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PROTECTION OF PROPERTY UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE GEORGIAN CONSTITUTION: ANALYSIS OF THE JUDICIAL PRACTICE OF BALANCING PROPORTIONALITY OF INTERFERENCE WITH THE INDIVIDUAL PROPERTY RIGHTS

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INTRODUCTION

Protection of private property is one of key cornerstone issues in development of liberal economy and building stable democratic political and legal system, which would be serving interests of modern civil society and interests of individual members of that society. In such a system state would be acting as a guarantor of effective enjoyment of property

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rights and would not be interfering in free circulation of property between private individuals. In other words the modern state's function is to safeguard property.[2] Such a modern state should not impose unnecessary restrictions on the right to peacefully enjoy property, unless they are absolutely necessary, proportionate and based on the principles of rule of law, which are the crucial foundations for ensuring effective exercise of the right to peaceful enjoyment of possessions.

The notion of private property was never recognised in the Soviet legal system, which for political reasons focused on protection of State property and socialist property. Private land ownership and ownership of real estate property, contrary to a possibility to have transactions in land and immovable property in liberal economy societies, was not recognised and was not allowed. It was limited to the right to use, to own and to dispose of property. But these rights, especially the rights to own and dispose of property were limited in law and in practice, circumventing the very essence of the right to peaceful enjoyment of possessions.

Thus, for instance, the Foundations of the USSR civil legislation declared that an individual owner had a right to own, use and dispose of property, however, they further established a discriminatory subdivision of property into its several types – the socialist property, which comprised of State property (so-called "peoples' property") and property of collective farms, professional trade unions and other collective organisations that were managing state-owned property. The Foundations of civil legislation that were used as sources of legislative drafting for Civil Codes of the Soviet Socialist Republics, also established a right to have individual or personal property, which was limited in scope of ownership. For instance, every citizen had a right to have personal property based on his/her "labour-related incomes", which could only be used for aims that were not contrary to "the interest of society". A person had a right to own only one house (or a part of it) of a particular size determined by law. Villagers, who were all members of the collective farms, could only own a limited number of domestic animals.[3] Personal property could be "requisitioned" or "confiscated", in the interests of the State or society, with payment of compensation and without it, respectively. Regime of protection of personal property was also much weaker than the State property that was better protected by criminal and administrative legislation and relevant law enforcement machinery.[4] This was also underlined in the provisions of 1977 Brezhnev's era Constitution of the USSR, whereas Article 61 of that Constitution established a duty on the citizen to protect socialist property as a highest valued property in existence. Such a legal approach fully reflected the Marxist approach to socialist property as a mean of production in socialist society, which in turn reflected the approach to the law of property

[2] This idea is not new, for instance, one of the greatest legal philosophers of the past John Locke has already expressed it in the Second Treatise on Civil Government – "The Government has no other end but preservation of property".

[3] Foundations of the Civil Legislation of the USSR (Articles 19 – 32), adopted by the *Verkhovny Sovet* of the USSR on 8 December 1961, with changes and amendments as in force in 1981.

[4] This attitude has changed and now under the provisions of the new Georgian Civil Code, the state's property rights are protected in an equal manner as the rights of private persons.

as a group of legal norms regulating the conditions of attribution of means of economic production and results of labour by the state (representing the interests of working class) who owned, used and disposed of the aforementioned items. This political economy approach made an emphasis on prevalence of collective and state property over private property of an individual, which meant that the property rights of every private person were generally diminished[5] notwithstanding declaration of joint people's ownership of land, natural and other resources that were declared state-owned, i.e. owned by all people.

Both the provisions of the USSR Constitution and the Foundations of Civil Legislature did not really reflect the provisions of international law, related to protection of property rights, which were adopted much earlier, as they greatly emphasised on dominance of socialist property over personal property. In particular, in comparison with the mentioned legal acts, Article 17 of the Universal Declaration of Human Rights, adopted and proclaimed by the General Assembly of the UN on 10 December 1948, with participation of the three original Soviet members of the UN, established that "everyone has the right to own property alone as well as in association with others" and that "no one shall be arbitrarily deprived of his property".[6] The approach taken in Soviet jurisprudence and reflected in Constitution and Foundations was also quite different from the spirit, formulations and notions used in the text of Article 1 of Protocol No. 1 to the Convention, adopted in 1952, which established that "every natural or legal person is entitled to the peaceful enjoyment of his possessions. 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." It also established that the establishment of the right to property "shall not 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."[7]

The changes brought to the Constitutions of the former Soviet States, after dissolution of the Soviet Union and relevant declarations of independence of these states, reflected on the approaches taken to protection of property, declaring that a right to peaceful enjoyment of possessions is a fundamental right, protected by law and its enforcement machinery, contrary to the Soviet times when this right was neglected. These constitutional novelties also prohibited any arbitrary interference into the right to peaceful enjoyment of possessions or any interference not based on law. For instance, Article 21 of the Constitu-

[5] To rephrase John F. Kennedy: "The rights of every man are diminished when the rights of one man are threatened." Address to the nation, 11 June 1963.

[6] The right to property was not recognised in the International Covenant on Civil and Political Rights. The same right was also presented quite in a different manner in Article 14 of the African Charter on Human and Peoples' Rights as a right guaranteed, but confined to some limitations and contained "human and peoples" duties arising from the Charter. A similar right to property with analogous limitations is also established by Article 21 of the American Convention on Human Rights (treaty adopted on 22 November 1969). Also, Convention of the Community of Independent States on Human Rights and Fundamental Freedoms (former Soviet Union states), Article 26, largely repeated the first sentence of Article 1 of Protocol No. 1, even though its wording is quite different.

[7] See, Article 1 of Protocol No. 1, adopted on 20 March 1952 in Paris.

tion of Georgia[8], with changes and amendments effectuated in 2006, developed the principles established by Article 1 of Protocol No. 1, and specified that:

"1.The property and the right to inherit shall be recognised and guaranteed. The abrogation of the universal right to property, of the right to acquire, alienate and inherit property shall be impermissible.
2. The restriction of the rights referred to in the first paragraph shall be permissible for the purpose of the pressing social need in the cases determined by law and in accordance with a procedure established by law.
3. Deprivation of property for the purpose of the pressing social need shall be permissible in the circumstances as expressly determined by law, under a court decision or in the case of the urgent necessity determined by the Organic Law and only with appropriate compensation."

Thus, the new Constitution of Georgia incorporated the approaches taken in the case-law of the European Court of Human Rights to protection of property and established a higher degree of protection to property rights than it was initially provided by Article 1 of Protocol No. 1 to the Convention.[9] In particular, Article 21 of the Constitution established that interference with property rights to acquire, alienate and inherit shall be effectuated only in the event of existing "pressing social need" and "in accordance with the procedure established by law". It also prohibited any deprivation of property without a judicial decision and without compensation, which is not exactly always similar in the practice of the European Court of Human Rights.[10] The domestic legislation seems to firmly prohibit any deprivation of property without compliance with the substantive and procedural requirements of law and relevant compensation to be pa*id.*[11] [12] A similar approach was adopted to certain sensitive areas of property protection in Georgia, such as for instance restitution

[8] Similarly, Article 41 of the Constitution of Ukraine, 28 June 1996, established that: "(1) Everyone has the right to own, use and dispose of his or her property, and the results of his or her intellectual and creative activity. (2) The right of private property is acquired by the procedure determined by law. … (4) No one shall be unlawfully deprived of the right of property. The right of private property is inviolable. (5) The expropriation of objects of the right of private property may be applied only as an exception for reasons of social necessity, on the grounds of and by the procedure established by law, and on the condition of advance and complete compensation of their value. The expropriation of such objects with subsequent complete compensation of their value is permitted only under conditions of martial law or a state of emergency. (6) Confiscation of property may be applied only pursuant to a court decision, in the cases, in the extent and by the procedure established by law."

[9] Adopted on 24 August 1995, with changes and amendments of 27 December 2006, interestingly, the 1921 Constitution of Georgia, a legal document establishing a number of fundamental rights for citizens, established equality in exercises of commercial and economic freedoms by the individuals.

[10] The report Property Rights in Post-Revolutionary Georgia states that: "Georgian legislation firmly safeguards property rights, mentioning only very specific conditions under which confiscation is permissible. Two Georgian laws regulate this field: the Organic Law of Georgia on Rules for Expropriation of Property in the Public Interest under Exigent Circumstances (1997) and the Law of Georgia on Rules for Expropriation of Property for *Sine Qua Non* Public Necessity (1999)." *http://transparency.ge/sites/default/files/Property%20Rights%20in%20Post-Revolution%20Georgia.pdf.*

[11] At the same time, the European Bank for Reconstruction and Development in 2007 found that some Georgian legislation did not fully meet international standards or was not fully effective with regard to corporate governance, insolvency, and secured transactions. (Georgia, Nations in Transit, by Elizabeth Fuller). *http://www.freedomhouse.org/uploads/nit/2009/Georgia-final.pdf.*

[12] Several cases concerning Georgia concerned expropriation of property from the foreign investors without proper compensation paid to them. These cases were examined by the International Centre for Settlement of Investment Disputes (*The Republic of Georgia v. Ioannis Kardassopoulos AS*, ICSID 12 November 2010; *Ioannis Kardassopoulos & others v. The Republic of Georgia*, ICSID 3 March 2010; *Itera International Energy LLC & Itera Group NV v. Georgia*, ICSID 4 December 2009).

of housing and property to the victims of Georgian-Ossetian Conflict, in a way it has been analysed by the opinion of the experts of the Venice Commission[13], one of whom was the member of the European Commission of Human Rights, which have stated that:

"…with regard to property, and in any particular case, the requisite fair balance had to be struck. … The striking of a fair balance depends on many factors, and it is of vital importance that the applicable procedures are such to enable that all relevant factors are taken into due consideration… Although Article 1 of Protocol No. 1 does not expressly require the payment of compensation for a taking of, or other interference with property, in the case of a taking (or deprivation) of property, compensation is generally implicitly required. … taking of property without an amount reasonably related to its value would normally constitute a disproportionate interference which could not be considered justifiable under Article 1. Article 1 does not, however, guarantee a right to full compensation in all circumstances, since legitimate objectives of "public interest", such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value. … Finally, an interference with the right to property must also satisfy the requirement of legal certainty, or legality … a deprivation of property a taking must be "subject to the conditions provided for by law" … the State (or public authority) must comply with adequately accessible and sufficiently precise domestic legal provisions, which satisfy the essential requirements of the concept of "law". This means not only that the interference in question must be based on some provision of domestic law, but that there must be a fair and proper procedure, and that the relevant measure must issue from and be executed by an appropriate authority, and should not be arbitrary."[14]

The aforementioned approach is clear and logical, is following the general approach taken in public and private international law to such matters as property taking, it is an easy to follow approach to be taken by the state and judicial authorities in practice in cases relating to interferences with property rights. However, plainly speaking, it does not take into account particular circumstances of interference with property rights. Let's assess how it is being applied in the practice by the European Court of Human Rights in cases concerning Georgia[15] and by the Georgian Constitutional Court[16] and which criteria are being applied to decide on whether property rights were unlawfully interfered with.

[13] Nevertheless, in certain areas, like town planning taking of property by means of expropriation without relevant compensation was being discussed as a problematic issue. *Human Rights in Georgia: Report of the Public Defender in Georgia: Second Half of 2006,* Tbilisi 2007, pp. 97 – 117.

[14] Opinion of the Venice Commission on the Draft Law on Restitution of Housing and Property to the Victims of the Georgian-Ossetian Conflict of the Republic of Georgia, adopted by the Venice Commission at its 60th Plenary Session (Venice, 8-9 October 2004) on the basis of comments by Mr Pieter Van Dijk and Mr Peter Paczolay (§§ 26 -27). *http://www.venice.coe.int/docs/2004/CDL-AD(2004)037-e.asp.*

[15] It is worth noting that Article 1 of Protocol No. 1 entered into force with respect to Georgia on 7 June 2002 (see *Nikolaishvili v. Georgia* (dec.), no. 30272/04, 7 June 2009), thus the Court's competence ***ratione temporis*** extends to the allegations of property violations only after that date.

[16] From a practical point of view judgments of the Constitutional Court are clear indicators of the domestic constitutional practice, even though under the case-law of the European Court recourse to the Constitutional Court of Georgia cannot be required to exhaust domestic remedies (see ***Apostol v. Georgia*****,** no. 40765/02, § 46, ECHR 2006-XIV).

APPROACHES TO PROTECTION OF PROPERTY TAKEN BY THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

The right to property (right to peaceful enjoyment of possessions) established by Article 1 of Protocol No. 1 covers a wide range of economic interests, which include not only classical property objects, but it also covers such objects as movable and immovable property, tangible and intangible interests, including shares, patents, copyright, intellectual property rights, permits and licenses to run business, arbitration and judicial awards, landlord entitlements to rent, economic interests connected with the running of a business (clientele, goodwill and business reputation), the right to exercise profession, a legitimate expectation to obtain something into ownership that is sufficiently established, property and social privileges that are sufficiently established in law, etc.[17] In short Convention and the Court's case-law protect a "bundle" of economic rights[18] and not only the classical "triad" of rights that were traditionally protected in the Soviet civil law (right of use, right to own and right to dispose of). Furthermore, the Court, in examining complaints under Article 1 of Protocol No. 1, created a system of assessing the complaints from the point of view of compliance with three distinct rules, which are said to include the principle that everyone has the right to peaceful enjoyment of possessions, that deprivation of possessions shall be subjected to certain conditions (interference with property must be done in the public interest and be subject to the conditions provided for by law and/or according to the general principles of international law) and that the states have the power to enforce such laws as they deem necessary for specific purposes (in the general interest and to secure payment of taxes or other contributions or penalties).[19] It goes without saying that the principles of rule of law and legal certainty enshrined in the Convention provide that laws that were used as a condition for interference are sufficiently accessible and foreseeable.[20]

It is also to be mentioned that interference with the right to property shall serve legitimate aim and shall be proportionate to that aim, meaning that there should be a reasonable relationship of proportionality between the means used to enforce the prohibition and the aim sought to be realised (so-called "fair balance test").[21] In any case any interference with property rights, either control of use of property, its expropriation or depriva-

[17] Monica Carss-Frisk. *The right to property: A guide to the implementation of Article 1 of Protocol No. 1 to the European Convention on Human Rights.* Human rights handbook, No. 34, 2001; Aida Grgić, Zvonimir Mataga, Matija Longar and Ana Vilfan. *The right to property under the European Convention on Human Rights. A guide to the implementation of the European Convention on Human Rights and its protocols.* Human rights handbooks, No. 10. http://book.coe.int/sysmodules/RBS_fichier/admin/download.php?fileid=2994.

[18] One of the examples of seeing property as a bundle of economic rights and interests is the approach taken in the Bilateral Investment Treaty between Ukraine and Georgia of 9 January 1995 that recognises two types of protected property rights – investments (movable and immovable property, shares and shareholdings, credits, intellectual property rights, goodwill and commercial secrets, licences and permits, concessions for natural resources) and revenues (financial income, gains, interests, shareholding, royalty and various other payments), which have a varying definition.

[19] *Sporrong and Lönnroth v. Sweden*, 23 September 1982, § 82, Series A no. 52.

[20] *Brumărescu v. Romania* [GC], no. 28342/95, § 61, ECHR 1999-VII.

[21] *AGOSI v. the United Kingdom*, 24 October 1986, § 54, Series A no. 108.

tion, must not be arbitrary, must be sufficiently substantiated, having sufficient legal and factual basis. To this end, the practice of the European Court never expressly speaks of such a factor as existence of a "pressing social need" in interfering with property. It is rather a test that is being used in assessing legitimacy and proportionality of interference with the rights envisaged by Articles 8 – 11 of the Convention. Also, contrary to the provisions of Article 21 of the Constitution of Georgia, the case-law speaks not only about interference with property that must be effectuated on the basis of procedure established by law, but also of the need to comply with the requirements of substantive law that constituted the grounds for such an interference.[22] The practice of the Court also underlines that this provision does not expressly require the payment of compensation for each and every instance of interference with property, but in order to be seen as proportionate and just to the aim of interference with property pursued compensation would be required for such types of deprivation of property effectuated by the State as nationalisation, expropriation or taking of property.[23] Moreover, practice of the Court also allows states wide margin of appreciation in matters of interference with property related to public law relations and more specifically to such matters as taxation, securing payment of taxes, customs duties or other contributions or penalties.[24]

The abovementioned approaches are also reflected in the case-law of the European Court of Human Rights in relation to Georgia. For instance, in the judgment of the Court in the case of *Amat-G Ltd and Mebaghishvili v. Georgia*, of 27 September 2005[25], it ruled that lengthy failure to comply with the final judicial decisions given in the applicants' favour constituted an interference with their right to the peaceful enjoyment of their possessions and upset a fair balance of proportionality between the reasons for interference with the applicants' legitimate expectation to obtain enforcement of judgments and the reasons for which the state failed to enforce the judgments at issue. It ordered the state to pay the applicants compensation for pecuniary and non-pecuniary damage arising from breach of their right to peaceful enjoyment of their possessions. The Court adopted an interesting reasoning in this case:

"… judgment … provided the applicant company with an established, enforceable claim which constituted a "possession" within the meaning of Article 1 of Protocol No. 1 … The first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful: the second sentence of the first paragraph authorises a deprivation of possessions "subject to the conditions provided for by law" … It follows that the issue of whether a fair balance has

[22] Harris, O'Boyle and Warbrick. *Law of the European Convention on Human Rights.* Oxford University Press, Second Edition. 2009. pp. 669 – 672; Karen Re*ld. A Practitioner's Guide to the European Convention on Human Rights.* Thomson/Sweet and Maxwell. London, 2008. pp. 310 – 317.

[23] *James and Others v. the United Kingdom*, 21 February 1986, § 54, Series A no. 98.

[24] *Gasus Dosier- und Fördertechnik GmbH v. the Netherlands*, 23 February 1995, § 74, Series A no. 306-B.

[25] *Amat-G Ltd and Mebaghishvili v. Georgia*, no. 2507/03, ECHR 2005-VIII.

been struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights becomes relevant only once it has been established that the interference in question satisfied the requirement of lawfulness and was not arbitrary…"

The same principles of respect to the property rights were underlined in a judgment adopted in a different case against Georgia brought by the applicants (*"Iza" Ltd. and Makrakhidze v. Georgia*) and adopted on 27 September 2005[26], where the Court found that a fact that the applicant companies were unable to have final judgments in their favour enforced against the State and entities that acted on its behalf constituted an interference with their right to the peaceful enjoyment of their possessions.

In another judgment in application brought against Georgia (*Klaus and Iouri Kiladze v. Georgia*), on 2 February 2010[27], the European Court had to rule whether the applicants' right to peaceful enjoyment of possessions was breached by the domestic authorities which allegedly arbitrarily denied two brothers, who were the victims of political repression during the Soviet era, compensation for damages based on the Law on victim status for persons subjected to political repression. In particular, the Court had to establish whether the applicants had legitimate expectation to receive such pecuniary and non-pecuniary compensation under the provisions of the relevant domestic law, but were arbitrarily denied it. The Court stated that:

"…It should be noted here that the jurisprudence of the Court in the matter, the notion of "property" can refer to either "existing possessions" or assets, a person is ought to receive, under which an applicant may claim to have at least a "legitimate expectation" of obtaining effective enjoyment of a property right …

… Given the foregoing, the Court finds that at the time of referral to the domestic courts, the applicants had, under Article 9 of the Act of December 11, 1997, a claim sufficiently established to be enforceable and they could legitimately claim recovery of damages against the State. This leads to the conclusion that this part of their action, Article 1 of Protocol No. 1 was applicable…"

Thus, it declared part of the applicant's complaints inadmissible, being incompatible *ratione materiae*, as there was no legitimate expectation to receive property the applicant's claimed in restitution and thus no right of property established for the applicants.[28] Nevertheless, the Court found that the applicant's had a sufficiently established claim to

[26] *IZA Ltd and Makrakhidze v. Georgia*, no. 28537/02, 27 September 2005.

[27] *Klaus and Iouri Kiladzé v. Georgia*, no. 7975/06, 2 February 2010.

[28] Furthermore, in a different admissibility decision against Georgia, ***Andronikashvili v. Georgia*** ((dec.), no. 9297/08, 22 June 2010), the Court held that as the right to claim the restitution of property expropriated from Georgian nationals or their ancestors by the Soviet State during the 1920s and 1930s, had no basis in the domestic legal system. It followed from that the applicant's complaint about the unreasonable length of the domestic proceedings were incompatible ***ratione materiae*** with Article 6 § 1 of the Convention.

receive compensation for moral damages and their inability to receive such damages for lengthy inactivity by the state cannot be seen as being compatible with the applicants' right to peaceful enjoyment of their possessions. The Court awarded the applicants just satisfaction in form of application of the provisions of Article 9 of the law of 11 December 1997 concerning compensation, which established that right to receive compensation or compensation in the amount of 4,000 Euros, each, in damages.

In a different case concerning a breach of the applicants' property rights over a house (cottage) they possessed, *Saghinadze and 2 Others v. Georgia*, 27 May 2010[29], and in which they had been living for more than ten years on the basis of an administrative decision allocating that cottage to the internally displaced persons from Abkhazia. The Court found that the first applicant had continuously been in the exclusive, uninterrupted and open possession of the cottage and used it for over ten years, and that had been tolerated by the authorities. Also, the applicants' right to use that house and prohibition to evict him from that house, which was established by legal acts confirming internally displaced persons' rights to use these kind of premises were ignored by the domestic authorities, including courts. The Court also noted that the domestic procedure established in law for eviction of the applicants from their cottage was not complied with as they were evicted not on the basis of the court order, but solely as a consequence of an oral order by the Minister of the Interior, by force through actions of the special police forces. Furthermore, the domestic courts failed to acknowledge the fact of continuous use of that cottage and the constant practice of the Supreme Court in respect of that type of cases. Thus, the Court ruled that such a deprivation constituted arbitrary practice and ordered Georgia to return the right to use the cottage or to give him another appropriate lodging, or to pay him a reasonable monetary compensation. In this case, the Court ruled that:

"… 103. The Court reiterates that the concept of "possessions" … has an autonomous meaning which is not limited to ownership of physical goods and is independent of the formal classifications in domestic law: the issue that needs to be examined is whether the circumstances of the case, considered as a whole, may be regarded as having conferred on the applicant title to a substantive interest protected by that provision … Accordingly, as well as physical goods, certain rights and interests constituting assets may also be regarded as "possessions" for the purposes of this provision … The concept of "possessions" is not limited to "existing possessions" but may also cover assets, including claims, in respect of which the applicant can argue that he or she has at least a reasonable and "legitimate expectation" of obtaining effective enjoyment of a property right … An "expectation" is "legitimate" if it is based on either a legislative provision or a legal act bearing on the property interest in question …

[29] *Saghinadze and Others v. Georgia*, no. 18768/05, 27 May 2010.

… 108. In the light of the above-mentioned factual and legal considerations and having due regard to the circumstances of the present case assessed as a whole, the Court concludes that the first applicant had a right to use the cottage as his accommodation and that this right had a clear pecuniary dimension. It should therefore be regarded as "a possession" for the purposes of Article 1 of Protocol No. 1...

… 160. Consequently, having due regard to its findings in the instant case, and without prejudice to other possible measures remedying the violations of the first applicant's rights under Article 8 of the Convention and Article 1 of Protocol No. 1, the Court considers that the most appropriate form of redress would be *restitutio in integrum* under the IDPs Act, that is, to have the cottage restored to the first applicant's possession pending the establishment of conditions which would allow his return, in safety and with dignity, to his place of habitual residence in Abkhazia, Georgia. Alternatively, should the return of the cottage prove impossible, the Court is of the view that the first applicant's claim could also be satisfied by providing him, as an internally displaced person, with other proper accommodation or paying him reasonable compensation for the loss of the right to use the cottage, the amount of which should be agreed on by the parties within six months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention. However, should the parties fail to reach agreement within that period, the Court reserves the right to fix the further procedure under Article 41 of the Convention, in order to determine itself the amount of such compensation (Rule 75 §§ 1 and 4 of the Rules of Court).

161. In addition, the Court has no doubt that the first applicant suffered distress and frustration on account of the violations of his various rights under the Convention and Article 1 of Protocol No. 1. The resulting non-pecuniary damage would not be adequately compensated for by the mere finding of these breaches. Making its assessment on an equitable basis, the Court awards the first applicant EUR 15,000 under this head."

In another case against Georgia *Tchitchinadze v. Georgia*[30], the Court found a breach of Article 1 of Protocol No. 1 for the following reasons:

"59. … the quashing of the final decision of 18 November 2004, which infringed the principle of legal certainty and interfered with the applicant's right to the peaceful enjoyment of the Mazniashvili estate, was a misuse of the reopening procedure under Article 422 § 1 of the CCP, not being justified by circumstances of a substantial and compelling character, and that it imposed an excessive and disproportionate burden on the applicant …"

The constant case-law of the Court also requires that the states allow measures of judicial protection for persons claiming that their property rights were breached.[31] Thus, in a

[30] *Tchitchinadze v. Georgia,* no. 18156/05, 27 May 2010.

[31] The situation might differ concerning protection of property rights of minority shareholders, whereas they cannot claim breach of their property rights if the actual victim was the legal entity, where they have a shareholding interest (see *Sultanishvili v. Georgia* (dec.), no. 40091/04, 4 May 2010.

judgment related to protection of property rights, adopted by the European Court in the case of *FC Mretebi v. Georgia* on 31 July 2007[32], the Court ruled that the applicant was denied in its right of access to a court to protect its property rights ensuing from obligations of a private party to pay the applicant compensation for transfer of a footballer. While not recognising a breach of a right to property, the Court found a breach of a right to judicial protection of property rights. In particular, it found that the domestic authorities unfairly denied the applicant right of vindicating its claim through the courts, which amounted to a breach of Article 6 of the Convention.

APPROACHES TO DEFINING PROPERTY IN THE CASE-LAW OF THE GEORGIAN CONSTITUTIONAL COURT

Similarly to approaches taken in the practice of the European Court of Human Rights, the Georgian Constitutional Court have ruled in a number of cases touching upon various economic interests arising from property. For instance, in a case of *LTD "Russenergoservice", LTD "Patara Kakhi" and JSC "Gorgota", individual company "Farmer" of Givi Abalaki and LTD "Energia" v. the Parliament of Georgia and the Ministry of Energy of Georgia*[33], the Constitutional Court underlined that the right to property and the right to inherit property were inalienable rights recognised by the Constitution. In particular, it mentioned that the property rights may only be overridden by pressing social needs determined by law. Limitation of constitutional rights could be justified only when the legitimate aim had been attained so that the valuables and the owner of that property were not separated. It ruled in this case that imposing the limitations implied fair balancing of interests, rather than replacing one interest with another.

In a different case, *Citizens of Georgia – Davit Jimsheleishvili, Tariel Gvetadze and Neli Dalalishvili v. The Parliament of Georgia*[34], the Constitutional Court ruled that the right to property was not absolute and that the state could impose certain restrictions on the property rights. The Court noted that the Constitution achieved a balance between private and public interests so that in cases of conflict of interests the public interest will prevail, and owners must tolerate certain interference with their property. The Constitution provided

[32] *FC Mretebi v. Georgia*, no. 38736/04, 31 July 2007.

[33] *LTD "Russenergoservice", LTD "Patara Kakhi" and JSC "Gorgota", individual company "Farmer" of Givi Abalaki and LTD "Energia" v. the Parliament of Georgia and the Ministry of Energy of Georgia*, decision of 19 December 2008, case no. 1/2/411, Published in *Sakartvelos Respublika* and CODICES database.

[34] *Citizens of Georgia – Davit Jimsheleishvili, Tariel Gvetadze and Neli Dalalishvili v. The Parliament of Georgia*, decision of 2 July 2007, case no. 1/2/384, published in *Sakartvelos Respublika* and a summary in CODICES database.

this balance in Article 21.2 and 21.3, under which interference with property by the state in the form of restricting or expropriating property is permissible only when there appears to be pressing social need and that it was unacceptable to introduce stricter limitations than those that are required by "pressing social need" and through the proportionality of interference principle. The Constitutional Court further mentioned that owners do have the opportunity of redressing their rights through civil law procedures, but they must be able to examine whether a decision to confiscate their property is well-founded and complies with legislative and constitutional requirements, including a requirement of pressing social need and relevant compensation for interferences with property.

In a case of *Citizens of Georgia – Zaur Elashvili, Suliko Mashia, Rusudan Gogia and Others and Public Defender of Georgia v. The Parliament of Georgia*[35], the Constitutional Court was requested to decide whether the rule of the Law on Entrepreneurs (Article 533) authorising a majority stockholder owning 95% of stocks in a joint stock company to acquire 5% of the voting stock for an equitable price (compulsory sale of stocks of minority stockholder), represented restriction or deprivation of property for the purposes of Article 21 of the Constitution and whether it met the constitutional criteria for either restriction or deprivation of property. The Court noted that expropriation of property could be characterised by direct or indirect participation of the state in a particular process of deprivation of property. However, the interference with minority shareholders' rights did not amount to property expropriation, within the meaning of Article 533 of the Law on Entrepreneurs. It ruled, however, that it amounted to "restriction" on the use of property mentioned in Article 21.2 of the Constitution, merely describing negative interference by the state. The Constitutional Court in this case came to the conclusion that this provision was unconstitutional as no fair balance was struck between the interests of private persons and the general public. In particular, it found that the rule under dispute was the determination of an equitable price for the stocks of minority stockholders. Where an equitable price was determined by the charter of the joint stock Company, and not by independent experts or brokerage companies, minority stockholders were deprived of the chance to challenge the price before the Court.

In a case of *"Avtandil Lomtadze and Merab Kheladze v. President of Georgia"*,[36] the Constitutional Court examined a case brought by a claimant that in 1997 the privatisation of state-owned enterprises had taken place, as a result of which the claimant had been created. In that way, "*Sakmilsadenmsheni"* Ltd. had acquired the ownership rights to a state enterprise and became, in its opinion, the legal successor and not the assignee of the purchased property. The claimant considered that its ownership rights, safeguarded by Article

[35] *Citizens of Georgia – Zaur Elashvili, Suliko Mashia, Rusudan Gogia and Others and Public Defender of Georgia v. The Parliament of Georgia*, decision of 18 May 2007, cases nos. 2/1/370, 382, 390, 402, 405, published in *Sakartvelos Respublika* and a summary in CODICES database.

[36] *"Avtandil Lomtadze and Merab Kheladze v. President of Georgia"*, decision of 5 May 2003, case no. 2/5/172-198, published in *Adamiani da Konstitutsia* and a summary published in CODICES.

21 of the Constitution, were directly violated, as it, as the newly created enterprise, had to compensate damage caused to an employee by the previously existing state enterprise. The Court, however, ruled that the claimant's assertion that after privatisation of the enterprise, compensation for damage caused to the health of an employee of a state enterprise should be carried out by the State. The Constitutional Court held that privatisation was the acquisition of the rights to state property by natural and legal persons or their associations; that, implied the acquisition of not only property rights (assets) but also obligations (liabilities). It accordingly did not find a breach of the right to property in the fact that the applicant succeeded to an obligation to pay compensation caused to health of a former employee of a privatised enterprise.

In a different case ruled upon by a Constitutional Court, *Citizens Vano Sisauri, Tariman Magradze and Zurab Mchedlishvili v. the President of Georgia*,[37] it underline that according to Article 21 of the Constitution property may be deprived on the ground of social necessity in circumstances directly determined by law, by a court decision or in case of urgent necessity determined by organic law and if appropriate compensation is made. Thus alienation of property of a public association by a governmental decree without any relevant grounds infringes the universal right to property entrenched in the Constitution since the members of the association are deprived of the possibility to benefit from the facilities established by them over the years. The disputed act, on which the interference with property was based, was not registered in the State Registry of Normative Acts at the Ministry of Justice, which would allow the Constitutional Court to examine the constitutionality of normative acts on an exceptional basis, but the Constitutional Court held that considering the contents of the act and its scope of regulation the constitutionality of the disputed act could be examined. In that case, the Constitutional Court held that the Prime Minister was not empowered to invalidate a legal act of the then supreme body by an individual, personal decree and thus interference with the applicant's property rights was not based on law.

CONCLUSIONS

Both the case-law of the European Court and the practice of the Constitutional Court of Georgia protect a variety of property rights, which include a variety of economic interests arising from the right to peaceful enjoyment of possessions. The tests established by the Convention, Court's case-law and the Georgian Constitution and the practice of the Con-

[37] *Citizens Vano Sisauri, Tariman Magradze and Zurab Mchedlishvili v. the President of Georgia*, decision of 23 February 1999, case no. 2/70-10, published in *Adamiani da Konstitutsia* and a summary published in CODICES.

stitutional Court of Georgia differ. In particular, the Convention uses the notion of "fair balance" between the means employed and the aim to be pursued. The practice of the Constitutional Court of Georgia looks into criteria of the pressing social need in interfering with property rights. Moreover, the practice of the European Court and Georgian Constitutional Court establishes clear criteria of the need to comply with the requirements of lawfulness in interfering with property and the need to avoid arbitrary interference. Both the procedural and substantive laws have to be complied with. Moreover, in cases relating to taking of property, the courts would tend to look at whether such a taking of property was followed by relevant compensation paid to those deprived of property. Both courts look into whether compensation had been paid to the persons whose property was taken. Thus, one can conclude that similar approaches are being taken by both the European Court and the Constitutional Court of Georgia in cases related to protection of property rights, notwithstanding the fact that Article 1 of Protocol No. 1 to the Convention and Article 21 of the Georgian Constitution provide for differing criteria for establishing whether a property right was breached by the State authorities and whether it was arbitrarily interfered with.

Generally, both the European Court of Human Rights and the Constitutional Court of Georgia are approaching the matters relating to protection of property rights with caution, analysing whether interference was based on law in first place and if so establishing whether a fair balance was struck between the interference with property rights and the public interest in the interference involved. Notwithstanding the difference in approaches practice of both courts is similar in its outcomes. The resulting judicial activity of both courts ensures stronger protection of property rights, coexistence of similar practices is important an important element of proof that both courts operate in a single European legal space with unique legal standards. The role of both courts in protection of property rights at the national level and at the European level cannot be underestimated and serves a good example of uniformity in protection of right to the peaceful enjoyment of possessions at European and domestic levels.