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COLLECTIVE PROPERTY THROUGH THE LENS OF THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

Abstract: *This paper aims to explore to what extent "property", as an ECtHR autonomous concept, includes the collective dimensions of property rights, as well as to systematize different collective dimensions of the right to property as addressed in the ECtHR case law. The underlying hypothesis of the paper, which was confirmed by research, is that the ECtHR failed to sufficiently elaborate on the collective dimensions of the right to property due to the causes that are not linked to cultural relativist arguments but to the ECtHR general approach of giving deference in examining domestic law pertaining to all the aspects of the right of property under Article 1 of Protocol No. 1 to the ECHR.*

Firstly, the key standards for protecting the right to property as developed through the ECtHR caselaw will be briefly presented. After that, selected ECtHR case-law on the collective dimension of the propriety rights of indigenous peoples and the caselaw on the restitution afforded in cases of denationalization will be examined to assess whether they diverge from the general protection of the right to property afforded by the ECtHR. The normative-legal method to analyze the case law of the ECtHR in terms of the protection it afforded to collective dimensions of the property right will be predominantly utilized.

Keywords: *right to property, collective dimension of the right to property, collective property, European Court of Human Rights, nationalized property, indigenous people*.

1. Protection of the right to property and the right to collective property in international instruments

The right to property is not recognized in either the United Nations International Covenant on Civil and Political Rights[1] or the United Nations International

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[1] International Covenant on Civil and Political Rights (ICCPR) 999 UNTS 171.

Covenant on Economic, Social and Cultural Rights[2]. On the universal level, the right to property is enshrined in Article 17 of the Universal Declaration of Human Rights (hereinafter: Declaration).[3] Although the Declaration does not have a legally binding character, many of its provisions, including those governing the right to property, enjoy such undisputed recognition as to be considered part of customary international law and therefore universally obligatory.[4]

On the other hand, the right to property is expressly envisaged in regional instruments for the protection of human rights to which two-thirds of all UN member states are parties.[5] This includes the American Convention on Human Rights (hereinafter: ACHR)[6], the African Charter of Human and Peoples' Rights (hereinafter: the African Charter)[7], and the Protocol No. 1 to the European Convention on Human Rights (hereinafter: P 1 ECHR).[8] The provisions of the three regional human rights conventions are not identically formulated but have a lot in common. They all guarantee the individual right to property and allow for its limitations in the public interest.

It has been argued in the literature that the regional human rights instruments recognize the right to property primarily as an individual right.[9] Conversely, the wording of the Declaration goes in the direction of a more extensive scope of the right to property considering that it specifies that the holder of the right to property can be either an individual on his/her own or an individual "in association with others".[10]

There are also specialized human rights instruments that are specifically tailored to protect certain collective aspects of the right to property. This is, primarily, the Indigenous and Tribal Peoples Convention (Convention No 169) of the International Labour Organization (ILO)[11], which remains the only binding international law instrument specifically applicable to indigenous peoples.[12] Its Article 14 recognizes, *inter alia,* the notion of indigenous peoples' collective ownership over land which they have traditionally occupied.[13] This was further reinforced in

[2] International Covenant on Economic, Social and Cultural Rights (ICESCR) 993 UNTS 3.

[3] Universal Declaration of Human Rights (10 December 1948) UN doc A/RES/217(III).

[4] European Parliament, At a Glance, The Universal Declaration of Human Rights and its relevance for the European Union, 1; J. G. Sprankling, "Toward the Global Right to Property", in: *The International Law of Property*, Oxford University Press: Oxford, 2014, 203.

[5] J. G. Sprankling, 203.

[6] American Convention on Human Rights 1144 UNTS 123, Article 21.

[7] The African Charter on Human and Peoples' Rights 21 ILM 58, Article 14.

[8] Article 1(1) of P 1 ECHR. See E. De Wet, "The Collective Right to Indigenous Property in the Jurisprudence of Regional Human Rights Bodies", *SA Yearbook of International Law*, 2015, 2.

[9] E. De Wett, 4-25.

[10] UNDHR, Article 17: Everyone has the right to own property alone as well as in association with others.

[11] International Labour Organisation Indigenous and Tribal Peoples Convention, 1989 (No. 169).

[12] M. Barelli, "The Interplay Between Global and Regional Human Rights Systems in the Construction of the Indigenous Rights Regime", *Human Rights Quarterly* 32(4)/2010, 954-955.

[13] The ILO Convention No. 169 was negotiated with the intent of replacing the ILO Convention No. 107 (International Labour Organisation Indigenous and Tribal Populations Convention, 1957 (No. 107)), which had also recognized the communal land rights of the members of indigenous population including natural resource

2007 by the U.N. Declaration on the Rights of Indigenous Peoples. Even though this Declaration does not have a binding character, it contains relevant provisions about indigenous peoples' collective property rights over land, territories, and resources as well as their cultural, intellectual, religious, and spiritual property.[14]

The United Nations Committee on the Elimination of Racial Discrimination has also called on states to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and take steps to return such lands and territories if the indigenous people were deprived of them. This means that the Committee has acknowledged the land-related property rights of the indigenous peoples under the International Convention on Elimination of All Forms of Racial Discrimination.[15] It is important to note, in the context of the present paper, that the said Convention was ratified by nearly all members of the Council of Europe.

In a vein similar to the ILO Convention No. 169, the American Declaration on the Rights of Indigenous Peoples gives due regard to the cultural, intellectual, religious, and spiritual property of this group.[16] In that respect, it unambiguously classifies indigenous peoples' property rights to their lands, territories and resources as collective rights.[17] However, it also constitutes a non-binding instrument and only a limited number of rights guaranteed therein constitute customary international law.

While the regional human rights adjudicatory bodies primarily apply the provisions of the ECHR, the ACHR, and the African Charter, which enshrine the individual right to property, those bodies, to a different extent, also protect the collective dimensions of the property right through their caselaw. Such an evolution of the right to property from an individual right to the right to property with a collective dimension is attributable to the fact that the regional bodies can interpret the respective treaty rights progressively and autonomously.[18] This approach can be explained through the notions of autonomous concepts and evolutive interpretation of the ECHR.

Namely, ever since the 1970s, the ECtHR developed the doctrine of autonomous concepts, characterizing as autonomous a significant number of concepts that figure in the ECHR, including "possessions" and "property".[19] The Inter-American

rights. The ILO Convention No. 107 is no longer open for ratification, but it remains in force in 18 countries that ratified it but have not ratified Convention 169. A total of 27 nations had ratified ILO Convention 107. See M. Barelli, 954-955; D. Shelton, "The Inter-American Human Rights Law of Indigenous Peoples", *University of Hawai'i Law Review* 35/2013, 938-941.

[14] See Articles 11 and 26 of this Declaration.

[15] International Convention on the Elimination of All Forms of Racial Discrimination, resolution 2106 (XX)2 of 21 December 1965.

[16] See Article 13 para. 2 of the American Declaration on the Rights of Indigenous Peoples: AG/RES.2888, XLVI-O/16, Adopted at the third plenary session, held on June 15, 2016.

[17] See Article 6 in conjunction with Article 25 of the American Declaration on the Rights of Indigenous Peoples: AG/RES.2888, XLVI-O/16, Adopted at the third plenary session, held on June 15, 2016.

[18] E. De Wett, 2015, 4; D. Shelton, 937-968.

[19] G. Letsas, "The Truth in Autonomous Concepts: How to Interpret the ECHR" *EJIL*, 15(2)/2004, 283-291.

bodies followed a similar approach, having insisted that terms in their respective regional human rights instruments have autonomous meaning.[20] Autonomous concepts should be interpreted as having an autonomous meaning in international law, regardless of their meaning in national legislation.[21] The second key feature of autonomous concepts relates to their flexibility, considering that they are subject to constant evolution. In academic literature, such flexibility was explained as a consequence of the evolutive interpretation by the ECHR which came to be known as a "living instrument" approach.[22] The principle of autonomous interpretation is deemed to have allowed European and Inter-American adjudicating bodies to define "property" in ways specific to indigenous peoples and to add a collective dimension to the right to property. The African Charter offers different kinds of protection than its European and American counterparts, considering that it envisages group rights.[23] Namely, when it comes to property, the African Court on Human and Peoples' Rights brought a relevant clarification by specifying that the right to property, in effect, can be individual or collective under the African Charter since "although addressed in the part of the Charter which enshrines the rights recognized for individuals, the right to property as guaranteed by Article 14 may also apply to groups or Communities" when interpreted in conjunction with Article 21, which regulates the collective rights of people.[24]

The available literature shows[25] that the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, along with the African Commission on Human and Peoples' Rights, "have done ground-breaking work" in expanding the scope of the right to property by being sensitive to group identity, while the European Court of Human Rights (hereinafter: ECtHR) is lagging behind such a development. Instead, the ECtHR has taken a more conservative position in its interpretation of the right to property when it comes to recognizing the collective dimension of the indigenous peoples' right to property, even though in principle it acknowledges their distinct way of life.[26]

This difference in approach towards the protection of collective dimensions of the right to property has been explained in scholarly literature as attributable to the cultural relativism introduced into the interpretation of human rights guarantees.[27]

[20] D. Shelton, 947.

[21] *R.L. v. The Netherlands*, Application No. 22942/93 European Commission on Human Rights, Decision of 18 May 1995; V. Ćorić, A. Knežević Bojović, "Autonomous Concepts and Status Quo Method: Quest for Coherent Protection of Human Rights before European Supranational Courts", *Strani pravni život* 4/2020, 31.

[22] G. Letsas, 298.

[23] J. M. Lundmar, "European Court of Human Rights for the Protection of Arctic Indigenous Peoples' land rights", doctoral dissertation, Faculty of Law School of Humanities and Social Sciences University of Akureyri Akureyri, November 2017, 68.

[24] The collective rights of peoples, when it comes to property, are envisaged by in Article 21, African Charter, and reads as follows: All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it. See J. M. Lundmar, 69.

[25] G. Pentassuglia, "Towards a jurisprudential articulation of indigenous land rights" *European Journal of International Law*, 22(1)/2011, 165-167; E. De Wet, 3.

[26] J. M. Lundmar, 1; E. De Wet, 27.

[27] E. De Wet, 27.

In contrast to the Americas and Africa, Europe constitutes a region where indigenous peoples are much fewer in number and, in most Council of Europe (CoE) member states, the issue of recognition of the collective property of indigenous peoples is not likely to arise.[28] In parallel, in the post-communist era, the ECtHR has developed fruitful jurisprudence pertaining to the transition from collective property to private property regimes. It has been argued by the ECtHR that such transition had been viewed as a necessary condition for transition to liberal democracy and alignment with the rule of law.[29] Although a similar transition from collective property to private property regimes was not limited to the European continent, the ECtHR is the only regional court that developed rich case-law in that regard.

Against this background, the authors of this paper aim to explore to what extent "property", as an ECtHR autonomous concept, includes the collective dimensions of property rights, as well as to identify and systematize different collective dimensions of the right to property as addressed in the ECtHR case law. The underlying hypothesis of the paper is that the ECtHR's jurisprudence failed to sufficiently elaborate on the collective dimensions of the right to property due to the causes that are not linked to cultural relativist arguments but are attributable to the ECtHR general approach of giving deference in examining domestic law pertaining to all the aspects of the right of property in the sense of P1-1. The authors will predominantly utilize the normative-legal method to analyze the case law of the ECtHR in terms of the protection it afforded to collective dimensions of the right to property.

The authors will first briefly present the key standards governing protection awarded under P1-1 which were developed through the ECtHR caselaw. Subsequent to that, the authors will examine the selected ECtHR case-law on the collective dimension of the right to persons pertaining to indigenous peoples as right holders and the caselaw revealing the ECtHR approach towards the restitution afforded in cases of denationalization. This will be done so as to assess whether they diverge from the previously identified general standards governing the protection of the right to property afforded by the ECtHR. In both sections, the authors will try to look for arguments brought by the ECtHR in cases when it diverges from the general standards of affording protection to different types of the right to property applied by the ECtHR.

Given an overwhelming number of property cases before the ECtHR dealing with the transition from collective to private property regimes and related implications,[30] the authors will not be able to analyse the entire body of the ECtHR caselaw cases. Instead, cases will be selected and a search will be done based on

[28] *Ibidem.*

[29] L. Dehaibi, "Liberal Property and Lived Property: A Critique of Abstract Universalism in the Human Right to Property", doctoral dissertation, McGill University, 2020, 162.

[30] For example, the ECtHR has heard over 1000 cases from Romania and Russia respectively. See. L. Dehaibi, 162.

the filters available on the Hudoc webpage. The preliminary search based on the given notion did not give a sufficient body of ECtHR jurisprudence as a result. More precisely, a search based on the term "collective property" gave only five results.[31] Therefore, the upgraded search was predominantly conducted utilizing the term "socially owned assets" and "nationalized property". The search concerning the land rights of indigenous people was conducted using the term "indigenous", which provided 48 results. However, this search did not include some relevant cases cited in literature, while insight into some of the cases revealed that the term "indigenous" was indeed included in the ECtHR judgment or decision but was not of particular relevance in deciding the case. The cases analysed were therefore selected by triangulation of results obtained on Hudoc, the cases cited in relevant caselaw and cases analysed in relevant literature.

In the research, the authors acknowledge Waldron's[32] distinction between the ideas of common and collective property to that of collective property. For him, in both cases, there is no individual to stand in a specially privileged situation with regard to any resource. Waldron[33] views the difference between the two notions in the following manner: in common property the rules governing access to and control of material resources are organized on the basis that each resource is in principle available for the use of every member alike, while in collective property, access to and the use of material resources in particular cases are to be determined by reference to the collective interests of society as a whole. For the purpose of this paper, the authors will only refer to the notion of the collective property and will try to predominantly focus on the types of above determined collective property since both the ECHR and the ECtHR through its case law give due regard to the notion of the public interest.[34]

2. Standards developed by the ECtHR under Article 1 of the Protocol No. 1 to the European Convention on Human Rights

Before delving into the ECtHR jurisprudence regarding collective property, it is worth briefly recalling the protection awarded under P1-1 and related tests applied by the ECtHR through its caselaw. This brief elaboration on the standards that the ECtHR applies to all property-related cases will further allow the authors to examine whether the ECtHR case law dealing with collective aspects of the right to property diverges from the general strand of the jurisprudence of the ECtHR in terms of providing the protection to the right to property, and if so, how is such departure justified.

[31] Out of these five cases, only one recognizes that there was a violation of the right to property.
[32] J. Waldron, "What is Private Property?", *Oxford Journal of Legal Studies*, 5(3)/1985, 313-349.
[33] *Ibidem.*
[34] The authors use the terms "general interest" and "common interest" interchangeably as synonyms.

Even though the wording of Article 1 of P 1 ECHR guarantees only the peaceful enjoyment of possessions, the ECtHR has stated as early as 1979 that it, in substance, guarantees the right to property.[35] The concept of "possessions" under P1-1 has an autonomous meaning and is therefore independent from its formal classification in domestic law. In ECtHR jurisprudence, "possessions" can be either "existing possessions" or claims which are „sufficiently established to be enforceable".[36] The concept of the so-called "existing possessions" is not limited only to the right of ownership but also includes a whole range of pecuniary rights such as rights arising from patents, shares, arbitration awards, established entitlement to a pension, and even rights arising from running a business.[37]

Claims which are "sufficiently established to be enforceable" are those claims in respect of which an applicant can argue that he or she has at least a "legitimate expectation" of obtaining a property right. [38] Such an expectation must be of a nature more concrete than a mere hope that they will be realized. An expectation is deemed legitimate if it is based on a legal provision or a legal act such as a judicial decision.[39] However, the ECtHR will not deem that a legitimate expectation exists if there is a dispute concerning the correct interpretation and application of domestic law.[40] When it comes to the collective dimension of property rights, the issue of whether a given collective property-related right is deemed an existing possession or a claim which is sufficiently established to be enforceable is one of the key issues in ECtHR jurisprudence.

P1-1 allows for interference with the peaceful enjoyment of possessions, if such interference, which may amount to deprivation of possession or control of the use of property, is in the public interest. Further, any such interference must be lawful and must strike a "fair balance" between the demands of the general interest and of the individuals fundamental rights (i.e. be proportionate).[41] It seems that the above balancing exercise which should be undertaken by the ECtHR is of particular importance in collective property related cases, as it gives due regard to collective dimensions of the right to property through underlining the relevance of public interest.

[35] Case of *Marckx v. Belgium*, Application no. 6833/74, Judgment of 13 June 1979, paras. 63-64; See more on the relevance of *Marckx v. Belgium* at: V. Ćorić, A. Knežević Bojović, "Indirect Approach to Accountability of Corporate Entities Through the Lens of the Case-Law of the European Court of Human Rights", *Strani pravni život,* 62(4)/2018, 30.

[36] A. Grgić *et al*, *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, 2007, Council of Europe, 7, https://rm.coe.int/168007ff55

[37] *Ibidem.*

[38] Registry of the European Court of Human Rights, *Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights Protection of Property*, 2024, para.11. https://ks.echr.coe.int/documents/d/echr-ks/guide_art_1_protocol_1_eng, last visited July 15, 2024.

[39] See Case of *Kopecký v. Slovakia,* Application No. 44912/98, Judgment of 28 September 2004, paras. 49-50.

[40] See Case of *Kopecký v. Slovakia,* Application No. 44912/98, Judgment of 28 September 2004, para. 50.

[41] See Case of *Beyeler v. Italy*, Application no. 33202/96, Judgment of 5 January 2000, paras. 108-114.

One other important element in examining whether a measure interfering with the peaceful enjoyment of possession is fairly balanced is the existence of compensation for such interference. In this regard, the ECtHR noted that Article 1 of P 1 ECHR (hereinafter: P1-1) does not explicitly encompass the right to compensation.[42] More specifically, the ECtHR in its previous case law held that P1-1 does not guarantee a right to compensation in full in all circumstances and consequently the legitimate objectives of public interest, such as those pursued by economic reforms or by measures improving social justice, could necessitate reimbursement being less than the real value of the property concerned. It is therefore noteworthy that the ECtHR opened doors for the possibility of awarding partial compensation under specific circumstances which may be particularly relevant for the caselaw pertaining to collective dimensions of the right to property. It remains to be seen whether the ECtHR applied this exemption in its case law pertaining to the protection of some forms of collective property.

3. Indigenous Peoples' Land Rights in European Court of Human Rights Jurisprudence

As it has been indicated before, the rights guaranteed by the ECHR and its protocols are primarily set to protect individual, rather than collective rights.[43] More specifically, it has been pointed out in doctrine that P1-1 requires states to refrain from interfering with individual rights. The evolution of human rights resulted in the ECHR being interpreted in line with the "theory of positive obligations", requiring states to take positive actions in order to ensure the effective realization of rights guaranteed by the ECHR.[44] However, when it comes to the collective rights of indigenous peoples, the existing ECtHR jurisprudence is yet to fully follow the approach employed by American and African human rights' protection bodies.

First of all, it should be noted that some European states do recognize the existence of land-related rights of indigenous peoples – for example, in 2005, Norway passed a law on communal lands as held by Sami in Finnmark Province in 2005,[45]

[42] It further reminded that it appears from the *travaux préparatoires* that the express reference to a right to compensation contained in earlier drafts of P1-1 was later excluded. See Case of *James and Others v. the United Kingdom*, Application no. 8793/79, Judgement of 21 February 1986, para. 64.

[43] G. Otis and A. Laurent „Indigenous land claims in Europe: The European Court of Human Rights and the decolonization of property" *Arctic Review on Law and Politics*, 4(2)/2013, 174.

[44] E. Ruozzi, "Indigenous Rights and International Human Rights Courts: Between Specificity and Circulation of Principles" APSA 2011 Annual Meeting Paper, Available at SSRN: https://ssrn.com/abstract=1902900

[45] Lov om rettsforhold og forvaltning av grunn og naturressurser i Finnmark (Fin-nmarksloven) https://lovdata.no/dokument/NL/lov/2005-06-17-8. The English translation of the Law is available at: https://lovdata.no/dokument/NLE/lov/2005-06-17-85 (Act relating to legal relations and management of land and natural resources in Finnmark). For more on this issue see, for instance: Z. Akhtar, Z. Sami Peoples Land Claims in Norway, Finmark Act and Providing Legal Title. *The Indigenous Peoples' Journal of Law, Culture & Resistance*, 7(1)/2022 115-138.

while in Sweden[46] the Reindeer Husbandry Act[47] recognizes the right to use land and water for the sustenance of Samis and their reindeer. The existence of such legislation facilitates property-related claims of indigenous people under P1-1, as it provides a clear legal basis for the claim, and may be utilized in the examination of whether there is a legitimate expectation related to the claim. So far, the ECtHR has made decisions that touched upon the issue of indigenous land rights but has not had the opportunity to directly protect collective property rights of indigenous communities invoking on whether the autonomous understanding of the right to property in P1-1 covers. Nevertheless, the existing jurisprudence is worth examining so as to see whether the approach of the ECtHR is in line with the global developments related to the said right. In this paper, several pivotal cases will be examined in this context.

The first relevant case is *Könkämä and 38 other Saami villages against Sweden*[48]. In it, the European Commission on Human Rights confirmed that the exclusive hunting and fishing rights provided under the Reindeer Husbandry Act and claimed by the applicant Saami villages in the given case can be regarded as possession within the meaning of P1-1. [49] While this broad understanding of possession on the part of the ECtHR was very important, the application in question was dismissed due to domestic remedies not being exhausted, and therefore no substantive decision was made.

In *From v Sweden*[50] the special way of the Saami was not only reaffirmed, but the Commission found that the national legislation that permitted a Saami village access to privately owned land for purposes of elk hunting was a decision made in general interest, and therefore constituted a proportionate limitation of property rights.[51] In other words, the special land-related rights of the Sami i.e. their collective rights to land were considered to be a general interest that justified interference with private property.

In *HINGITAQ 53 against Denmark*[52], ECtHR examined the applicants that they had, on a continuing basis, been deprived of their homeland and hunting

[46] Other European countries recognise other forms of community property. According to L. Alden Wily, 2018. "Collective Land Ownership in the 21st Century: Overview of Global Trends" Land 7, no. 2, 4. https://doi.org/10.3390/land7020068, Austria, Bulgaria, Germany, Italy, Norway, Czech Republic, Hungary, Iceland, Ireland, Latvia, Russia, Sweden, Turkey, Portugal, Romania, Spain, Ukraine recognize some form of community property in their national laws.

[47] Rennäringslag (1971:437), available at: https://www.riksdagen.se/sv/dokument-och-lagar/dokument/svensk-forfattningssamling/rennaringslag-1971437_sfs-1971-437/

[48] Application No. 27033/95, European Commission on Human Rights Decision of 25 November 1996.

[49] This decision was a step forward from the position taken by the Commission in Case G. and E. v. Norway, Application No. 9278/81 and 9415/81 (joined), decision of 3 October 1983, when the Commission found the request of two applicants, Norwegian Sami, manifestly unfounded, as have not provided sufficient proof of their specific property rights or claims vis-a-vis the land that was the subject-matter of the dispute, even though it had previously accepted that interference with the land in question (building of a dam and flooding) will affect their way of life, thus triggering the application of Article 8 of the ECHR.

[50] Application No. 34776/97, European Commission on Human Rights Decision of 4 March 1998.

[51] E. de Wet, 11.

[52] Application no. 18584/04, Decision of 12 January 2006.

territories and denied the opportunity to use, peacefully enjoy, develop, and control their land under both Article 8 of the ECHR and P1-1. In examining the admissibility of the application in question, the ECtHR did acknowledge that Denmark had interfered with the applicant's rights *in rem*. However, ECtHR deemed these interferences as instantaneous acts that did not produce a continuing situation. As the acts of interference occurred prior to the ECHR entering into force in Denmark, the ECtHR found it had no jurisdiction over the claim made by the applicant *ratione temporis*. The avoidance on the part of the ECtHR to delve deeper into the consequences of the interference was criticized in doctrine, with some authors pointing out that such an examination could have moved the European jurisprudence closer to the developments in international and regional human rights' law.[53]

Finally, in the case *Handölsdalen Sami Village v. Sweden*[54] the ECtHR had the opportunity to decide whether the Sammi applicants' winter grazing rights on land belonging to private parties was protected as "possession" within the meaning of P1-1, given their right to use land for such purposes was recognized under Swedish law. The ECtHR employed a rather narrow approach in this case and declared the application inadmissible in the part relating to the said claim.[55] In doing so, ECtHR asserted that the applicants' claim of having grazing rights did not constitute "existing possession" in the meaning of ECtHR jurisprudence, as it was on the Swedish courts to determine whether grazing rights applied to the disputed land.[56]

ECtHR then went on to examine whether the invoked Sami rights constituted a "legitimate expectation" i.e. whether they could legitimately expect to obtain effective enjoyment of the said asset. Invoking its previous reasoning whereby a proprietary interest in the nature of a claim may be regarded as an "asset" only where it has a sufficient basis in national law, for example where there is settled case-law of the domestic courts confirming it. In this particular case, the ECtHR was not satisfied, given the decisions of Swedish courts that preceded the case before the ECtHR, that "the applicants claim to a right to winter grazing on the disputed property was sufficiently established to qualify as an "asset".[57] ECtHR consequently found that the claim in question was not protected under P1-1. According to some scholars, this decision confirmed that the ECtHR was not willing to go beyond the findings of national courts in the absence of evidence that the decision passed by those courts was arbitrary.[58]

[53] E. de Wet, 16; G. Gismondi, "Denial of Justice: The Latest Indigenous Land Disputes before the European Court of Human Rights and the Need for an Expansive Interpretation of Protocol 1", *Yale Human Rights and Development Journal*, 18/2016, 26-27.
[54] Application no. 39013/04, Decision of 17 February 2009.
[55] Paras. 49-51.
[56] Para. 51.
[57] Para. 55.
[58] N. Bankes, "The Protection of the Rights of Indigenous Peoples to Territory through the Property Rights Provisions of International Regional Human Rights Instruments", *The Yearbook of Polar Law Online* 3, 1 (2011), 80.

The position taken by the ECtHR can be seen as not aligned with the practices of other regional human rights protection bodies. More specifically, it does not seem to acknowledge the emerging standards set in the flagship *Endorois* case decided on by the African Commission on Human and People's Rights[59] whereby "traditional possession of land by indigenous people has the equivalent effect as that of a state-granted full property title and traditional possession entitles indigenous people to demand official recognition and registration of property title".[60]

In other words, full and substantive cross-fertilization of jurisprudential concepts[61] seems to be lacking in this ECtHR case. As Koiruvova pointed out, the concept of property rights in Europe does not yet correspond "with the community-based understanding of what "property" means for indigenous people".[62]

One key criticism of the ECtHR's approach came in the form of a partly dissenting opinion of Judge Ziemele to the judgment on the merits in *the Handölsdalen Sami village and Others v. Sweden* case. In it, judge Ziemele first invoked the developments in international indigenous law[63] and in particular the recognition of their rights to own the land they traditionally used. She then criticized the ECtHR for accepting the Swedish rules on the burden of proof which was, in this case, on the Sami, in proving that they had winter grazing rights on the land "from time immemorial". Judge Ziemele found that "this approach excluded considerations relating to the specific context of the situation and rights of indigenous peoples".[64] Further, she reminded of the criticism expressed by the UN Committee on the Elimination of Racial Discrimination (CERD) vis-à-vis this particular rule of Swedish law, assessing it as constituting de facto discrimination against the Sami in legal disputes.[65] ECtHR decision in this case also received backlash in doctrine.[66]

[59] Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya Comm No 276/2003, Decision of 25 November 2009.

[60] Para. 209 of the decision in *Endorois* case.

[61] For more on this issue see: G. Pentassuglia, 2011. As to previous instances of cross-fertilization, and, more specifically, on instances when the ECtHR invoked the practices of the American and African human rights' protection bodies, a useful overview is provided in M. Papaioannou, "Harmonization of International Human Rights Law Through Judicial Dialogue: the Indigenous Rights' Paradigm", *Cambridge International Law Journal*, 3(4) /2014, 1037-1059.

[62] T. Koivurova, "Jurisprudence of the European Court of Human Rights Regarding Indigenous Peoples: Retrospect and Prospects", *International Journal on Minority and Group Rights*, Vol. 18, Koivurova, Timo, Jurisprudence of the European Court of Human Rights Regarding Indigenous Peoples: Retrospect and Prospects (2011). International Journal on Minority and Group Rights, 18/2011, 36.

[63] Including the ILO Convention No. 169, the existence of mechanism such as the UN Working Group on Indigenous Populations, the UN Special Rapporteur on the Rights of Indigenous Peoples and the UN Expert Mechanism on the Rights of Indigenous Peoples, and concluding observations on State reports, general comments and case-law from existing UN human rights treaty bodies (including General Comment No. 23 and several cases examined by the Human Rights Committee under the International Covenant on Civil and Political Rights. See paragraph 2 of Judge Ziemele Partly Dissenting Opinion.

[64] Para. 5.

[65] Para. 7. Judge Ziemele quoted Concluding observations of the Committee on the Elimination of Racial Discrimination CERD/C/SWE/CO/18, paragraphs 19-20.

[66] G. Gismondi, 2016 and E. De Wet, 2015.

The situation, at least when it comes to Sweden, has since changed. Namely, in 2020 landmark in the *Girjas* case[67] the Swedish Supreme Court found that, in applying national property law, the protection afforded to Indigenous peoples and minorities by binding public international law has to be taken into account. In practical terms, in the *Girjas* case the court resorted to „evidentiary relaxation" and relieved the Sami of the onerous burden of proof previously imposed by Swedish courts.[68] In the context of the jurisprudence of the ECtHR, this decision can have two implications. First, it could change its position towards the protection awarded to indigenous people's rights under Swedish law as domestic law. Second, it could prove to be an additional impetus for the ECtHR to duly consider the international law developments and the practices of other regional human rights' protection bodies in its case-by-case analysis and consequently influence its position as to whether a given claim of indigenous people's representatives in Sweden constitutes possession that would trigger the application of P1-1.

4. ECtHR jurisprudence in the context of (de)nationalization of property

Contrary to the limited case-law of the ECtHR dealing with indigenous peoples' related rights to property, there is a vast number of property cases before the ECtHR pertaining to the transition from collective property regimes to private ones and *vice versa* under the communist and post-communist rule in Central and Eastern Europe (hereinafter: CEE). The widespread taking of private property into public ownership and control was one of the notable features of those communist regimes.[69]

The above category of cases includes cases dealing with the compensation, restitution or rights of the protected tenants. After the fall of communism, expectations rose for the nationalized property to be returned *in natura* or for compensation to be awarded, either to their former owners or to their descendants.[70] Many of the cases that implicate property restitution in the context of the de-nationalization of land property are still heard to this day. They also pertain to different legal situations created following the return of property to the previous owner. The large number of cases belonging to this group can be illustrated by statistics showing that there were over 1000 cases before the ECtHR falling within the given group from Romania and Russia.[71]

When it comes to the caselaw dealing with the rights of the protected tenants, it will not be examined within this paper, as it pertains to state management

[67] Swedish Supreme Court Case No. T 853-18, decided 23 January 2020.
[68] C. Allard, "Girjas Reindeer Herding Community v. Sweden: Analysing the Merits of the Girjas Case", *Arctic Review on Law and Politics*, 12/2021, 56–79.
[69] A. Grgic *et al.* 32.
[70] *Ibidem.*
[71] L. Dehaibi, 162.

of housing and special lease schemes, which concerns both privately owned and socially owned property. Consequently, it is only of limited relevance for the examination of the treatment of collective property under the ECHR. The extensive caselaw of the ECtHR dealing with the effects of property transition on tenancy protection arise out of the widespread communist practice of imposing state control over private property.

One of ECtHR leading cases dealing with balancing the rights of owners against those of tenants in (at that time ongoing) process of gradually relaxing restrictive rules concerning the lease of privately owned dwellings is illustrative of the difficulties related to the issue at hand. The ECtHR in *Schirmer against Poland* rightly pointed out to legal and social issues that may arise in the light of conducting such a balancing exercise, which comes as a part of the process of transition from a socialist legal order and its property regime to one compatible with the rule of law and the market economy.[72] The ECtHR duly admits the difficulties and complexity of such a transition, as well that it cannot serve as a pretext for exempting the Member States from the obligations stemming from the ECHR or its Protocols. However, the ECtHR ideological stand according to which only market economy is compatible with the rule of law seems dangerous from the standpoint of providing full protection of collective dimension of the right to property through its case law.[73] Although perceived as problematic, it seems that the given value statement did not influence the ECHR adjudication in the given case pertaining to measures to control the eviction of tenants. This is because the ECtHR found the violation of Article 1 of P 1 ECHR of the owner of the rented apartment in that case, based on a comprehensive balancing exercise between the demands of the general interest and protection of the right to the peaceful enjoyment of possessions. Similar value statements were contained in the ECtHR cases of restitution of nationalized property where the inseparable link has been created between democracy and market economy.[74]

For the purpose of this analysis, the extensive ECtHR caselaw dealing with the transition from collective property regimes to private ones and *vice versa* will be classified chronologically into cases dealing with claims concerning the state's non-fulfilment of compensation commitments to the owners of the nationalized property which were made before the fall of the communist regime and to the transition-related cases that arose subsequently to its fall. The first group of cases is significantly smaller in volume compared to the other, since the number of applications against CEE states rapidly increased after the end of the Communist reign.

[72] *Ibidem.*

[73] See more on the principle of the rule of law in the European context at: A. Knežević Bojović, V. Ćorić," Challenges of Rule of Law Conditionality in EU Accession", *Bratislava Law Review*, 7(1)/2023, 41-62.

[74] See *inter alia* case of *Maria Atanasiu and Others v. Romania*, Applications nos. 30767/05 and 33800/06, Judgement of 12 October 2010, para.169.

4.1. ECtHR caselaw triggered by complaints for the protection of property initiated before the fall of communist rule

The first group of cases involving collective dimensions of the right to property deals with claims concerning the state's non-fulfilment of compensation commitments to the owners of the nationalized property made before the fall of the communist regime. Similar legal issues also arose outside communist regimes as a result of expropriation or other modes of confiscation of the property, which will not be covered by this assessment.

This group of cases is to be examined in the context of standards developed by the ECtHR presented in the section 2 of this paper. A particular emphasis will be placed on the assessment of whether the ECtHR undertook an adequate balancing exercise in the given cases and awarded the compensation giving due regard to the collective aspects of the right to property.

Since this group of compensation cases is not large in number, the analysis will be focused on the ECtHR reasoning in the case *Czajkowska and Others v. Poland*[75] which deals with the nationalization of property under the communist rule. The given case constitutes an example of the ECtHR's recognition of a violation of property rights which is attributable to the failure of Poland to fulfil compensation obligations towards the former owner and his/her legal successors, whose property was nationalized under the communist rule. Instead, national authorities issued decisions granting only partial compensation to the owner and later her legal successors while promising that further sums of money would be granted in subsequent periods. However, over the course of the next 16 years, the applicants had not obtained all their damages.[76]

In the given case, the ECtHR recognized the need to strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. However, it appears from the judgment that such a balancing exercise was not comprehensively undertaken by the ECtHR, even though the applicants submitted that the property in question had mostly been sold to private entities for commercial rather than public purposes.[77] The ECtHR also failed to elaborate on the issue of whether the partial compensation can be considered fair in the given case, or, in other words, whether the requirements for awarding partial compensation set forth in *James and Others v. the United Kingdom*[78] are met in terms of the above-mentioned social justice concerns. Instead, the elaboration of the ECtHR was very superficial and limited in scope, considering that it held that the applicants were entitled to full compensa-

[75] Case of *Czajkowska and Others v. Poland*, Application no. 16651/05, Judgment of 13 July 2010.
[76] A. Mrziykowska, "Legal Obligations of Poland Regarding the Restitution of Private Property Taken During World War II and by the Communist Regime in Light of the Jurisprudence of the European Court of Human Rights", *Polish Yearbook of International Law,* 39/2019, 122.
[77] Case of *Czajkowska and Others v. Poland*, para. 55.
[78] Case of *James and Others v. the United Kingdom* Application no. 8793/79, judgment of 21 February 1986

tion under the relevant domestic legislation, since the right to such compensation has been confirmed by domestic authorities.[79] In other words, the ECtHR failed to delve into the question of whether the nationalized land in the given case serves the public interest. Therefore, the ECtHR missed the opportunity to elaborate its approach with regard to the question of why nationalized property (as a form of collective property) should be fully reimbursed. Nevertheless, the ECtHR's further reasoning is useful, as it reaffirms some important guidelines from its previous jurisprudence, according to which the adequacy of the compensation would be diminished if there is an unreasonable delay over 15 years, as is the case in the given judgment.[80] In undertaking its limited balancing exercise, the ECtHR concluded that the fair balance was upset by the fact that applicants continue to be faced with uncertainty as regards the amount and the date of payment of the remainder of the compensation along with the manifestly excessive period which the authorities have required to calculate and pay the compensation.[81]

When it comes to assessing whether the partially unpaid compensation can be qualified as "possessions" in terms of P1-1, the ECtHR observed that pecuniary assets, such as debts and the above partially unpaid compensation fall within the scope of P1-1 as it constitutes a "legitimate expectation" that a current, enforceable claim will be determined in the applicant's favour.[82] Such a conclusion was driven by the fact that there has been a combination of the indicated legislative acts and the administrative decision determining the amount of compensation to be paid in place and as such is in line with the general strand of the ECtHR case law dealing with the protection of property. It is noteworthy that the ECtHR in this case applied reasoning that is also present in other ECtHR caselaw dealing with the restitution of nationalized property. According to that approach, the ECtHR holds that legitimate expectations are met only if the relevant legislative acts governing compensation are adopted after P 1 ECHR entered into force in respondent countries.

4.2. ECtHR caselaw concerning (de)nationalization of property-related complaints initiated after the fall of communism rule

This group comprises the cases in which the applicants questioned the legality of communist nationalization decisions in light of the domestic provisions binding at the time of the issuance of such decisions and cases where deprivation

[79] Case of *Czajkowska and Others v. Poland*, para. 60.

[80] In a similar vein, the ECtHR also found the violation of Article 1 of P 1 ECHR in the case of *Kirilova and others v. Bulgaria*, Applications nos. 42908/98, 44038/98, 44816/98 and 7319/02, Judgment of 9 June 2005 and in the case of *Igarienė and Petrauskienė v. Lithuania*, Application no. 26892/05, Judgment of 21 July 2009, as significant delays occurred in delivering flats offered as compensation for the expropriation of their properties to the applicants. However, the given case is not related to the communist rule. See Registry of the European Court of Human Rights, *Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights, Protection of property*, 2024, 81.

[81] Case of *Czajkowska and Others v. Poland*, para. 62.

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

of property after World War II was carried out in accordance with nationalization laws. It appears from the cases of the ECHR organs which were brought after the fall of the communist regime that they did not always extensively elaborate on substantive issues arising out of the character and limits of nationalized ownership, nor that the balancing exercise between the protection of property and the requirements of the general interest was carefully undertaken. Such a deferential approach is attributable to various factors.

Firstly, the ECtHR did not delve into substantive issues in a number of cases where confiscations of nationalized property occurred before the respondent state ratified P 1 ECHR. Instead, the ECtHR rejected those applications for the lack of temporal jurisdiction. Such an approach was followed, among others, in the case *Jan Malhous against the Czech Republic*.[83] The case of *Brežny & Brežny v. Slovakia*[84] is also relevant for the rejection of the part of the application due to the lack of temporal jurisdiction. Although Slovakia at that time was one of the post-communist states, the given confiscation did not come as a result of the widespread nationalization of private property but as a consequence of the conviction made by the national municipal court.

In respect to the cases of the confiscation of private property and its transfer to collective property which took place before the respondent state ratified P 1 ECHR, the ECHR organs have consistently held that such deprivation of ownership or another right in *rem* constitutes "an instantaneous act" which does not produce a continuing situation of "deprivation of a right".[85] Due to the lack of continuing effects of such deprivation, the ECtHR held that Article 1 of P 1 ECHR cannot be interpreted as imposing a general obligation on the state to return nationalized property which was taken before the respective state ratified the ECHR. In that light, it underlined that the given Article does not guarantee the right to acquire property.[86] This position of the Commission and the ECtHR is not applicable only to the right to property and in particular to its collective dimension. In fact, it is in line with the general principles of international law regarding the non-retroactivity of treaties.[87] While there are exceptions concerning "continuing violations" in some areas of human rights law, this principle is rather strictly applied in cases concerning property rights. Therefore, the caselaw pertaining to the restitution of nationalized property, which became known as socially owned property, does not diverge in this respect from the general strand of the ECtHR jurisprudence on the right to property.

[83] The application was declared incompatible with the provisions of the ECHR insofar as the applicant challenged the measures under the 1948 Act in respect of his father's property which were taken prior to the entry into force of the ECHR in respect of the Czech Republic. Case of *Jan Malhous against the Czech Republic*, Application no. 33071/96, Grand Chamber decision of 13 December 2000, 16.

[84] Case of *Brežny & Brežny v. Slovakia*, Application no. 23131/93, Commission decision of 4 March 1996, 66-79.

[85] Case of *Jan Malhous v. the Czech Republic*, 16; Case of *Preußische Treuhand GmbH & Co. KG a.A. v. Poland*, Application no. 47550/06, Decision of 7 October 2008, para. 57.

[86] Case of *Maria Atanasiu and Others v. Romania*, paras. 135-164.

[87] A. Mrziykowska, 114.

However, once a State, which ratified P1 ECHR, enacts legislation providing for the restoration of property previously nationalized under a communist regime, such legislation is considered as a basis for the protection of the so-called "new" property right under Article 1 of P 1 ECHR, as long as one satisfies the requirements for entitlement. The judgment in the case *Maria Atanasiu and Others v. Romania* may serve as an example of such case law pertaining to the (de)nationalization context.[88] The same approach was followed by the ECHR's organs in respect of arrangements for restitution or compensation established under pre-ratification legislation, in case such legislation remained in force after the respondent state ratified P1 ECHR, as evidenced in the case *Von Maltzan and Others v. Germany*.[89] In *Maria Atanasiu and Others v. Romania*, the undertaken balancing exercise led to the finding of the violation of the right to property, considering that national authorities failed to adopt sufficient legislative and administrative measures that would be capable of providing all parties concerned with the restitution process with a coherent and foreseeable solution proportionate to the public interest aims pursued.[90] Contrary to that, the violation was not established in the case of *Von Maltzan and Others v. Germany* since the ECtHR found that applicants' belief that the laws then in force would be changed to their advantage cannot be regarded as a form of legitimate expectation for the purposes of P1-1.[91] In both cases, the balancing tests were carefully applied although without paying special attention to the nature of the collective property and its implications.

Secondly, the scope of ECtHR review is limited by the fact that a property claim that is not grounded in national law will not be protected under P1-1, as the ECtHR is not entitled to create property rights. The ECtHR in its caselaw pertaining to the transition from a communist to a market-economy system in CEE countries expressly stated that under the ECHR, it is not possible to derive an obligation on the part of a respondent state to enforce restitution and compensation claims if such claims do not have a clear basis in national law.[92] However, it appears that the identical requirement is set forth for the protection of all types of property under P1-1. Consequently it cannot be deemed that divergencies exist between the caselaw on the collective dimension of the right to property and the general strand of ECtHR jurisprudence dealing with the property right.

In a nutshell, none of the applications that alleged violations of any dimension of property rights have prompted the ECtHR to extend the scope of state responsibility.[93] Such a approach on the part of the ECtHR of giving extensive

[88] Case of *Maria Atanasiu and Others v. Romania*, para. 136.

[89] Case of *Von Maltzan and Others v. Germany,* Applications nos. 71916/01, 71917/01 and 10260/02, Grand Chamber Decision of 2 March 2005, para. 74.

[90] Case of *Maria Atanasiu and Others v. Romania*, para. 189.

[91] Case of *Von Maltzan and Others v. Germany,* paras. 112-113.

[92] A. Mrziykowska, 115-132.

[93] Please note that the opposite has been true in the case of (alleged) violations of some other rights protected, inter alia, under Articles 2 and 3 of the ECHR. See A. Mrziykowska, 133; E. De Wet, 13.

deference to national law in determining whether a property interest exists and refusing to go beyond the determinations of national authorities in protecting the right to property can be explained by the fact that the ECtHR cannot completely isolate itself from the financial arguments that were brought up in the discussions in CEE countries about the potential scope and costs of denationalization. Moreover, such ECtHR's approach comes as a consequence of the lack of specific regulations on the protection of the property rights of individuals at the international level.[94]

Naturally, the subsidiary character of the ECtHR jurisdiction also brings some limitations as to the extent to which the ECtHR develops its approach in terms of violations linked to the transition of nationalized property. Such limitations have been particularly apparent in one specific group of cases brought in the nationalization context, where applicants questioned the legality of the communist nationalization decisions in light of the domestic provisions binding at the time of the issuance of a nationalization decision. The case *Jan Pelka and Others v. Poland,* where the Commission rejected the application as *ratione materiae* incompatible with the ECHR provisions considering that it was lodged with the ECHR organs while domestic nationalization-related proceedings were still in progress may serve as an illustrative example of that group of cases. Namely, the applicants had requested from domestic organs to declare the nationalization decisions null and void; however, the administrative proceedings before national authorities, as per the relevant law, could not result in recognition of the applicant's property rights – this had to be done in separate proceedings. ECtHR consequently held that national remedies had not been exhausted.[95] Such a stance taken by the ECHR organs in *Jan Pelka and Others v. Poland* with regard to the requirement of the exhaustion of domestic remedies in the nationalized property context is aligned with the general lines of reasoning in the overall jurisprudence of the ECHR organs on the given requirement.

As regards the extent of the ECHR organs' authority to develop standards governing the confiscation of nationalized property, it is noteworthy that states have a wide margin of appreciation when introducing restitution solutions and determining the conditions under which they agree to restore property rights of former owners.[96] Such a margin should be also applied with regard to the amount of determined compensation. Thus, this margin allows national authorities to take into account the state's financial capabilities and even exclude restitution in relation to specific categories of former owners.[97] In a similar vein, the determination of the notion of "public interest" is also left to the discretion of contracting states. The ECtHR regularly held that the notion of "public interest" is necessarily extensive and should be interpreted accordingly.[98] More specifically, the ECtHR

[94] *Ibidem.*

[95] Case of *Jan Pelka and Others v. Poland*, Application No. 33230/96, Commission Decision of 17 January 1997, 4.

[96] Case of *Jantner v. Slovakia*, Application No. 39050/97, Judgement of 4 March 2003, para. 34.

[97] Registry of the European Court of Human Rights, 78.

[98] See more on the interpretation of the notion of public interest in property related cases at: M. V. Matijević, "Acquisition of Property Through Prescription and Illegal Occupation of Immovable Property of IDPs from Kosovo* after the 1999 Conflict", *Strani pravni život*, 57(3)/2013, 181-182.

stated that it is natural to leave a wide margin of appreciation to national authorities when it comes to their decisions to enact laws on the expropriating property or affording publicly funded compensation (though sometimes partial) for the expropriated property, since that involves implementation of social and economic policies. However, the ECtHR stated in its jurisprudence that it does not accept the interpretation of the notion of "public interest" offered by national authorities unless it is not "manifestly without reasonable foundation".[99]

Although the wide margin of appreciation is a common feature of the ECtHR caselaw when it comes to determining violations of the right to property, it is clear from the examined case law that it is additionally extended in cases dealing with radical property transformation in the (post)communist regime. In order to justify such an extended margin of appreciation, the ECtHR particularly pointed to its benefits for contracting states when they regulate complex property issues during the transition from a communist regime to a democratic public order protecting private property.[100] In that context, the ECtHR identified difficulties it faces in striking a fair balance between property rights and public interest when the transformation of the State's economy and legal system affects a wide population. Those difficulties justify a considerable margin of appreciation in the cases linked to property transformation.[101]

The extended margin of appreciation is coupled with a more lenient review on the part of the ECtHR regarding the striking of a fair balance between the right to property and public interest concerns in (de)nationalization context. In the (de)nationalization context, the ECtHR undertook various balancing exercises which were not limited only to striking a fair balance between the right to property and public interest as occasionally such a review was meant to strike a fair balance between different rights such as the right to property and the right to respect for private and family life in the sense of Article 8.

When it comes to undertaking a balancing exercise of whether the confiscation of private property under communist rule was proportionate to the public interest, it seems that a loose proportionality test was regularly applied in a way that mostly leaves the interpretation of key standards to national authorities while not giving due regard to the collective dimension of nationalized property. However, the proportionality tests undertaken by the ECtHR in some isolated cases depart from the above. Instead of delving into the separate analysis of a large number of proportionality tests conducted by the ECtHR on this issue, we will briefly present one of the most striking judgments in the case of *Jahn and Others v. Germany* to illustrate how the ECtHR in the "unique context

[99] Case of *James and Others v. the United Kingdom*, Application no. 8793/79, Judgment of 21 February 1986, para. 46.; The ECtHR statement that the margin of appreciation is left to national authorities concerning the scope of property restitution and the notion of public interest should be taken with caveats since the final word on their interpretation will be taken by the ECtHR in its balancing exercise.

[100] Registry of the European Court of Human Rights, 81.

[101] Case of *Maria Atanasiu and Others v. Romania*, paras. 171-172.

of German reunification" fully recognized the distinctive features of the collective dimension of the right to property.[102]

In the case of *Jahn and Others v. Germany*, the ECtHR found that the lack of any compensation for the deprivation conducted based on land reform during the communist regime did not upset the "fair balance" that has to be struck between the protection of property and the requirements of the general interest.[103] Although the general standard applicable to the right to property goes in the direction of allowing for partial compensation for interference with the right to property, under specific circumstances, in *Jahn and Others v. Germany* the ECtHR went a step further, accepting that exceptional circumstances like the unique context of German reunification may justify even the absence of any compensation for the confiscated property.

Interestingly, the ECtHR in the given case recognized the distinctive nature of the rights of the new farmers and partly grounded the judgment on the specifics of collective property over agricultural land, a form of property introduced by land reform during the communist regime in Germany. More concretely, the ECtHR stated that established farmers' rights over land cannot be classified as property rights such as those that existed at the time under democratic, market economy regimes. Instead, it referred to them as a mere reflection of the "collectivist system of property rights that characterized the former communist countries".[104] The distinctive limitation of those collective rights is attributable to the fact that heirs to such land under applicable national legislation were not in a position to keep it lawfully unless they themselves were farming the land or were members of an agricultural cooperative. The ECtHR in the given case gave due regard to such a limitation by finding that the applicants were not entitled to inherit the land lawfully and that any compensation to the initial owners of confiscated property is not necessary for striking a fair balance between the right to property and public interest.

It is important to keep in mind that along with the specific nature of collective property the unique circumstances of the German unification also strongly contributed to this exceptional ECtHR finding considering that the given judgement was partially based on a series of uncertainties regarding the legal position of heirs. Conversely, the ECtHR in a similar subsequent case (*Vistiņš and Perepjolkins v. Latvia*) which arose out of the context of German reunification, found a violation of the right to property where at least partial compensation was paid to applicants.[105] However, the value of *Jahn and Others v. Germany* seems undisputed since the ECtHR in that judgment gave due regard to the specific of collec-

[102] Case of *Jahn and Others v. Germany,* Applications nos. 46720/99, 72203/01 and 72552/01, Grand Chamber Judgment of 30 June 2005.
[103] Case of *Jahn and Others v. Germany,* para. 117.
[104] *Ibid*., para. 101.
[105] Case of *Vistiņš and Perepjolkins v. Latvia*, Application No. 71243/01, Grand Chamber Judgment of 25 October 2012, paras. 127-130.

tivist system of property rights that characterized former communist countries and gave them considerable weight in its balancing exercise. Such a finding of the ECtHR therefore demonstrates its ambiguous approach towards the resolution of cases pertaining to confiscated property under communist rule. On the one hand, the ECtHR comes up with value statements encouraging the transition from a totalitarian regime to a democratic form of government and favors private over collective property. On the other hand, in isolated cases, the ECtHR grants full recognition to the collective dimension of the nationalized property which results in non-sanctioned interference with the "right to private property" of former owners.

5. Conclusion

The right to property is not recognized in either the United Nations International Covenant on Civil and Political Rights or the United Nations International Covenant on Economic, Social and Cultural Rights. Conversely, it is recognized in regional instruments for the protection of human rights. This includes Article 21 of the ACHR, Article 14 of the African Charter and P1-1. The provisions of these three regional human rights instruments, while not being identical, all guarantee the individual right to property and allow for its limitations in the public interest. There are also specialized human rights instruments that are specifically tailored to protect certain collective aspects of the right to property – these mainly concern the notion of indigenous peoples' collective ownership over land which they have traditionally occupied. While regional human rights adjudicatory bodies primarily apply the provisions of the ECHR, the ACHR, and the African Charter, which enshrine the individual right to property, they also protect the collective dimensions of the property right through their caselaw, albeit to a different extent. This approach can be explained through the notions of autonomous concepts and evolutive interpretation of the ECHR and the ACHR, whereas the African Charter itself also recognizes the collective dimensions of the right to property.In examining to what extent "property", as an ECtHR autonomous concept, includes the collective dimensions of property rights, the authors looked into two specific strands of ECtHR case-law: the cases concerning the collective dimension of the property rights of indigenous peoples and the caselaw on the restitution afforded in cases of denationalization.

An examination of ECtHR jurisprudence on land-related rights of indigenous peoples has shown that the ECtHR did in fact rely on the autonomous concept of the right to property to recognize, in general, that indigenous peoples in Europe have rights over the lands they have traditionally used. Further, the ECtHR acknowledged that limitations, envisaged in national law, to properitary rights of individuals that benefit indigineous peoples are in the public interest. This recognition, however, was conditional on the requirements applicable in

the general strands of ECtHR jurisprudence related to the right to property. This was particularly visible through the ECtHR examination of whether the rights of indigenous peoples constituted existing property or claims that are reasonably substantiated. Namely, in assessing these issues, the ECtHR gave deference to the legislations and judicial and administrative practices of the respondent states. This means there was very little cross-fertilization between the ECtHR caselaw and the practices of two other regional bodies *vis-a-vis* the rights of indigenous peoples over the land they traditionally occupied or utilized. In other words, the ECtHR seems reluctant to delve into the issue more deeply and diverge from its general jurisprudence and thus to fully acknowledge the specificities of indigenous's people's rights.

The examination of the ECtHR jurisprudence concerning (de)nationalisation of property, i.e. transition from collective property regimes to private ones and *vice versa* under the communist and post-communist rule in CEE shows that the ECtHR was and is aware of the difficulties and complexity of such a transition (which was welcomed), but finds that it cannot serve as a pretext for exempting the Member States from the obligations stemming from the ECHR or its Protocols. More specifically, the analysed cases pertain to the outcome of the claims for the restitution of the property which was nationalized after World War II. Through the given strand of caselaw, the extent of the ECtHR recognition of the specific collective features of the nationalized property was acknowledged.

Firstly, the analysis of the selected caselaw reveals that the ECtHR has mostly circumvented dealing with substantive issues and in particular with the examination of whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights in the cases of nationalized property. Instead, a large number of applications were rejected on procedural grounds as incompatible with P1-1 *ratione materiae* and/or *ratione temporis*.

When it comes to the applications which were not rejected, the ECtHR approach of giving extensive deference to national law in determining whether a property interest exists and of refusing to go beyond the determinations of national authorities is again apparent. More specifically, the ECtHR has affirmed that the states have a wide margin of appreciation in determining the public interest and introducing restitution solutions as a part of the process of transforming the State's economy and legal system, as this affects a wide population and may have considerable pecuniary implications. Although the wide margin of appreciation is a common feature of the ECtHR caselaw when it comes to determining violations of the right to property, it is clear from the examined case law that the given margin is additionally extended in cases dealing with radical property transformation in the (post)communist regime. This is coupled with a more lenient review on the part of the ECtHR regarding the striking of a fair balance between the right to property and public interest concerns. Such a loose propor-

tionality test was regularly applied in a way that does not give due regard to the collective dimension of nationalized property. However, the proportionality tests undertaken by the ECtHR in isolated cases depart from the above.

An illustrative example of such divergence can be found in *Jahn and Others v. Germany,* which is distinctive in several aspects. While the general standard applicable to the right to property goes in the direction of allowing for partial compensation for interference with the right to property to comply with the principle of proportionality under specific circumstances, in *Jahn and Others v. Germany* the ECtHR went a step further, accepting that exceptional circumstances like the unique context of German reunification may justify even the absence of any compensation for the confiscated property. It is interesting that the ECtHR further in the given case give due regard to the distinctive collective nature of the rights of the new farmers, according to which heirs could keep the land lawfully validly as long as they were farming it or were members of an agricultural cooperative. This case therefore demonstrates the ambiguous approach of the ECtHR towards the resolution of cases pertaining to confiscated property under communist rule. On the one hand, the ECtHR comes up with value statements encouraging the transition from a totalitarian regime to a democratic form of government and favors private property over the collective property. On the other hand, in isolated cases, the ECtHR grants full recognition to the collective dimension of the nationalized property which results non-sanctioned interference with the "right to private property" of former owners. Considering that the ECtHR cases on the restitution of property nationalized during the communist rule were mostly resolved and came under the category of the well-established case law, no turning points in jurisprudence are anticipated in the future.

Overall, it can be concluded that, while the ECtHR has to an extent carved out a place for collective dimensions of the autonomous concept of the right to property, it remains cautious when it comes to awarding protection to these collective property rights i.e. deferential towards the legislation and judicial and administrative practices of national states. This further implies that in some respects, such as the property rights of indigenous people, the ECtHR keeps lagging behind the protection awarded to collective property rights under two regional human rights' protection systems – namely the Inter-American and the African one. Given the current developments in international law and even in some national legal systems, it is reasonable to expect that ECtHR will be under additional pressure to align its jurisprudence with that of the other two regional adjudicatory bodies when adjudicating cases involving indigenous people rights. The property rights of indigenous peoples lend themselves particularly well to such a development.

On the other hand, the ECtHR is the only regional court that developed extensive case-law concerning the transition from collective property to private property regimes. Therefore it would be worth to analyse whether the ECtHR

influenced the case law of the Inter-American and African adjudicatory bodies in that respect. It seems that the ECtHR's general approach of employing a more relaxed approach towards the applicants should be modified *vis-à-vis* (de)nationalisation cases. It could be done by extending the scope of responsibility of contracting states by relying on a less deferential approach in examining domestic law pertaining to the right to property.

Finally, it seems that the identified differential approach of the ECtHR in (de)nationalization cases cannot be attributable to cultural relativist arguments, as has been argued in the scholarly literature, since the fall of communism is not a phenomenon restricted to the European continent. Moreover, it was explained in the paper that the ECtHR approach towards the collective property established during the communist rule is rather ambiguous since labelling of the communist regime as totalitarian does not go hand in hand with the identified practice of favoring the holders of collective property rights over the private property holders. Moreover, the examined body of ECtHR case law further shows that cultural relativism also cannot serve as an explanation for the ECtHR approach towards the recognition of the property rights of indigenous people. Although Europe (in contrast to the Americas and Africa) constitutes a region where indigenous peoples are much fewer in number and where the issue of recognition of the collective property of indigenous peoples is less likely to arise, it does not necessarily mean that such a cultural context shaped the ECtHR approach in that regard. Therefore, the ECtHR failure to elaborate more systematically on the collective dimensions of the right to property is rather attributable to its general approach of giving deference in examining domestic law pertaining to all the aspects of the right of property in the sense of Article 1 of P 1 ECHR. Such an approach comes as a logical consequence of the lack of specific regulations on the protection of the property rights of individuals at international level. It seems therefore that without further development and strengthening of the international legal instruments governing the right to property, the ECtHR will not be willing to extend the scope of state responsibility and to give up its differential approach in examining violations of the right to property.

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