

THE CONTROVERSIAL IMPACT OF ECHR ON LAND REGISTRIES

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- The insertion in the European Convention on Human Rights of a right to the peaceful enjoyment of possessions raised numerous questions between the experts negotiating the text.
- Should the Convention contain a right to own property, following the example of Article 17 of the Universal Declaration of Human Rights, adopted in 1948?
- Alternatively and more simply, should property rights be protected?
- Or should they be excluded, as not being sufficiently fundamental?

- Also the incorporation of a right to compensation for deprivation of property gave rise to fierce discussions.
- These problems explain why the right to peaceful enjoyment of possessions was included in Protocol No. 1, signed on 29 March 1952 (and entered into force in 1954), and not in the Convention itself (4 November 1950).

Article 1 of Protocol No. 1 provides that:

- *“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possession except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
- *The preceding provisions shall not however in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”*

The European Court of Human Rights held that article 1 of protocol 1 contains three rules:

- the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the **principle of peaceful enjoyment of property**;
- the second rule, contained in the second sentence of the first paragraph, covers **deprivation of possession** and subjects it to **certain conditions**;
- the third rule, stated in the second paragraph, recognizes that the Contracting States are entitled, amongst other things, to **control the use of property in accordance with the general interest**.

The three rules are not, however, “distinct” in the sense of being unconnected.

The second and third rules are in fact related to particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule.

The ECHR has established three main principles applying to the protection of property:

- The principle of lawfulness
- The principle of legitimate aim in the public interest
- The principle of fair balance

Principle of lawfulness

- The Court has reiterated that the most important requirement of article 1 of protocol 1 is that any interference by a public authority with the right to peaceful enjoyment of possessions should be lawful.
- The principle of lawfulness requires that each infringement upon the right to property have a basis in domestic law.
- This legal basis has to be accessible, sufficiently precise and foreseeable.

Principle of legitimate aim

- The interference with the right to property has to pursue a legitimate aim: according to the second sentence of article 1 of protocol 1 deprivations of property are only allowed if they are in the public interest; the second paragraph provides that the control of use of property has to be in accordance with the general interest.
- The Court ascertains on a case by case basis whether the interference with the right to property pursues a legitimate aim. Member states enjoy a wide margin of appreciation when deciding which aim is legitimate.

Principle of fair balance

- The principle of fair balance requires that the interests of the individual affected by the measure interfering with the right to property have to be pondered with the interests of the general public.
- The interference must not impose an excessive or disproportionate burden on the individual.

DOES ADVERSE POSSESSION BREACH HUMAN RIGHTS?

- A well known case in which the European Court of Human Rights had to deal with a possible violation of article 1 of protocol 1 of the Convention is **Pye v. United Kingdom.**
- The litigation was the result of a 4 years saga stemming from the British case **Pye v Graham:**

Mr. Pye allowed his neighbours - the Grahams - to use a piece of land he owned, under a grazing agreement. After the agreement expired, Mr. Pye did not enter into another agreement because he wanted to develop the land, but the Grahams continued to occupy the land. After 12 years the Grahams claimed the land under adverse possession and the House of Lords ruled for them.

After the decision of the House of Lords, Pye submitted the case to the European Court of Human Rights, asking for compensation by the UK government, alleging that it failed to enact adverse possession legislation compatible with Article 1 Protocol 1 of the ECHR.

The Fourth Chamber delivered a judgment in which it held that adverse possession constituted an uncompensated expropriation, which is in conflict with Article 1 of Protocol No. 1 of the Convention.

Afterwards, the Grand Chamber reversed the decision, holding that the contracting states enjoyed a wide margin of appreciation in implementing social and economic policies, and it was not unreasonable for a state to provide for the extinction of title where the requirements of adverse possession were satisfied.

The Grand Chamber considered that Article 1 of Protocol No. 1 was applicable to the case, as the applicant had lost ownership his land as a result of the operation of the legislation on adverse possession.

The Grand Chamber also noted that the applicant was affected not by a “deprivation of possessions” within the meaning of Article 1 of Protocol No. 1, but rather by a “control of use” of land.

The Court further considered that the existence of a 12-year limitation period for actions for recovery of land pursued a legitimate aim in the general interest. There was also a general interest in the extinguishment of title at the end of the period. The Grand Chamber concluded that the fair balance required by Article 1 of Protocol No. 1 was not upset in the applicant's case.

- On the other hand, the decision was not unanimous: five Judges expressed a joint dissenting opinion and two Judges expressed a separate dissenting opinion.
- The “core” of the dissenting opinions of the five Judges is that *“in the case of unregistered land, title was made out by establishing a number of years’ possession. Title deeds served only as evidence in support of possession, and could be defeated by a person who could prove actual (adverse) possession for the requisite number of years. In such a system, the extinguishment of title at the end of the limitation period could be seen as a coherent element in the rules on acquisition of title.*

In the case of registered land, however, title depends not on possession, but on registration as the proprietor. A potential purchaser of land can ascertain the owner of the land by searching the register, and there is no need for a potential vendor to establish title by proving possession....

*While we can accept that, where land is abandoned, it may be in the general interest that it should be acquired by someone who would put it to effective use, **we are unable to accept that the general interest would extend to depriving a registered landowner of his beneficial title to the land except by a proper process of compulsory acquisition for fair compensation ...”.***

As the Pye case shows, there is a clear **tension between land registries and adverse possession**, tension that is confirmed also by the comparative analyses of Moccia (1993) and Marais (2011).

This is not surprising, bearing in mind that adverse possession contains a counter-principle capable of defeating even the most reliable and professionally handled system of registration.

- The comparative perspectives above mentioned demonstrate that **the requirements for adverse possession are stricter in jurisdictions with a positive registration system.**
- Very instructive from this point of view is the experience of English law:
- Prior to the Land Registration Act of 2002, a registered owner's title could simply be extinguished after 12 years of sustained possession by the squatter (as it happened in the *Pye v. Granham* case), and there was no mechanism to alert the registered owner to the fact that his title to land may be automatically extinguished after the 12-year period.

- The Land Registration Act 2002 instead, although allowing the squatter to apply to be registered as owner of the dispossessed land after 10 years of continued possession, requires the registered owner to be given an opportunity to claim his land back. The registered owner has two years in which to regularize his possession of the land by evicting the squatter.

The explanation of the change provided by the report “Land Registration for the Twenty-First Century” explains: *“We consider that this new scheme strikes a fairer balance between landowner and squatter than does the present law. It also reflects the fact that the basis of title to registered land is the fact of registration, not (as is the case with unregistered land) possession”*.

Also the German example demonstrates that the requirements for acquisitive prescription and adverse possession are much stricter when the correctness of the registry is guaranteed by a “positive” system, as in that State land can be acquired by adverse possession only after 30 years and only according to very strict requirements.

An opposite approach is instead followed by countries with a “negative” registration system, like France and Italy. In these countries (with the exception of the few Italian areas where the tabular system applies), registration does not confer or guarantee title, with the result that the buyers must examine the deeds and draw their own conclusions.

These registration systems couldn't survive without acquisition by adverse possession (*usucapio*): it ensures that ownership and possession coincide, especially in situations where there may be defects as to ownership in the registry; proof of possession allows people to avoid the *probatio diabolica* (devil's burden), which would consist of climbing up the chain of title to its origin.

Regarding adverse possession, we can therefore conclude that negative registration systems comply with human rights better than positive ones.

HUMAN RIGHTS AND INDEFEASIBILITY

The Pye case has highlighted that human rights may have a significant future role to play in real property law.

This could happen not only with regard to the close interaction between land registries and adverse possession, but also about the role of *indefeasibility*, which is a foundation stone of the **Torrens system**

Not surprisingly the issue of the relationship between human rights and indefeasibility is thoroughly investigated by scholars and courts of states that apply the Torrens system.

Howell noted, before the Pye case, that a *“right lost through failure to register may well be seen as an expropriation of a property interest without compensation”*.

The Scottish Law Commission's discussion paper on land registration (2004) sought to balance the conflict between Torrens system and human rights by suggesting that any indemnity given to the purchaser of a void transaction should not be by way of indefeasible title, but in monetary compensation.

Griggs (Possession, Indefeasibility and Human Rights, 2008)

*“as human rights jurisprudence continues to expand, **Torrens legislation needs to resolve the inherent tension that may arise between it and human rights.** As we move inexorably to a national conveyancing system in terms of process, any harmonisation of the substantive law should address the **dilemma posed by the interaction of possessory based principles to a system of title by registration.** The type of litigation encapsulated in *Pye* seems little to do with advancing human rights, yet it directly attacks a system of land registration ...*

.... In summary, the questions raised here will not be answered by mechanical formula, the application of economic theory, or by resort to historical reference. It is not about 'protection or redistribution; it is the protection of whom, and the distribution of what.' It is this which must be answered, and with land being in 'defined and limited supply', the answer that should be given, is a strong preference for the precepts, ideals and values provided within and by, the Torrens system of land registration".

- The compatibility between human rights and land registries could be similarly put under question in the German system, where the conclusiveness of the title is immediately assured in no less effective terms.
- The Austrian Grundbuch and the Italian Libro Fondiario – which are designed to protect the right of a *bona fide* purchaser after the short term of sixty days (three years in absence of notification) – appear to be safer from this point of view.

In any case it is important to stress out that *“in the context of Article 1 of Protocol No 1, the States are under a positive obligation to provide judicial procedures that offer the necessary procedural guarantees ... This means in particular that Article 1 of Protocol No 1 implies that any interference with the peaceful enjoyment of possessions must be accompanied by procedural guarantees ... In ascertaining whether this condition has been satisfied, a comprehensive view must be taken of the applicable judicial and administrative procedures”* (ECHR, *Vontas and Others v. Greece*, 2009).

This statement is perfectly in line with the opinion expressed by the distinguished Italian scholar Nicola Coviello in 1924: *“The principle of public faith is very useful, if it is based on the principle of legality, but if it were accepted without this, would lead to pernicious consequences. The interest of third parties would be protected, and sacrificed instead the interest of the legitimate owners, the mentally incompetent persons, etc, who deserve equal protection”*.

ECHR AND THE SAFEGUARD OF LEGAL CERTAINTY

The ECHR considers essential also the **safeguard of legal certainty**. In the above mentioned case *Vontas vs Greece*, the Court declared that, with specific regard to land registries, “*a system of title deeds exists in order to ensure legal certainty as to the ownership of land. Subsequently, these titles can be relied upon by owners as proof that a piece of land belongs to them. The fact that in the present case ... the applicants were unable to prove events which took place in the distant past was in the Court’s view and in the circumstances of this case contrary to the principle of legal certainty* » (§ 41).

Fener Rum v. Turkey (no. 14340/005)

Another violation of the principle of lawfulness was found by the ECHR in the decision by the Turkish authorities to void - after a considerable amount of time - a title to an immovable, against the interest of a good-faith third party (the Ecumenical Patriarchate, an Orthodox church in Istanbul).

The Court considered that the striking out by the Turkish courts of the applicant foundation's property title and its removal from the land registers, 38 and 44 years after the acquisition of the properties in question, had amounted to an interference in its right to the peaceful enjoyment of its possessions.

The Turkish courts had based their decisions on the fact that foundations made up of religious minorities - whose constitutive documents did not contain a statement that they had capacity to acquire immovable property - were precluded from acquiring such property by any means. However, the applicant foundation's acquisitions had been validated by a certificate from the provincial governor's office and entered in the land register. The applicant foundation was thus certain of having acquired the properties lawfully.

For 38 and 44 years the applicant foundation had been able to enjoy its property as a legitimate owner, paying the various taxes due in respect of its assets. Thus, the interference in its right to the peaceful enjoyment of its possessions seemed incompatible with the principle of the rule of law. The Court noted that the legislation governing the constitutive documents of foundations had been amended in 2002 and that they could now acquire immovable property; however, the applicant foundation had not benefited from that change in the law. In those circumstances, the Court concluded that there had been a violation of A1P1

Zehentner v. Austria (no. 20082/02)

Another interesting decision of the ECHR on the topic of enforcement proceedings which could have a strong impact also on land registries is **Zehentner v. Austria**, in which the Court found a violation of both article 1 protocol 1 and article 8 of the Convention.

The Court stated that, while generally there may be good reasons for having an absolute time-limit for lodging an appeal against a judicial sale of real estate, specific justification would be required where a person lacking legal capacity is concerned. In the case at question, neither the protection of the bona fide purchaser nor the general interest of preserving legal certainty are sufficient to outweigh the consideration that the applicant, who lacked legal capacity, was dispossessed of her home without being able to participate effectively in the proceedings and without having any possibility to have the proportionality of the measure determined by the courts.

Buj v. Croatia (no. 24661/02)

- In this decision the Court sanctioned the excessive duration of the procedure for the registration of the title to a piece of land property.
- In 1994 the applicant's mother died and inheritance proceedings were started. In 1999 in a decision issued by the Municipal Court, the property was distributed between the applicant and his brother. Ownership of the property was to be registered after the decision became final. An appeal lodged by the applicant's brother was declared inadmissible and was served on the applicant's representative in 2002. The applicant's ownership of the inherited property had at the date of the proceeding not been recorded in the land register.

- The applicant complained about the excessive length of the proceedings and the lack of an effective remedy in relation to that grievance. He further alleged that the length of proceedings had infringed his right to the peaceful enjoyment of his possessions as guaranteed by A1P1.
- The ECHR considered that the length of the proceedings was excessive and held unanimously that there had been a violation of A. 6 § 1 and 13. Having regard to its finding of a violation of the mentioned articles of the Convention, the Court also held unanimously that it was not necessary to examine whether there had been also a violation of A1P1.

CONCLUSIONS

An overall analysis of the jurisprudence of the ECHR on the topic of real property law and land registries (Petrelli, 2014) clearly demonstrates that a great importance is given to the principle of legitimate expectation and to the safety of real property transactions, always in the perspective of finding the necessary proportionality and balance between private and public interests.

We can therefore conclude that, the achievement of the mentioned principles and objectives – which is clearly connected to the principle of lawfulness - demands a land registration system that is able to guarantee the completeness and the accuracy of the land registry, of course within the limits of the laws applied in the single contracting States.