ALBA: Article 1 of the First Protocol of the ECHR – an update 21 years on

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Possessions and inherent limitation

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The terms "property" (as used in the heading of A1P1) and "possessions" (as used in the first sentence) have an autonomous meaning independent from formal classifications used in domestic law.[1] A multitude of "things", corporeal and otherwise, have been recognised as being capable of being "possessions" for the purposes of A1P1: the obvious ones are land,[2] and physical items like artwork.[3] But intangible assets have also been recognised: for example, IP rights,[4] shares in a company,[5] and even the value of a business (provided it consists of tradable goodwill and not simply the promise of future income).[6]

However, it is not just the nature of the "thing" over which a right is claimed that determines whether A1P1 is potentially engaged. A1P1 only protects a person's right to peaceful enjoyment of *"his"* possessions. Clearly a possession will be "yours" if you own it. But it is also clear that you can have a "possession" for the purposes of A1P1 even where your right or interest in the thing in question falls short of "ownership".

Other forms of property right (i.e. rights that in English law are known as rights *in rem*, such as leases and easements) fairly obviously qualify as possessions. However, perhaps less obviously, also included are rights that in English law are *in personam* only, such as contractual rights, licences, or even simply a right to occupy that has a pecuniary dimension. The ultimate question 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 A1P1.[7]

For example, in *Saghinadze v Georgia*, the applicant was an internally displaced person within Georgia, who was evicted from a cottage in which he had lived for 10 years, having initially been placed there by the Government as part of his employment by a Ministry. The ECtHR

[1] E.g. *Former King of Greece v Greece* (2003) EHRR CD43, §60.
[2] *Id.*
[3] *Beyeler v Italy* (2003) 36 EHRR 5.
[4] *Melnychuk v Ukraine* (App. No. 28743/03, 5 Jul 2005).
[5] *Sovtransavto Holding v Ukraine* (2004) 38 EHRR 44.
[6] *Wendenburg v Germany* (App. No. 71630/01, 6 Feb 2003).
[7] *Saghinadze v Georgia* (2014) 59 EHRR 24, §103.

found that the applicant's "right to use the cottage" was a "possession" for the purposes of A1P1.[8] In reaching that view, the Court considered it important that the applicant had originally taken possession of the dwelling consensually and not "vexatiously", that his possession of it remained of a "good faith character" and that it had been tolerated by the authorities without objection for many years. It was also important that all of this had occurred during a period of humanitarian crisis in Georgia, such that it was not realistic to expect the authorities to follow meticulously the administrative formalities that would have been needed to give the applicant formal title. Further, the Court found it relevant that Georgian law itself protected internally displaced person. Georgian law recognised that possession of a dwelling in good faith by such a person was a right of "a pecuniary nature", provided certain protection from eviction and even recognised such occupation as an asset protected under the Georgian Civil Code's rules of possession.[9] This serves to show that, despite the autonomous meaning of the term "possessions", the recognition of the right under domestic law can be very important in practice.

Ultimately, *Saghinadze* might not deviate too far from a common-sense understanding of a property right. However, the case law under A1P1 has gone much further than this and protected a legitimate expectation of obtaining a property right. In *Stretch v United Kingdom*, the applicant had been granted a lease of industrial land for twenty-two years by the local authority. The lease required him to build six buildings at his own expense and included an option to renew for a further twenty-one years. Both the applicant and the local authority had acted on the basis that the option to renew was valid and enforceable. It subsequently transpired that it had been granted *ultra vires* and was therefore void. However, the Court found that the applicant had at least a "legitimate expectation" of exercising his option to renew, which, for the purposes of A1P1, was to be regarded as "attached" to the property rights granted to him by the local authority under the lease.[10]

In *Kopecky v Slovakia*, the Court explained further that the legitimate expectation in *Stretch* was protected because it was based on "a reasonably justified reliance on a legal act which has a sound legal basis *and which bears on property rights*".[11] That last phrase limits the principle: A1P1 cannot be invoked in any case where a person might have what in domestic judicial

[8] *Id.*, §108.
[9] *Id.*, §§104-7.
[10] *Stretch v United Kingdom* (2004) 38 EHRR 12.
[11] *Kopecky v Slovakia* (2005) 41 EHRR 43, §47.

review is referred to as a "legitimate expectation". Rather, it is "implicit that no such expectation could come into play in the absence of an "asset" falling within the ambit of Art.1 of Protocol No.1".[12] Equally, A1P1 does not confer a right to *future* property (e.g. through inheritance).[13]

Having considered thus far what constitutes "possessions" and what sort of right over them needs to be in play for A1P1 to be engaged, the next question is whether that right has been interfered with.

A simple example would be where a person owns the freehold to a piece of land that was already subject to another person's right of way over the land when the freehold was purchased. The purchaser cannot invoke A1P1 when the holder of the right of way later exercises that right by walking over the land, despite the purchaser's ownership right. There has been no interference with that right in this example. The reason is that the right is qualified from the outset, or inherently limited. In this example, the relevant right that was purchased was freehold ownership *minus* the right of way. The situation would of course be very different if *after* the land was purchased the council created a footpath over it. That would (all else being equal) be an interference with the ownership right because that right was *not* inherently limited when it was obtained.

Therefore, to know whether there has been an interference, one has to know what the contours of the property right were to start with: defining the possession at the outset is crucial to discovering whether A1P1 is engaged at all. In particular, it must be asked whether the putative interference simply picks up on a qualification inherent in the property right at the point of acquisition, or whether the interference supervenes on an otherwise unqualified right.

In some cases, that question allows an easy answer. In *Sims v Dacorum BC*, a couple lived in a council property under a joint tenancy and one sought to terminate the tenancy by giving unilateral notice to the Council. The other wanted to stay and the Council brought possession proceedings. As will become relevant later, part of the judgment is about the effect of a common law rule from a case called *Hammersmith & Fulham LBC v Monk*,[14] which essentially provides that a periodic joint residential tenancy terminates automatically in this situation if the tenancy agreement does not provide differently. But in this case, the tenancy agreement

[12] *Id.*
[13] *Marckx v Belgium* (1979-80) 2 EHRR 330, §50.
[14] [1992] AC 478.

also stipulated that either tenant could terminate the tenancy unilaterally, at which point the Council could then decide whether any other joint tenants could remain in the property. The Supreme Court found that in that context any A1P1 claim in defence to the possession proceedings was "very hard to sustain" because the tenant had been deprived of his property "as "the result of a bargain that he himself made".

This is plainly right – the termination of a contract or property right in accordance with its terms cannot give rise to an interference with a possession.

However, in other cases, the inherent limitation idea can be very difficult to pin down. Two cases are classically cited to explain the conceptual difficulties. The first is *Aston Cantlow Parochial Church Council v Wallbank*,[15] in which it was held that chancel repair liability that had attached to a property prior to its purchase amounted to an inherent limitation on the property right and so there was no interference when the owner was asked to repair the chancel. The second is *Pye v UK*,[16] in which the Grand Chamber of the European Court of Human Rights found that the laws of adverse possession, which had in that case permitted squatters to take title over the owners, were not an inherent limitation upon applicant's property.

It is not immediately easy to understand why the two cases fell to be treated differently. Why did the pre-existence of the laws of adverse possession not mean that the ownership right was inherently limited in *Pye*?

One possible explanation is that *Pye* concerned the operation of a general legal regime (namely the laws of adverse possession) that applies across the board, as opposed to a specific limitation that attaches to a particular item of property (like the chancel repair liability). The latter can be seen as being impliedly consented to when the property is purchased with that liability attached. It can also be foreseen in a way an owner cannot (usually) foresee that the laws of adverse possession might apply to his property.

However, whilst this "general legal regime" and/or "foreseeability" test might sound principled, it quickly breaks down upon analysis.

If, in *Sims*, there had been no provision in the tenancy agreement, would the pre-existence of the common law rule in the *Monk* case have been an inherent limitation and acted in the same

[15] [2004] 1 AC 546.
[16] (2008) 46 EHRR 45.

way as the contractual term? On the general legal regime/foreseeability test, maybe not. That might seem acceptable at first: if the parties choose to make something explicit in a contract, they have consented into the rule. But what if they only leave that term out because they know they don't need it, in light of the common law rule?

What if, to use the right of way example, a house owner bought a house knowing full well that the property behind it had no access and so an easement could be implied by necessity? When that came to pass (via the operation of a general legal regime) would that be like *Pye* or like *Aston Cantlow*?

Another case that demonstrates the oddities of such a test is *Beyeler v Italy*.[17] Under the Italian Civil Code, certain transactions involving objects of cultural or artistic interests had to be declared to the state, failing which any transfer of title would be void. The state was then able to decide whether to exercise a right of pre-emption over the property (subject to compensation). In *Beyeler*, the state exercised its right of pre-emption over a Van Gogh painting purchased by the applicant. The ECtHR found that this interfered with the applicant's proprietary rights to the painting,[18] despite the fact Italian law meant that his title was always revocable and that it was highly foreseeable that a right of pre-emption might be exercised in relation to a work of cultural value.

Other cases are even more problematic for such a test, in particular the licences cases. For example, in *R (Royden) v Wirral Metropolitan Borough Council*, a UK court held that a licence to drive a cab, despite being a "possession" for the purposes of A1P1, is inherently subject to the possibility of de-regulation, such that when changes were made to regulatory laws to the disadvantage of licence-holders that was simply the operation of an inherent limitation on the property right rather than something that supervened upon it.[19] It is not immediately clear how this can be reconciled with *Pye* or *Beyeler*. Indeed, whilst in those cases the laws that affected the right pre-existed the purchases of the property, in *Royden* all that existed prior to the acquisition of the licence was a power to change the laws that applied to it.

This serves to show that a "general legal regime/foreseeability" principle is a deeply unsatisfactory litmus test. Yet a line must be drawn somewhere because if every potentially applicable legal regime (or, by reference to *Royden*, every possible rule that could be

[17] *Beyeler v Italy* (2003)36 EHRR 5,
[18] *Id.*, §§105, 106.
[19] [2002] EWHC 2484.

introduced in the future) is seen as an inherent limitation on the right to property, this would mean, in effect, that A1P1 could never bite.[20]

Why is it so difficult to conceptualise where the line should be drawn? The reason may lie in the fact that the concept of inherent limitation taps into a more difficult and fundamental question about what a property right is in the first place.

Most legal systems recognise property rights, such as ownership. There is a paradigm idea of what the term "ownership" means, which supposes that an owner can do anything he or she likes with the owned asset and can lose that right only by consent. That is an "absolute" idea of ownership, which is also in some legal systems referred to by its Roman law name "*dominium*".

However, in fact no legal system protects property rights as absolute rights. Ownership, for example, is always qualified. No legal system allows owners to use their property to commit crime. Most restrict owners' power to alienate their property (for example on bankruptcy and in some cases upon death) and most provide for state seizure of property if it results from the proceeds of crime or might be used to fund terrorism, or is needed to make way for public infrastructure. To take land rights as an example, it is easy quickly to think of a myriad of laws that prevent the owner from doing what he or she likes with the land: environmental laws, planning regimes, the laws of nuisance and the rights of others (like the easement example, or where someone is said to have an Article 8 right to call a property his or her "home" despite its being owned by another person). It is difficult to think of a principled heading under which to lump all of these qualifications on property rights, but one way is to think of them as "anti-property".[21]

Despite all of these countervailing anti-property qualifications on property rights, "ownership" and "property" continue to mean something - indeed, their recognition in A1P1 demonstrates that. Yet to define a "real-world" property right, a balance has to be struck between the hypothetical *dominium*-like property interest on the one hand and the "anti-property" interest on the other.

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[20] See, e.g. A Goymour, 'Property and Housing' in D Hoffman (ed), The Impact of the Human Rights Act on Private Law (Cambridge, 2011) ch 12, 253–8 at p. 277, commenting that if 'inherent limitation' is viewed in this way, A1P1 loses 'any sensible meaning'.

[21] See Gardner & MacKenzie, An Introduction to Land Law (Hart, 4th Ed.), Chapter 10.

There are at least two ways of viewing that balancing exercise. The first and probably the easiest is to see the property right as forming an absolute entitlement serving a particular ideal (what ideal is an interesting question which there is not time to cover, albeit answering it may turn out to be crucial) from which elements can be taken away in the name of competing interests (likely serving some different ideal). Thus, in *Pye v UK*, the (otherwise absolute) ownership right over the land is interfered with in the name of protecting adverse possessions, thus A1P1 is engaged.

Another model sees the property right as only ever constituting the sum total of what is left when the various "bits and pieces" have been taken away, the whole exercise serving a single higher ideal (precisely what is again a difficult but important question).

In other words, is a property right an absolute right from which elements get "taken away", that taking away constituting an interference, or is it always the residue of whatever is left once all of those bits and pieces have been taken away, those elements all delineating the property right from the very outset and thus acting as inherent limitations?

There are doubtless problems with both models. However, it is perhaps helpful to realise that they both have some merit in terms of how we understand what a property right is. This reveals that when courts decide whether or not a possession is inherently limited they are in reality having to choose between these competing visions of what it means to have a property right in the first place. Whilst understanding that might not make the exercise any easier, it at least helps to explain why it is so challenging.