the creditor's claims as priority or non-priority, which plays an important role in the possibility of repayment[56]), which is further discussed below.

Enforcement Procedures

As already mentioned, un unenforced judgment or excessive delays in its enforcement can breach a creditor's right to property. Particularly relating to delays in the execution of a judgement, the ECtHR has often addressed the question of whether and under what circumstances such delays violate the substantive right to property. This right secures the peaceful enjoyment of one's possessions. However, the concept of "possessions" must be interpreted in such a way that a potential interference with the right in question can be decided. A general interpretation can be found in the case *Molnar Gabor v. Serbia*. The ECtHR declared that "'possessions' can be 'existing possessions' or assets, including claims, in respect of which an applicant can argue that he has at least a 'legitimate expectation' (which must be of a nature more concrete than a mere hope) that they will be realised, that is that he or she will obtain effective enjoyment of a property right."[57] An enforceable judgment in favour of the creditor gives him a "legitimate expectation to acquire"[58] the fulfilment of a claim. Such a claim regardless of its nature "can constitute a 'possession' within the meaning of Article 1 of Protocol No. 1."[59] A judgment therefore creates for the creditor "an enforceable claim protected by Article 1 of Protocol No. 1."[60]

The inability to enforce a judgment violates the creditor's right to the peaceful enjoyment of one's possessions.[61] Where a judgment has imposed an obligation on the State to provide compensation in land or money to a creditor, and such judgment has subsequently not been enforced, the creditor's right to the peaceful enjoyment of his possessions has been violated. The creditor was namely expecting to receive compensation and the State did not provide any persuasive justification for its inactivity.[62] A similar situation occurs in the case of a judgment for the return of one flat and the payment of compensation for

[54] See also: Omar and Jennifer L. L. Gant, 2021, pp. 201–213.

[55] For more on this, see: Kadner Graziano et al., 2019.

[56] For more on priority and non-priority claims in insolvency proceedings, see: Filipiak, Hrycaj, and the European Parliament, 2021.

[57] *Molnar Gabor v. Serbia*, para. 46. See also: *Humbatov v. Azerbaijan*, para. 33.

[58] *Dimitar Yanakiev v. Bulgaria (No. 2)* No. 50346/07.

[59] *Popov v. Moldova (No. 1)*, para. 61, *Jasiūnienē v. Lithuania*, para. 44, *Jurevičius v. Lithuania*, para. 32. See also: *Burdov v. Russia (No. 2)*, para. 87, *Gulmammadova v. Azerbaijan*, para. 43, *Raguž v. Serbia*, para. 25.

[60] *Panorama Ltd and Miličić v. Bosnia and Herzegovina*, para. 73.

[61] *Spahić and others v. Bosnia and Herzegovina*, para. 26, *Marinković v. Serbia*, para. 37.

[62] *Jasiūnienē v. Lithuania*, paras. 44 *et seq*. For more, see: Galič, 2004, 59.

another, where at the time of the ECtHR decision the flat had still not been returned and the compensation was paid after a delay of more than four years. The ECtHR decided that "the judgment provided the applicant with an enforceable claim, constituting a 'possession' within the meaning of Article 1 of Protocol No. 1," and that consequently "the delays in the execution of this decision, as well as the continuing non-execution of part thereof, amounted to a violation" of the above-mentioned right.[63] Furthermore, the court confirmed that the inability to obtain enforcement for a period of one year and four months and, in the second case, for a period of two years and six months, constituted a violation of that right.[64] Similar occurred in the case of an enforcement delay of six years and seven months, in which the occupants were not evicted from the house and therefore the creditor could not enjoy the possession of his house.[65] The right to property was furthermore violated in a case in which the State did not comply with a judgment ordering the eviction of building tenants for more than five years. The ECtHR decided that "social considerations and the requirements of public order might have justified a delay in enforcement," however such a period of non-enforcement is not acceptable. Similarly, there was a violation in a case where the creditor was not the owner of the flat, but the judgment confirmed his right to rent the flat. When such judgment was not enforced for more than seven and half years, the ECtHR confirmed that such a creditor's claim to a flat on the basis of an occupancy voucher constitutes a "possession" in the frame of Article 1 of Protocol No. 1, and that this Article was therefore violated.[66]

It is possible to conclude that in property-related cases in which the right to a fair trial was violated, the ECtHR generally also found a breach of the right to the peaceful enjoyment of one's possessions (Galič, 2013).[67] In *Jurevičius v. Lithuania*[68] the ECtHR even pointed out that the grounds for establishing a violation of Article 1 of Protocol No. 1 and a violation of Article 6 are the same.

Insolvency Procedures

As explained above, national insolvency regimes may also come into collision with creditors' property rights. While the concept of "possessions" covers not only "existing possessions" but also assets (including claims) in respect of which the applicant can argue that he has at least a "legitimate expectation" of the fulfilment of his claim,[69] a creditor's right to payment is treated as a "possession" within the meaning of the ECHR, even if his claim is unsecured.[70]

[63] *Jurevičius v. Lithuania*, paras. 32–41. See also: *Komnatskyy v. Ukraine*, paras. 26–27.
[64] *Zubko and others v. Ukraine* Nos. 3955/04, 5622/04, 8538/04, and 11418/04, para. 70.
[65] *Popov v. Moldova (No. 1)*, para. 63.
[66] *Gulmammadova v. Azerbaijan*, para. 44. Similar in *Teteriny v. Russia* No. 11931/03. For more on this, see: Grgić et al., 2007.
[67] See: *Yuriy Nikolayevich Ivanov v. Ukraine*, paras. 52–56.
[68] *Jurevičius v. Lithuania*, para. 41.
[69] See: 'Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights', 2022, 7.
[70] As was the case in *Bäck v. Finland* No. 37598/97.

One of the most problematic mechanisms in the bankruptcy procedure of a natural person that might lead to the (unjustified) deprivation of a creditor's property rights is debt adjustment. The latter was addressed by the ECtHR in *Bäck v. Finland*,[71] where the applicant claimed a violation of his property rights due to the alleged almost total extinction of his claim through a debt adjustment. It follows from the case that the applicant contracted to guarantee a bank loan to the debtor, who was a private individual. The latter subsequently applied for a debt adjustment in accordance with Finish insolvency law, which resulted in the nearly total extinction of the applicant's claim. The applicant found it also problematic that the writing off of his claim discriminated against him as a private creditor, who, unlike other creditors that were banks, would receive no compensation from the State.[72] The Court accepted the argument of the Finish Government (joined by the governments of the countries with similar legislation) that the insolvency rules on debt adjustment serve the public interest. Thus, although the Court found that the applicant's claim was indeed almost extinguished by the debt adjustment, it concluded that the Finish insolvency law did not impose an excessive burden on the applicant.[73] Namely, at the time when the applicant decided to guarantee the debtor's loan he had to take into consideration the possibility that the debtor might be declared bankrupt and thus his claim would most likely become worthless. Moreover, the Court found that the Finish national courts carried out a thorough and careful assessment of the case and the applicant had a fair possibility of defending his rights and interests.[74] In addition, the Court stressed that the applicant's claim had already been rendered highly precarious before the debt adjustment was issued.[75] However, it follows from *obiter dictum* that the Court does not exclude the possibility of considering the court-ordered irrevocable extinction of a debt as an excessive burden on the creditor[76] that might unjustly violate his property rights.

An insolvency regime might also interfere with the creditor's property rights by classifying some claims as priority while others as non-priority. However, this distinction must not be based on arbitrary criteria. In *Acar and Others v. Turkey*[77], the Court had to decide whether the national insolvency legislation that considered work-related claims of employees accrued within the year prior to the opening of the insolvency procedures as priority, whereas claims falling outside the one-year reference period as non-priority, breached the property rights of non-priority claims holders. The Court has referred to the guidelines of the International Labour Organisation and found such insolvency regime appropriate.

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[71] See the previous fn.
[72] *Ibid.*, para. 17.
[73] *Ibid.*, para. 62.
[74] *Ibid.*, para. 63.
[75] *Ibid.*, para. 70.
[76] *Ibid.*, para. 63.
[77] *Acar and Others v. Turkey* Nos. 26878/07 and 32446/07.

IV. Analysis

Although the ECtHR case law is very diverse and deals with various aspects of enforcement and insolvency procedures, several lessons might be learned from it in order to improve national legislations across Europe (or their application before the national courts) in order to achieve adequate human rights protection of creditors.

The analysis has shown that the time frames in which enforcement and insolvency procedures are carried out are of great importance for guaranteeing an effective right to a fair trial (Article 6 ECHR). The enforcement procedure has to be expeditious and effective, which means it should not take too long for it to finish. This is a legal standard that remains flexible so that all relevant circumstances of the case at hand might be taken into consideration. The ECtHR provided some guidance as to the factors that should be taken into considerations when deciding if the length of the procedure violated the creditor's right to a fair trial. In enforcement procedures such factors are: the complexity of the procedure, the creditor's own conduct, the competent authorities' conduct, and the amount and nature of the court award. It follows from the ECtHR case law that in some cases a period of one year and seven months is tolerable, while in others even a one-year delay may be problematic, especially if it concerns the execution of a judgement regarding a basic necessity for a person in need. However, it is in line with the general principle of *volenti non fit iniuria* that procedures that take too long due to the creditor's inactivity do not violate his rights. Similar to enforcement procedures, the complexity of the insolvency procedures should be taken into consideration when deciding on a violation of the creditor's right to a fair trial due to the length of the procedure. Although insolvency procedures are known to be the most complex procedures in private law, the ECtHR deemed a ten-year duration of such procedures to be unacceptable in the light of the right to a fair trial.

In both enforcement and insolvency procedures the State is (generally) not liable for the unsuccessful enforcement of a creditor's claims against private debtors and for their unpaid debts in the event of insolvency. However, the State does have a positive obligation to ensure an (as much as possible) effective system of enforcement and debt repayment even in the event of the debtor's insolvency. If the State does not fulfil this obligation and is responsible for ineffective enforcement with delays (which resulted in the debtor having no property when the judgement was finally to be enforced) it can be liable to the creditors. Similarly, the State might be held liable to the creditors if the inefficiency of the insolvency procedure was caused by insolvency liquidators acting as agents of the State.

Since claims in respect of which the creditor can argue that he has at least a "legitimate expectation" of the fulfilment of his claim constitute a "possession" within the meaning of Article 1 of Protocol No. 1 to the ECHR, the creditor enjoys human rights protection also in this regard. If the State does not ensure an effective enforcement procedure that is carried out within a reasonable time frame (as explained above), it can be held liable for a violation of the creditor's right to property. The (in)effectiveness of enforcement procedures is usually evaluated through the prism of the length thereof. Moreover, in insolvency procedures creditors may be deprived of their property rights in cases of debt adjustment. Since such adjustment is not only in the interest of the debtor but also serves the public interest, it is usually widely recognised in numerous national jurisdictions and tolerated by the ECtHR unless it can be considered to be an excessive burden on the creditor or if he did not have a fair possibility to defend his rights and interests in the procedure. The claimant's right to property might also be violated in the case of arbitrary criteria classifying some claims as priority while others as non-priority. As this classification strongly influences the probability of the payment of the creditor's claims, it should be based on justified criteria.

V. Conclusion

The initiation of enforcement or insolvency procedures represents a serious encroachment on the debtor's assets and his private sphere. The latter is especially true in cases that concern procedures against private individuals. While a great majority of current legal discussions focus rather on the position of the debtor, this legal analysis – differently – takes into consideration the position of the creditor.

While they represent two different types of procedures usually brought under the umbrella of private law, enforcement and insolvency procedures nevertheless do have much in common. From a creditor's perspective, they both strive to achieve the same goal: the repayment of the creditor's claims to the maximum extent possible.

The analysis herein has shown that Article 6 of the ECHR (the right to a fair trial) and Article 1 of Protocol No. 1 thereof (protection of property) are usually called into question when it comes to the protection of the human rights of a creditor in enforcement and insolvency procedures. The above findings and observations summarise the relevant ECtHR case law on the matter and might serve as guidance to national legislatures when adopting laws in this field and national courts when interpreting them. Namely, the ECHR together with its case law constitute one of the pillars on which the constitutionalisation of European private law is based. Since private law institutions and procedures should be applied and interpreted only in a manner compatible with human rights, the constitutionalisation of enforcement and insolvency laws across Europe seems inevitable. Thus, we hope that this analysis invites the reader to (re)consider some established institutions of enforcement and insolvency procedure law from a human rights perspective.

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