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Protection of the Right to Property under Georgian Legislation and the European Convention on Human Rights

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Abstract: Disputes on property rights date back to the ancient times. Having undergone extensive development, the right to property can be protected through a vindication claim and *actio negatoria* which are the most common of the private legal means of protecting property rights within the domestic judicial proceedings in Georgia. Within the Council of Europe, "existing property" and legitimate expectations to acquire an asset are safeguarded by Article 1 of Protocol No. 1 to the European Convention on Human Rights, which enjoys supremacy over domestic legislation, including the country's Constitution. The European Court of Human Rights differentiates between three rules on how protection of property is represented under this provision and interprets the state's positive obligations in securing property rights, including through investigation.

Keywords: *actio negatoria, constitution, ECHR, property rights, vindication claim*

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1. General overview

The purpose of this article is to present the constitutional, civil, and European dimensions of the right to property through an analysis of Georgian law and the European Convention on Human Rights (hereafter ECHR, or the Convention), focusing on the specifics of domestic and European means of protection of property rights. The article discusses the development of property rights in Georgian legal doctrine and means of protecting the right to property, such as a vindication claim and *actio negatoria*, as well as constitutional protection of the right to property. Following a detailed discussion of the domestic means of protection of the right to property, the article reviews the history of including the right to property in Protocol No. 1 to the European Convention on Human Rights and gives a brief overview of the relevant case-law of the European Court of Human Rights (hereafter ECtHR, or the Court).

An important aspect of the article is that it discusses the European Court's approach to the hierarchical relationship between the European Convention on Human Rights and domestic law (including the Constitution). This hierarchical relationship is certainly also important in the context of European and domestic protection of property rights.

2. Right to property in the Georgian legal system

2.1 Concept of the right to property in Georgian law: A brief overview

The right to property has come a long way. Property disputes date back to the ancient period. Starting with Plato, it has been one of the most important issues in the history of the development of human thought. Despite the well-known universal nature of property rights (Gregory & Eduardo, 2005, pp. 2ff.) the definition of ownership implies legal and other types of restriction on the right to property, including contractual restrictions. Not to deviate too much from the definition at stake, it could be said, briefly, that the law defines, rather moderately, property as a right that gives its owner the maximum prerogative that can be enjoyed over it (Zoidze, 2005, pp. 86ff.).

Thus, ownership in Georgian legal doctrine is considered as complete domination over the property (Chanturia, 2001, p. 53; Zoidze, 2003, p. 57;

Chechelashvili, 2006, p. 99). This means that the law completely attributes a specific property to the owner and subjects the use and disposal of this property, in general, to the owner's will. In this way, the law provides the owner with a certain scope of freedom, in which, as a rule, only the owner's decision is valid. However, such freedom cannot be unlimited. Moreover, while using their property, each person is obliged to account to the outside world—the rights of others should be taken into consideration. In turn, the state protects the right to property. Protection of the right to property under the Constitution of Georgia is, on the one hand, a guarantee of private property as an institution and, on the other hand, a guarantee of and individual's right to property as an individual (Izoria, 2005, p. 145). Furthermore, there is no substantive, unlimited ownership (Zoidze, 2003, pp. 83ff.). In the case of special preconditions, restriction of ownership may actually amount to deprivation of property. However, in the end, the constitutionality of such restrictions is assessed through the prism of the principle of proportionality (Izoria, 2005, p. 147).

2.2 Protection of property rights by a vindication claim

The most common of the private legal means of protection of property rights is a vindication claim. Article 172(1) of the Civil Code of Georgia contains the requirement for the transfer of ownership, although legal literature also refers to the right to recover ownership, as the owner's right to demand is derived from their ownership right. The right to recover property was regulated by the institution of *rei vindicatio* in Roman law (Garishvili & Khoperia, 2013, p. 313), which is why the term 'vindication' has remained in legal academic circulation until today. A vindication claim is based on the premise that a dispossessed owner can recover the property from the possessor who is withholding the property in bad faith (Terré & Simler, 2018, p. 409). The right of ownership must ensure full dominion over the property, including actual dominion, in the form of ownership. Obviously, the owner has the right of ownership along with other powers, and if the owner is deprived of ownership, they can demand the return of the property from the unauthorised possessor in accordance with Article 172. Thus, the prerequisites for a vindication claim are as follows: the plaintiff must be the owner and the respondent must be the possessor of the property; the respondent should not have the right to possess this property (Judgment of the Supreme Court of Georgia, as-772-735-2013). It is noteworthy that the aforementioned prerequisites must exist cumulatively—that is, all three prerequisites must be present at the same time (Mariamidze, 2014, p. 27).

Thus, the claimant must be the owner. As regards the property to be recovered, the claim based on Article 172 refers to the return of both movable and immovable property. It always includes only a specific property, and not other properties that exist in the place of the original property (Wolf & Wellenhofer, 2016, p. 16).

Only the owner is entitled to a vindication claim. Thus, first, it is checked whether the claimant is in fact the owner. By analogy, the norm is also used in favour of the owner of conditional property, who does not have full ownership rights, but conditional ownership is considered a step before the right of ownership, and the Civil Code also confirms it as a property right (Totladze, 2018, pp. 80ff.). The co-owner also has a right to file a vindication claim as far as it concerns the corresponding co-possession of their share. The co-owner can request the recognition of their co-ownership (the Civil Procedure Code of Georgia, Art. 155(IV)). Therefore, co-owners can also request the transfer of the whole property. However, a co-owner does not have the right to demand the recovery of the property only for him- or herself, but should demand the recovery of the property with regard to all co-owners jointly (Wolf & Wellenhofer, 2016, p. 16). Other rights apart from the right to property are also noteworthy. For example, superficies, usufruct, and pledge also allow possession. In order to ensure that those who have these property rights have their possessions guaranteed (secured), Article 172(1) extends to these cases as well.

In general, using a vindication claim is resorted to when the owner is deprived of possession of the property (Zoidze, 2003, p. 97). Thus, on the basis of Article 172, the claim seeks returning the property to the owner. Based on the right to reclaim the property, a legally binding relationship arises between the owner and the possessor. The general regulation of Article 362 applies to the place of performance of the obligation. In the absence of other circumstances, the so-called obligation to collect applies. In the case of the obligation to collect, the debtor must carry out the performance at their place of residence, and the result of the performance must be in this place. In the obligation to collect, the creditor must take the performance from the debtor (Wolf & Wellenhofer, 2016, p. 32; Zarandia, 2002, pp. 10ff.).

2.3 Protection of property rights by *actio negatoria*

Actio negatoria was known back in Roman law. However, the modern *actio negatoria*, which is more of a "quasi-surgical" intervention for "protection against disorder," has little in common with the *actio negatoria* under Roman law, although it is not harmful to retain this pseudo-historical term (Baldus, 2017, p. 1410). *Actio negatoria* is one of the legal means of protection of property. Under Article 172(2)of the Civil Code of Georgia, if encroachment on or other disturbance of the right of ownership occurs without seizure or dispossession of the property, the owner may demand that the disturber end the disturbance. If the disturbance continues, the owner may seek a prohibitory injunction.

Thus, while Article 172(1) gives the owner the right to claim the property from the illegal possession of another person, Article 172(2) covers all the cases where the deprivation of the right of ownership is not apparent, but the infringement of the right of ownership takes place in another way (the so-called *actio negatoria*). Thus, the rights of the owner must be protected from such encroachment of the property, which is not related to the loss of ownership, but is related to the implementation of such *de facto* actions in relation to the right of ownership, by which the use of the property is hindered (Totladze, 2018, p. 84) or restricted.

Under Article 172(2), the right to claim vests in the owner. According to the definition of the Supreme Court of Georgia, *actio negatoria* is a special type of a civil law claim, the legal result of which is not focused on obtaining the right to a property but on determining the manner of using this property. The preconditions of *actio negatoria* will be met in a case where there is an owner of a property who is prevented from using their property due to an illegal action of another (Judgment of the Supreme Court of Georgia, as-103-96-2017). However, in addition to the sole owner, the co-owner can file a claim. By analogy, it should be possible to use this provision by owners of other absolute rights, which are also protected from all types of unauthorised encroachment and in cases of conditional ownership (Ring *et al*., 2016, p. 944).

Actio negatoria aims to restore the owner's ability to fully use of the property, to prevent interference, to restore the original condition, and to create guarantees to prevent possible interference in the future. *Actio negatoria* is enjoyed by both the owner and any legitimate possessor (Kochashvili, 2013, pp. 175–176) who is deprived of the ability to use the property. The respondent in this case will be a person who, by their illegal action, creates an obstacle to the use of property rights.

Actio negatoria is filed by the owner, for example, in the case when a third person arbitrarily passes through the owner's land, on foot or by car, as well as in the case when the trespasser prevents the owner from using the property by building certain structures (for example, a fence).

2.4 Protection of property rights in the Constitution

In relation to property rights, the constitutional concept of property is more recent. Conceptually, it is the relationship between the private person and the state. It includes state intervention in property rights both in terms of deprivation (expropriation) of property and by imposing regulations or controls on the use of private property (Akkermans, 2018, p. 108).

Georgian legislation affirms the right to property as a fundamental right with constitutional value, and the issue of relation of this right to the Constitution is one of the central issues in the practice of the Constitutional Court of Georgia (Zoidze, 2007, pp. 91ff.). Why is the right to property recognised by the Constitution, and is the provision of the right in the Constitution a safeguard in itself for the security of property? The answer to the first question is simple: issues of property redistribution cannot always be subject to endless revision, as this is beyond the scope of reasonableness. That is why, by fixing the property right in the constitutions, the property regime is better protected from its frequent changes.

Article 19 of the new Constitution of Georgia guarantees the universal right to property and inheritance (Constitution of Georgia as of 13 October 2017, Art. 19(1)). While this Article also refers to the right of inheritance, this provision is in fact recognised as a safeguard of the right to property (Tughushi *et al.*, 2013, p. 222; Zarandia, 2008, pp. 161–162; 2007, pp. 143–144). Property and freedom are the basic principles of a modern legal state and market economy (Khubua, 2004, p. 110). In one of the cases, the Constitutional Court opined that the safeguard of the right of inheritance complements the safeguard of the right to property as such, and together with the latter forms the basis of the private property order provided for by the Constitution. Property and the right of inheritance together form the essential, basic elements of the social order, which is based on the principle of private autonomy of a person (Judgment 3/1/512, II-74).

The Plenum of the Constitutional Court has repeatedly noted the importance and purpose of the right to property. In one of the key judgments, by which confiscation of property as a form of additional punishment was

declared unconstitutional, the court explained that, according to the generally recognised principles and norms of the Constitution of Georgia and international law, the right to property is an inalienable and supreme human value, a universally recognised basic right in a democratic society and it is the cornerstone of the social and legal state (Judgment 1/51).

3. Interrelation of domestic and European law

The European Convention on Human Rights is a constitutional mechanism of the European public order, and its Contracting Parties are obliged to ensure the conformity of domestic law with the Convention in order, at least, to preserve the foundations of this public order. This obligation also applies to the constitutional law of the Contracting Parties. Article 1 of the Convention does not differentiate between legal provisions and measures to which the Convention should apply, and no part of the jurisdiction of the Contracting Party is excluded from the scope of the application of the ECHR, including and especially constitutional review (*United Communist Party of Turkey and Others v. Turkey* [1998], paras. 27 *et seq.*).

The duty of the implementation of the ECHR by the state implies the superiority of the Convention over the Constitution of the country. The European Court of Human Rights applies the United Nations Vienna Convention on the Law of Treaties (hereafter the VCLT). Under Article 27 of the VCLT, "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

The restriction of a right based on the constitution was assessed as a violation of the ECHR in the case of *Ramishvili v. Georgia* [2018]. In this case, a committee of three judges, in a judgment of third-degree importance, without referring to the VCLT or extensive reasoning, found a violation of the right to free elections safeguarded by Article 3 of Protocol No. 1 to the Convention. The ECtHR did not even consider it necessary to look at Article 6(2) of the 2008 edition of the Constitution of Georgia that asserts the supremacy of the Constitution over international treaties. Therefore, the ECHR, including the protection of property guaranteed by Article 1 of Protocol No. 1 to the Convention and interpreted by the European Court, is the standard according to which the supremacy of constitutional rights, including property rights, should be ensured.

4. Right to property in European Law

4.1 Concept of the right to property under the ECHR: A brief overview

The "protection of property" guaranteed by Article 1 of Protocol No. 1 differs in many aspects from the domestic regulation of property rights discussed above. The protection of property guaranteed by the Convention and interpreted in the ECtHR case-law is quite limited compared to the protection of property under domestic law. The reason for this is primarily the lack of enthusiasm on the part of states.

Thus, for example, the right to property was not reflected in the International Covenant on Civil and Political Rights, nor in the International Covenant on Economic, Social and Cultural Rights. The adoption of both covenants by the United Nations General Assembly on 16 December 1966 was intended to guarantee the rights provided for in the Universal Declaration of Human Rights (hereafter the UDHR) by international treaties, since the declaration itself, as a document approved by a resolution of the General Assembly, did not have this status of positive international law (Hannum, 2005, p. 351). Yet, while the preambles of both covenants stipulate that in accordance with the UDHR, the covenants serve to create conditions "whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights," neither of these acts safeguard the right to property declared in Article 17 of the UDHR.

As regards the ECHR, since it was extremely difficult for the states to agree on the wording of the right to property, this was one of the rights that was not reflected in the text of the Convention and was only included in the first additional protocol, and even that in a very limited way and by granting the state broad rights to interfere with property (Harris *et al*., 2018, p. 862). According to the *travaux préparatoires* of the ECHR, representatives of some states even considered that the right to property was "undeniably" an economic right, and it was difficult to introduce only one such category of right without taking into account other economic and social rights (Preparatory Work, 1976, p. 11).

4.2 Legitimate expectation

The European Court of Human Rights reinforces the approach that Article 1 of Protocol No. 1 to the Convention applies to existing property and does not guarantee the right of a person to receive property (*Rola v. Slovenia* [2019], para. 71). A claim cannot be considered as "existing property." Therefore, the ECtHR examines the extent to which the claim constitutes "property" within the meaning of the Convention, that is, the extent to which this claim is justified. Legitimate expectation is important in this context; it is a reasonably justified expectation based on a rule of law or a legal act, or the qualification of a claim under domestic law (*Grbac v. Croatia* [2021], para. 86).

The court distinguishes between a mere hope of obtaining property and a legitimate expectation (*Kopecký v. Slovakia* [2004], paras. 49–50). Even in those cases where the claim is not based on a specific legal provision, it can still have a sufficient legal basis and be considered as property. If there is no such basis, the claim is conditional and cannot be considered as property. A legitimate expectation does not arise where there is a dispute as to the correct interpretation and application of domestic law and when the applicant's arguments are not accepted by domestic courts (*Čakarević v. Croatia* [2018], para. 52).

In the case of *Meladze v. Georgia* [2018], a plot of land was arbitrarily occupied in the Vere valley. The applicant did not pay taxes and did not legalise the property. In 2008, the City Hall sold the land plot to a private investor. The applicant failed to appeal to the court against the City Hall. Instead, the applicant unsuccessfully applied to the competent State Commission established by law and later failed to challenge its unfavourable decision before a court of general jurisdiction.

The European Court held that the main issue of the application was the commission's refusal to transfer the ownership of the land plot to the applicant, concluding that the applicant had not exhausted domestic remedies. The European Court still deemed it important to explain why the application was inadmissible from the substantive point of view as well.

The Court explained that Article 1 protects existing property and claims that can be deemed property. The plot was owned by the state. Since the privatisation that took place in 2008, a third person later owned the land plot. Thus, the plot was not the applicant's "existing property."

The Court also examined whether the applicant had a legitimate expectation to obtain ownership rights to the plot. The only question that had to be answered in this regard was whether the applicant's expectation was reasonably justified under the domestic legislation. The applicant did not meet the criteria established by law. Under the domestic legislation, arbitrarily occupied land was an agricultural or non-agricultural plot of land owned by the state, on which a residential house (built or demolished) or a non-residential building (constructed) was located arbitrarily.

When the applicant applied to the commission, the property had already been transferred to a private person. Accordingly, the applicant did not have a sufficiently substantiated property interest under the domestic legislation. The Court observed that a person's mere hope that authorities will act in their favour could not be considered a form of legitimate expectation. Accordingly, the application was inadmissible not only due to the applicant's failure to exhaust domestic remedies but also due to the fact that the applicant did not have either an existing property or a legitimate expectation within the meaning of the Convention.

4.3 Disputes between private parties and the state's positive obligations to protect property rights

In the case of *Ali v. Georgia* [2018], the applicant disputed that another person fraudulently acquired his 90% share in the company. In particular, with a forged power of attorney of the notary, Hussain Ali allegedly granted T. M. the authority to represent his interests in court. Hussain Ali was sued and ordered to pay 8 million dollars. T. M. acknowledged the debt and signed a settlement act. T. M. transferred the 90% share belonging to Hussain Ali to A. Y. After that, A. Y. transferred ownership of 90% of the company's charter capital to the company's minority shareholder, A. T.

Before the European Court, the applicant failed to prove the participation of the state in the negotiations between the private parties. However, the state has an obligation not only to not interfere with property rights, but also to protect property rights, especially when a person legitimately expects the state to intervene in terms of protection of property rights. The degree and nature of the obligations depends on the facts. In particular, when the loss of property is caused by the fault of the state, the obligations are stricter. When disputes arise between private individuals, the positive obligations of the state include the protection of property under the law and the availability of safeguards in judicial review so that disputes can be resolved effectively and

fairly. An investigation was conducted and a plea agreement was concluded. The applicant, however, did not agree with the outcome. The Court concluded that the state had fulfilled its obligations and the application was manifestly ill-founded.

In another case, *Novoseletskiy v. Ukraine* [2005], the European Court examined the alleged violation of Article 1 of Protocol No. 1. It concerned an investigation that the state had to conduct in response to the applicant's complaint about the loss of personal belongings from the apartment temporarily leased to the applicant by his employer—a state institution (Mchedlidze, 2019, p. 69).

It was unclear to the European Court why it was so persistently denied at the domestic level that the applicant had left his personal belongings in the apartment. Moreover, there was a testimony of a witness according to which he had helped the applicant to move his personal belongings to the apartment. The Prosecutor's Office did not pay attention to the applicant's request to prosecute the officials who allowed other people to live in the apartment; at the same time, it investigated in detail whether the applicant had left his personal belongings in the apartment.

The Court found a violation of the first sentence of Article 1.1 of Protocol No. 1 to the Convention, since the respondent state had failed to establish a fair balance between the conflicting interests. The law enforcement authorities did not conduct an effective and impartial investigation into the loss of the applicant's personal belongings.

Later, in the case of *Blumberga v. Latvia* [2008], the European Court clarified requirements for investigations to be conducted in the context of property protection. In particular, in the case of life-threatening attacks on individuals, the state authorities are obliged to act on their own initiative when they become aware of the case. Where no such circumstances arise, the Court's assessment is limited to determining whether the criminal investigation was conducted with gross and serious violations. In the *Blumberga* case, the applicant's two homes were burglarised while he was in custody for several months.

In 2020, the European Court of Human Rights again had to specify the scope of its investigation in the context of property protection in the case of *Abukauskai v. Lithuania* [2020]. In this case, the applicant's house was intentionally set on fire while he was at home with his wife. The husband and wife escaped from the burning house through the window. The Court

clarified that the principles established in the *Blumberga* case could not automatically be extended to all cases where the interference with property rights was carried out in a manner that was potentially dangerous to the life and health of the applicants.

Indeed, the damage to the applicants' property had been done in a dangerous manner. In this way, the *Abukauskai* case differed from the *Blumberga* case. However, in the *Abukauskai* case, the applicants did not allege within the domestic proceedings that they had suffered any injuries or that their lives or health was in danger due to the dangerous nature of the arson attack. There was also no evidence that they required medical attention due to the fire. The applicants did not allege the violation of Article 2 (right to life) or Article 3 (prohibition of ill-treatment) of the Convention. In these circumstances, the court's review was limited to determining whether there were obvious and serious flaws in the criminal investigation.

4.4 The three rules of protection of property

The right to protection of property is presented in the form of three rules given in Article 1 of Protocol No. 1—(1) the general rule, (2) deprivation of property, and (3) control of the use of property.

The first rule is of general nature. It concerns peaceful enjoyment of property and is given in the first sentence of Article 1(1) of Protocol No. 1: "every natural or legal person is entitled to the peaceful enjoyment of his possessions." The second rule only applies to the deprivation of property, for which certain prerequisites must be met. This rule is given in the second sentence of Article 1(1) of Protocol No. 1: "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 third rule recognises the right of the state to control the use of property and is given in Article 1(2) of Protocol No. 1: "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."

These rules are interrelated. The second and third rules deal with specific cases of interference with the right to free enjoyment of property and must therefore be interpreted in light of the general principles contained in the first rule (*The Karibu Foundation v. Norway* [2022], para. 72).

The Grand Chamber of the European Court summarised the criteria for evaluating the reasonableness of interference with the right to protection of property protection guaranteed by Article 1 of Protocol No. 1 as follows: the interference must be lawful and pursue a legitimate aim, with means that they are reasonably proportionate to the achievement of that aim (*Beyeler v. Italy* [GC], 2000, paras. 108–114).

4.4.1 General rule

The case of *Papastavrou and Others v. Greece* [2003] is noteworthy in terms of protection of property. Based on a 1934 ministerial order, reforestation was started on a plot of land, about which there was a dispute between the applicants and the state. This decision was not subject to review. In 1994, under the decision of the prefect of Athens, the afforestation resumed. The applicants unsuccessfully challenged this decision within domestic proceedings. They brought the complaint before the European Court of Human Rights, alleging *de facto* deprivation of their plots of land.

Contradictory evidence regarding the soil structure of the plots of land were submitted to the European Court. However, deciding upon this technical issue was beyond the European Court's purview. The fact that the issue of reforestation had not been reviewed since 1934 was of decisive importance for the Court, as it violated the rights of many *bona fide* owners. However, no compensation was available at the national level.

In the European Court, the applicants requested 2,522,410 euros in pecuniary damages, a figure based on the assessment made by a civil engineer according to the market value of the adjoining plots of land. A year later, the Court decided the issue on just satisfaction and each applicant was awarded 250,000 euros. The Court's reasoning for reducing the amount of compensation was that the applicants were not deprived of their land plots and were limited to some extent in their use of the land plots. At the same time, the authorities had not properly considered at the national level their claim that the land could not be considered a forest, that the land had never been a forest, and the evidence related to the structure of the soil had not been assessed by the national court, so the applicants were ineligible for compensation at the domestic level. At the same time, the state paid compensations for the plots of land confiscated for the 2004 Olympics.

4.4.2 Deprivation of property

The case of *Svitlana Ilchenko v. Ukraine* [2019] concerns the demolition of a private garage located on state-owned land. Since 1980, the applicant used a garage situated in the yard of her house. In 1995, the garage was registered as her private property. In 2003, the municipality authorised a private developer to build a new housing complex on the land where the garage stood. The garage was demolished after domestic courts found that the applicant did not have the right to use the land on which the garage was located.

In this case, the question of public interest was inextricably linked to the question of proportionality. Therefore, the European Court examined both issues together. There was no indication in this case that the authorities' decisions were motivated by particularly important interests such as environmental protection, the need to uphold the rule of law to prevent illegal construction, or social justice interests. The housing project was aimed at making a commercial profit, despite the authorities' assessment that the project also served public interests, as it helped to increase and renovate the existing housing stock. Accordingly, only compensation could meet the requirements of Article 1 of Protocol No. 1 to the Convention. This compensation should have been determined through proceedings that provided an overall assessment of the consequences of deprivation of property, taking into account the market value of the property at that time. However, no such compensation or corresponding guarantees were offered to the applicant. Accordingly, a violation of Article 1 was unanimously established, and the state was obliged to compensate the applicant for damages in the amount of 8,000 euros.

4.4.3 Control of the use of property

The case of *Zelenchuk and Tsytsyura v. Ukraine* [2018] concerned a land moratorium, barring any form of disposal of agricultural land, except for inheritance. The ban was extended several times and was still in effect at the time of proceedings before the Court. The applicants inherited the agricultural land shares in 2000 and 2004, respectively.

In the opinion of the Court, the impugned legal regulation amounted to controlling the use of the property. The moratorium was aimed at preventing the impoverishment of the rural population, excessive concentration of land in the hands of wealthy individuals or hostile forces, and ensuring that agricultural land was cultivated.

Based on the principle of subsidiarity, the European Court can assess the situation affecting the applicants in view of the aim of creating a land market, which the respondent state has always stated as the objective of the restriction. The European Court considered that the legal ambiguity, reasons for introducing and maintaining the moratorium, and burden imposed on the applicants were relevant factors for the assessment.

The Court also considered the duration of the restrictions, their broad scope, and their absolute and inflexible nature. The restrictions affected applicants for more than twelve and ten years, respectively. The applicants could not sell the land in almost any possible way and use it for purposes other than agriculture. Nor were the restrictions subject to any individual review or exception, with the result of examining the proportionality of the measure at the legislative or individual level.

The repeated extensions of the moratorium and the resulting uncertainty further increased the burden on applicants. Their realisation of one of the main elements of the right to property, the right to dispose of property, became dependent on rather obscure legislation. It was not predictable when it would be adopted, and it was not sufficiently clear why its adoption was delayed. Overall, the applicants were burdened by the government's breach of its obligations and deadlines. This burden was excessive because the government had weak arguments for choosing the most severe alternative to the least restrictive interference. A fair balance between the common interests of society and the property rights of the applicants was not achieved. Consequently, the European Court unanimously found that it constituted a violation of the right to property.

5. Conclusion

This article discussed the protection of property rights within the framework of civil, constitutional, and ECtHR proceedings. The right to property has a different history of development at the domestic and ECHR/ECtHR levels, which leads to different aspects of protection of this right within the respective proceedings. The standards discussed in the article, and the review of the practice developed by domestic courts and the ECtHR may be of interest and use in developing and presenting legal arguments for the protection of property rights both at the domestic and ECtHR levels.

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References

Abukauskai v. Lithuania [2020], ECtHR 72065/17, 20.2.2020.

Akkermans, B. (2018), 'A Comparative Overview of European: US and South African Constitutional Property Law,' *European Property Law Journal*, vol. 7, no. 1, pp. 108–143. https://doi.org/10.1515/eplj-2018-0002

Ali v. Georgia [2018], ECtHR 41710/05, 12.6.2018.

Baldus, C. (2017), *MüKo, Sachenrecht*, § 1004, 7th edition, Beck-Online.

Beyeler v. Italy [2000], ECtHR (GC) 33202/96, 5.1.2000.

Blumberga v. Latvia [2008], ECtHR 70930/01, 14.10.2008.

Čakarević *v. Croatia* [2018], ECtHR 48921/13, 26.4.2018.

Chanturia, L. (2001), *Ownership of Immovable Property* [in Georgian], Tbilisi: TSU.

Chechelashvili, Z. (2006), *Property Law (Comparative Legal Research)* [in Georgian], Tbilisi.

Citizen of Denmark Heike Cronqvist v. the Parliament of Georgia [2012], Constitutional Court of Georgia N3/1/512, 26.6. 2012.

Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, 1950.

Constitution of the Republic of Georgia, adopted on 24 August 1995.

ECtHR (1976), Preparatory Work on Article 1 of Protocol No. 1 to the European Convention on Human Rights, Strasbourg.

Garishvili, M. & Khoperia, M. (2013), *Roman Law* [in Georgian], Tbilisi: Meridiani.

Grbac v. Croatia [2021], ECtHR 64795/19, 16.12.2021.

Gregory, S. A. & Eduardo, M. P. (2012), *An Introduction to Property Theory*, Cambridge: Cambridge University Press.

Hannum, H. (2005), 'The Universal Declaration of Human Rights,' in R. K. M. Smith & C. van den Anker (eds.) *The Essentials of Human Rights*, London: Hodder Arnold Publishing.

Harris, D. J.; O'Boyle, M.; Bates, E. & Buckley, C. (2018), *Law of the European Convention on Human Rights*, 4th ed., Oxford: Oxford University Press. https://doi.org/10.1093/he/9780198785163.003.0001

International Covenant on Civil and Political Rights, United Nations, 16.12.1966.

International Covenant on Economic, Social and Cultural Rights, United Nations, 16.12.1966.

Izoria, L. (2005), *Commentary to the Constitution of Georgia* [in Georgian], Tbilisi: Meridiani.

Judgment of the Constitutional Court of Georgia, 1/51, 21 July 1997, Constitutional Submission of the Chughureti District Court of Tbilisi.

Judgment of the Supreme Court of Georgia, as-103-96-2017, 31.03.2017.

Judgment of the Supreme Court of Georgia, as-774-735-2013, 11.11.2012.

Khubua, G. (2004), *Theory of Law* [in Georgian], Tbilisi.

Kochashvili, K. (2013), *Possession and Property: The Fact and the Right in Civil Law*, Tbilisi: TSU.

Kopecký v. Slovakia [2004], ECtHR 44912/98, 28.9.2004.

Mariamidze, G. (2014), *Case-Study and Methods of Their Solution in Property Law* [in Georgian], Book I, Tbilisi.

Mchedlidze, N. (2019), *Right to Accommodation: Review of International Standards and Practice* [in Georgian], Tbilisi: EU/EMC.

Meladze v. Georgia [2018], ECtHR 30635/09, 2.10.2018.

Novoseletskiy v. Ukraine [2005], ECtHR 47148/99, 22.2.2005.

Papastavrou and Others v. Greece [2003], ECtHR 46372/99, 10.4.2003.

Ramishvili v. Georgia [2018], ECtHR 48099/08, 31.5.2018.

Ring, G.; Grziwotz, H. & Keukenschrijver, A. (2016), *BGB, Sachenrecht*, vol. 3, 4th ed., Beck-Online.

Rola v. Slovenia [2019], ECtHR 12096/14 and 39335/16, 4.6.2019.

Svitlana Ilchenko v. Ukraine [2019], ECtHR 47166/09, 4.7.2019.

Terré, F. & Simler, P. (2018), *Droit Civil: Les Biens*, 10th ed., Paris: Dalloz. https://doi.org/10.3917/pug.simle.2018.01

The Karibu Foundation v. Norway [2022], ECtHR 2317/20, 10.11.2022.

Totladze, L. (2018), *Commentary to the Civil Code* [in Georgian], Book II, Tbilisi.

Tughushi, T.; Burjanadze, G.; Mshvenieradze, G.; Gotsiridze, G. & Menabde, V. (2013), *Human Rights and Practice of Legal Proceedings of the Constitutional Court of Georgia*, Tbilisi.

United Communist Party of Turkey and Others v. Turkey [1998], ECtHR 1828/06, 34163/07 and 19029/11, 30.1.1998.

Vienna Convention of 1969 on the Law of the Treaties, United Nations, 23.5.1969.

Wolf, M. & Wellenhofer, M. (2016), *Sachenrecht*, München: C. H. Beck.

Zarandia, T. (2002), *Place and Terms of Performance of the Contractual Obligation* [in Georgian], PhD thesis, Tbilisi, Tbilisi State University.

Zarandia, T. (2007), 'Grundlagen des Zivilrechts in der georgischen Rechtsprechung, Grundlagen der Zivilrechtsordnung in den Staaten des Kaukasus und Zentralasiens,' in *Theorie und Praxis, Materialien einer Konferenz an der Universitht Bremen*, Berlin: BWV, Berliner Wissenschafts-Verlag.

Zarandia, T. (2008), *Osnovy grazhdanskogo prava v sudebnoy praktike Gruzii*, Berlin: BWV, Berliner Wissenschafts-Verlag.

Zelenchuk and Tsytsyura v. Ukraine [2018], ECtHR 846/16 and 1075/16, 22.5.2018.

Zoidze, B. (2003), *Georgian Property Law* [in Georgian], Tbilisi: Science.

Zoidze, B. (2007), *Constitutional Review and System of Values in Georgia* [in Georgian], Tbilisi: Constitutional Court of Georgia.