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SAFEGUARDS FROM UNLAWFUL DEPRIVATION OF PROPERTY IN THE MACEDONIAN LEGISLATION AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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Abstract

Even though the right to property is not a personal right by its nature, still it enjoys the same level of protection as personal right does in national and international laws. This is due to the fact that the person's right to hold property is of crucial importance in the existential, social and legal sense of the word.

Provisions guaranteeing the protection of property are found nowadays in the highest form of legislation such as constitutions and other founding documents on a national level and also in an internationally binding document like the European Convention on Human Rights.

The main objective of this paper is to analyze the effectiveness of the legislation set forth to ensure the protection of property in the Macedonian legal system. The analysis includes the constitutional provisions guaranteeing the protection of property, the protection of property under the general Law of Ownership and Other Real Rights and under special laws, overlook of the regulation concerning interference or deprivation of property in the public interest, for payment of taxes and enforcement of penalties, and the compliance of Macedonian legislation with the rules and standards for the protection of property set by the European Convention on Human Rights.

Keywords: property, ownership, protection of property, property rights.

I. CONSTITUTIONAL GUARANTEES OF PROPERTY

Macedonian legislation recognizes the importance of property, not only for civil law relations but also as one of the foundations for sustainable development of the country's economical system

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which is now based on free market and freedom of enterprise. The transition from a socially governed economy into a free market economy had been a long and painstaking process in Macedonian society that couldn't have been carried out without the fundamental changes in the area of property relations. These changes began with defining property as a right of individuals guaranteed by the Macedonian Constitution from 1991¹. The guarantee of property is clearly stated in article 30, paragraph 1 of the Constitution: “*Property and the right to inheritance are guaranteed*”. Article 30 is located in the part of the Constitution that refers to the economical, social and cultural right of individuals, which is a clear indication that property is considered to be a right of individuals, although it is not a personal right by nature. The guarantee of property is reinforced with the proclamation that one of the fundamental values of the Macedonian constitutional order is the protection of property (art. 8, par 1). In other words, the Constitution not only guarantees the right of individuals to hold property but also guarantees the protection of property². The guarantees are set forth to ensure that property holders can peacefully enjoy their property without interference from third parties or the public authorities and if such interference occurs the property holders are entitled to seek protection from the Macedonian judicial system. By introducing guarantees for property the Macedonian Constitution aligns with other EU countries that have incorporated similar provisions in their constitutions and other founding documents such as: the German Basic Law (Grundgesetz für die Bundesrepublik Deutschland³) that guarantees property in article 14, the Italian Constitution (Costituzione Italiana⁴) that recognizes and guarantees private property in article 42, the Spanish Constitution (Constitución Española)⁵ also recognizes and guarantees private property in article 33, the Polish Constitution (Konstytucja Rzeczypospolitej Polskiej⁶) guarantees the ownership and other property rights in article 64, the Croatian Constitution (Ustav Republike Hrvatske⁷) guarantees property in article 48, Slovenian Constitution (Ustava Republike Slovenije⁸) guarantees property in article 33 and others.

The guarantee of property given by the Macedonian Constitution doesn't exclude the lawful interference or deprivation of an individual's property by the state authorities to satisfy the public interest. According to the provisions of the Constitution, property plays a dual role in the legal system one that consists of providing benefits for the individual and benefits for the community⁹. When a property is set to benefit the community (the public interest) then the property rights of individuals may be subject to lawful interferences or deprivation. The question is what can be considered as “lawful interference or deprivation”. From the provision of the Constitution we can derive that interference or deprivation of property can be considered as lawful if two requirements are met: first – it must benefit the public interest and second - it must be prescribed by law¹⁰. When determining the conditions for lawful interference or deprivation of property in article 30,

¹ Constitution of the Republic of North Macedonia, Official Gazette of the RM, No. 52/91.

² See: P. Живковска, *Стварно право* (Европа 92, Скопје, 2005) 102; С. Климовски, *Уставно право и политички систем* (АД „Просветно дело“ - Скопје, 2000) 221.

³ Grundgesetz für die Bundesrepublik Deutschland < <http://www.gesetze-im-internet.de/gg/index.html>>.

⁴ Costituzione Italiana < <http://www.senato.it/1024>>.

⁵ Constitución Española < <https://boe.es/legislacion/documentos/ConstitucionCASTELLANO.pdf>>.

⁶ Konstytucja Rzeczypospolitej Polskiej, <<https://trybunal.gov.pl/o-trybunale/akty-normatywne/konstytucja-rzeczypospolitej-polskiej>>.

⁷ Ustav Republike Hrvatske Narodne Novine br. 56/90.

⁸ Ustava Republike Slovenije, Uradni list RS, št. 33/91-I.

⁹ See: art. 30, par. 2, Constitution of the Republic of North Macedonia.

¹⁰ See: art. 30, par. 3, Constitution of the Republic of North Macedonia.

paragraph 3, the Constitution doesn't refer directly to expropriation which is commonly understood to be the manner of interference or deprivation of property in the public interest. The vague wording of the constitutional provision motivated scholars to raise the question of whether the Constitution "leaves an open door" for all types of interferences or deprivation of property including nationalization¹¹. Although the constitutional provision doesn't specify what kind of interferences or deprivation of property can be enacted for the benefit of the public interest we can still safely say that nationalization and other forms of deprivation of property rights, in general, are not compatible with Macedonian constitutional order. The Constitution is centred around the individual's right to hold property, guaranteeing its enjoyment and protection. This excludes the possibility for massive interference or deprivation of property, targeting a variety of property rights, belonging to an unspecified number of individuals. With this in mind, most scholars agree that the provision of article 30 paragraph 3, should be interpreted in connection with the provision of article 30 paragraph 4 where it is stated that: "*In case of expropriation of property or interference with property a just compensation is guaranteed no less than the market value*". The result of such interpretation is the conclusion that the Constitution allows for government authorities to interfere with an individual's property or to deprive a certain individual of his or her property rights by way of expropriation when public interest is in question. For the expropriation to be lawful it must be conducted under conditions prescribed by law to satisfy a precise public interest also predetermined by law. When individual property rights are subject to expropriation by public authorities the affected party is entitled to just compensation that can't be less than the market value of the expropriated property.

We concur with the conclusion on how article 30, paragraph 3 should be interpreted, however, we would like to point out that interference or deprivation of an individual's property may also be enacted by public authorities to secure payment of taxes or to enforce penalties. In these cases, the conditions set by the provision of article 30, paragraph 3 of the Constitution should adequately apply. So, for the interferences or deprivation of property for payment of taxes or enforcement of penalties to be lawful it needs to be conducted under strict and predetermined conditions specified by law, leaving no room for arbitrary decision making.

What constitutes property is not precisely determined by the Constitution. An overlook of the constitutional provisions however indicates that the Constitution refers to rights in rem as property. Primarily the right of ownership over movable and immovable things and also, to some extent, the other real rights which according to the constitutional provisions are derived from ownership. The term "property" as it is used in the Constitution doesn't include other rights such as claims and interests of monetary value. The enjoyment of such rights is also guaranteed by the Constitution but under the provision of Article 55 which states:

"Free market and freedom of enterprise are guaranteed.

The Republic provides equal opportunities for all participants on the market.

The Republic undertakes measures against monopoly and monopolist behaviour on the market".

Freedoms guaranteed in article 55 of the Constitution can be limited for the purpose of national defence, protection of nature and the environment or people's health.

¹¹ See: P. Живковска, *Стварно право...op.cit.*, 102; С. Шкарик, *Уставно право, втора книга* (Union Trade, 1995) 179; В. Митков, С. Климовски, *Политички и уставен систем*, (Скопје, 1995) 121.

The constitutional provisions reflect the distinction between rights in rem and rights in personam¹² that is observed in Macedonian legislation. The so-called "rights in rem" are rights over movable and immovable things. In the Macedonian legal system, they are also referred to as "property rights".

Property rights are regulated by the General Law of Ownership and Other Real Rights from 2001¹³. According to the Law property rights are: ownership, servitudes (predial and personal), pledge (pawn and mortgage), real burdens and long term lease on construction land (art. 4). By determining the property rights the Law of Ownership and Other Real Rights supplements the constitutional provisions that are imprecise with respect to what the term "property" entails.

II. PROTECTION OF PROPERTY UNDER MACEDONIAN LAWS

i. Protection of Property under the General Law of Ownership and Other Real Rights

Constitutional guarantees of property are transfused into concrete provisions in the Law of Ownership and Other Real Rights that closely regulate the protection of property rights. The Law of Ownership and Other Real Rights, like the Constitution, guarantees the peaceful enjoyment of property rights and their protection under the law (art. 5-7).

Regarding the peaceful enjoyment of property, the Law stipulates that individual are entitled to exercise their property rights in accordance to the principle of free disposition, meaning that they can make use of their property rights any way they see fit. However, the free disposition of the property holder in the enjoyment of his or her rights is not unlimited. The Law of Ownership and Other Real Rights puts up legal boundaries in which the property rights may be exercised. The general boundaries are: the nature and purpose of the object of property rights, the public interest determined by the law and the prohibition of abuse of rights (art. 9). Some boundaries consist of limitations that one property holder needs to observe in favour of another known as neighbours' rights.

As for the protection of property rights, the Law states that protection is guaranteed under conditions determined in its provisions, primarily referring to provisions of Chapter IV, Title 5 – *Protection of the right of ownership*. In this Title, the Law regulates the legal actions (lawsuits) that the owner can use before the courts for protection of his or her right of ownership: lawsuit for reinstatement of the owner's possession (*actio rei vindicatio*), lawsuit of the presumed owner, a lawsuit against interference (*actio negatoria*) and a lawsuit for protection of co-ownership and joint-ownership. The lawsuit for reinstatement of the owner's possession (*actio rei vindicatio*) can be used on part of the owner when a third party has unlawfully taken possession of the thing he or she owns (art. 156). When using this lawsuit the owner is required to prove his or her right of ownership before the courts, as well as to prove that the possession of the third party is unlawful. Lawsuit of the presumed owner may be used on part of a person that has fulfilled all the legal requirements for acquiring ownership, but for reasons unbeknown to him hasn't truly become the owner (art.160). This lawsuit can be used by the presumed owner against a third party who has possession over the object of ownership without legal base or on a weaker legal base than the one of the presumed owner. Lawsuit against interference (*actio negatoria*) is used by the owner when

¹² On the difference between rights in rem and rights in personam see: M. Davies, *Property, Meanings, histories, theories* (Routledge-Cavendish, Canada, 2007) 20; S. J Hepburn, *Principles of Property Law* (Second Edition, Cavendish Publishing, London 2001) 21.

¹³ Law of Ownership and Other Real Rights, Official Gazette of the RM, No. 18/01.

he is subjected to nuisance or trespass by a third party (art. 161). With this lawsuit, the owner asks the court to ban the actions of nuisance or trespass, and by doing so to enable the owner to peacefully enjoy his or her right. The lawsuit for protection of co-ownership and joint-ownership is not a special type of lawsuit per se, because it can take the shape of all the before mentioned lawsuits (art. 162). The Law of Ownership and Other Real Rights singles it out in order to underline that every co-owner or joint-owner has the power to protect the right of ownership of all co-owners or joint-owners against violations by a third party.

The lawsuits regulating the protection of the right of ownership can be adequately used for protection of the other property rights recognized by the Law of Ownership and Other Real Rights.

ii. Protection of Property under Special Laws

Protection of property rights is not limited only to the provisions of the Law of Ownership and Other Real Rights. Protection of property rights is also afforded by other (special) laws that don't regulate strictly or exclusively property relations.

The Law of Civil Procedure¹⁴ regulates the declaratory judgment which can be used for protection of property rights (art. 177). This remedy is used when the holder of a certain property right needs to reaffirm the legality of the right he or she holds by asking the court to declare that he or she is the rightful property holder. The court's verdict declaring the existence of a property right in favour of the plaintiff protects him or her against pretensions on part of the defendant.

Property rights may be protected with actions for exclusion brought before the courts in bankruptcy proceedings according to the Law for Bankruptcy¹⁵ (art. 125). With the action for exclusion, a person may ask the court for a certain property right to be excluded from the estate of the debtor in the bankruptcy proceedings. In order for the action for exclusion to be successful, the person needs to prove that he or she is the rightful holder of the property right in question.

To some extent, Macedonian special laws also afford protection for property rights that a person has a "legitimate expectation" to acquire under the condition specified by law. Such are the property rights acquired by way of denationalization, privatization, construction and legalization. By way of denationalization individuals may recuperate private property that they've lost during the process of nationalization¹⁶. The right to apply for denationalization is afforded to Macedonian citizens or their heirs. Subject to denationalization is the nationalized property that was owned by the applicant (previous owner) at the moment of denationalization. If the previous owner is no longer alive, the right to apply for denationalization passes on his or her heirs. When the nationalized property still exists it is returned to the applicant as is in the moment of denationalization (art. 16). However, if the property no longer exists or it has been transferred onto a third party by the State then the applicant has the right to receive compensation in the amount of the value of the property at the moment of its nationalization (art. 31).

Privatization is a transfer of state property onto private natural or legal entities. Subject to privatization is the construction land owned by the state but used by natural or legal entities for erecting privately owned structures¹⁷. The right of privatization is afforded to all persons that under

¹⁴ Law of Civil Procedure, Official Gazette of the RM, No. 79/05.

¹⁵ Law for Bankruptcy, Official Gazette of the RM, No. 34/06.

¹⁶ See: art. 3 – 5, Law for Denationalization, Official Gazette of the RM, No. 20/1998.

¹⁷ See: 12, Law for Privatization and Lease of Construction Land Ownership of the State, Official Gazette of the RM, No. 4/05.

socialistic legislation obtained the right of use on construction land and have erected structures on that land including the previous owners of that land.

Construction in the legal sense of the word entails exercising the right to build on construction land. This results in acquiring ownership over the erected structure. The right to build is derived from the right of ownership, long term lease, concession or public-private partnership on construction land. According to building regulation, the owners or the holders of the right of a long term lease, concession or public-private partnership have the right to undertake the construction planned with development and zoning plans¹⁸. For the right to undertake construction (the right to build) state or municipal authorities issue a building permit under conditions predetermined by the zoning laws and by-law.

By legalization, a builder of an illegal structure can acquire ownership over the erected structure if the structure complies with building standards, and if it can be incorporated into the existing zoning plans¹⁹.

The abovementioned property rights are acquired in an administrative procedure before various state or municipal authorities. When deciding on the matter of whether the applicant can acquire property by way of denationalization, privatization, construction or legalization, the authorities are obligated to follow the letter of the law and to assess if the applicant has met the legal requirements or not. Since the decision of the appropriate authority is strictly bound by law, and the outcome of the proceeding depends on the applicant's ability to fulfil the predetermined legal requirements, the state or the municipal authorities have no discretion in rendering their decisions. Therefore every applicant that has fulfilled the legal requirements and filed a request to be afforded a certain property right (by denationalization, privatization, construction or legalization) in a timely manner, has a legitimate expectation to obtain such right based on a decision rendered by the appropriate authorities. In cases when the authorities have failed to recognize the property rights of an applicant, he or she has the right to a legal remedy. In some of the proceedings (privatization, legalization, construction) the applicant can appeal the decision of the first instance before higher administrative authorities. If the appeal is unsuccessful, then they may file a lawsuit before the administrative courts (the Administrative Court and the High Administrative Court). In denationalization proceedings, the right to appeal before higher administrative authority is not recognized, which enables the applicants to directly file a lawsuit for protection of their property rights before the administrative courts.

Notably, Macedonian legislation provides various types of legal remedies for the protection of property rights before the courts and other state authorities.

Property holders are entitled to use several types of legal actions in a civil procedure before the courts against third parties, including state authorities, when their property rights have been violated. Use of legal actions in the civil procedure is conducted under the principle of equality of arms, meaning that all parties involved have the equal opportunity to defend their rights and legitimate interest, with no possibility for special privileges to be afforded to anyone, not even to the public authorities acting as plaintiffs or defendants. The equality of all parties is observed in all aspects of regulating property relations, not only in the area of protection of property rights. Equality also exists in acquiring and exercising property rights under the Law of Ownership and Other Real Rights²⁰.

¹⁸ See: art. 13, Law of Construction, Official Gazette of the RM, No. 130/09.

¹⁹ See: art. 9-20, Law for Treatment of Illegally Built Structures, Official Gazette of the RM, No. 23/11.

²⁰ See: P. Живкоска, *Стварно право...op.cit.*, 106.

Property rights can also be protected before the administrative courts (the Administrative Court and the High Administrative Court). This type of protection is aimed to shield against actions of state and municipal authorities that violate an individual's property rights. As plaintiff before the administrative courts may appear every natural or legal entity whose property rights had been violated with a decision rendered by state or municipal authority in administrative procedure. Needless to say, the defendant in these court proceedings is always a state or a municipal authority. In addition to protection before the courts, property rights may be protected in some administrative proceedings as well.

Steps have also been taken to increase the efficiency of the proceedings in which property rights are protected, such as: prescribing timelines for conducting the proceedings before the courts, limiting the number of times that the higher court may annul a decision of the court of the first instance and return the case for reevaluation to only once²¹, introducing the right of individuals to request protection before the Supreme Court for violation of their right to a trial within a reasonable time²², shortening the length of some administrative proceedings by prescribing that they are to be conducted in only one instance (without the possibility of appeal before a higher administrative authority) and other.

III. INTERFERENCE OR DEPRIVATION OF PROPERTY IN PUBLIC INTEREST FOR PAYMENT OF TAXES AND ENFORCEMENT OF PENALTIES UNDER MACEDONIAN LAW

i. Public Interest

As it was mentioned, the Macedonian Constitution allows interference or deprivation of an individual's property for the public interest. For such interference or deprivation to be lawful, it must be conducted under conditions specified by law, and it must be accompanied with payment of just compensation no less than the market value of the expropriated property. Following the constitutional guidelines, the expropriation is regulated by a special law – The Law on Expropriation²³. According to the Law, subject to expropriation are rights over real estate such as the right of ownership, the right of long term lease on construction land, servitudes and the right of use of construction land owned by the State. By directly listing the right that may be subject to expropriation the Law provides certainty and limits the scope of interference or deprivation of an individual's rights by the public authorities for the public interest (art.3). The Law also precisely determines the types of public interest that may lead to expropriation and it divides them into two categories: public interest of the State and local public interest (Art. 4-7). When expropriation is conducted for the public interest of the State it may result in interference (partial expropriation)²⁴ or deprivation (full expropriation) of private or municipal property in favour of the State (art. 9, par. 1; art. 10, par. 1). If the local public interest is in question expropriation leads to interference of deprivation of individual's private property in favour of municipalities (art. 9, par. 2; art. 10, par. 2).

²¹ See: art. 351, par. 3, Law of Civil Procedure...

²² See: art. 36, Law of Courts, Official Gazette of the RM, No. 58/06.

²³ Law on Expropriation, Official Gazette of the RM, No. 95/12.

²⁴ Interference with property rights (partial expropriation) includes imposing predial servitudes or other interferences such as the temporary occupation of land for preparatory activities, geological research or placement of construction materials and machinery on adjacent land.

The Law of Expropriation also guarantees compensation for the expropriated property in the amount of its market value which is determined on part of authorized appraisers or the Bureau of Forensics (art. 37). Although the Law seemingly guarantees impartiality in respect to determining the market value of the expropriated property by leaving it in hands of professional appraisers, in actuality the licensed appraisers are employees of the municipalities of the state authorities which puts their impartiality in question. Supporting this claim is the fact that in expropriation proceedings the compensation is always determined at the lowest rate, which forces the owners of the expropriated property to file a claim for compensation before the courts²⁵. The courts on the other hand almost always award higher compensation for the expropriated property, than the one determined in the expropriation proceedings. The affected party in the expropriation proceedings has a legal remedy at his or her disposal if he or she feels that the right of just compensation has been violated. However, the fact that this legal remedy is so frequently used against the public authorities indicates that the conduct of the public authorities places an unnecessary burden on the affected parties forcing them to peruse just compensation before the courts. Debatable regulation with respect to the compensation for an expropriated property is also article 44-a of the Law on Expropriation. The article states that when the compensation for one or several properties belonging to the same owner subject to linked expropriation proceedings exceeds the amount of five million Euros, the compensation will be paid in instalments year by year during a period of five years, and if the compensation exceeds the amount of 25 million Euros the compensation will be paid in early instalments during a period of eight years. To our opinion, this provision puts an excessive burden on the owner of the expropriated property because he is not only deprived of a significant portion of his property (taking into account the value of it) but also is denied the right to be promptly and fully compensated.

There are other provisions of the Law on Expropriation that also raise concern as to their justification. Such as the provisions of article 33, paragraph 2, that empower the Government to allow premature dispossession of the property before expropriation is completed and the compensation paid. There are no precise guidelines only general ones and it is left up to the discretion of the Government to decide on the matter. The provisions of article 35 regulating the annulment of expropriation are also questionable. According to those the owner of the expropriated property may ask for annulment only after 10 years have passed from the moment that the decision for expropriation had become final. To our opinion, it is neither proportional nor justified for the owner to have to wait up to 10 years before he can start to recuperate the expropriated property because the public authorities have failed to fulfil the intended purpose for expropriation.

ii. Payment of Taxes

For the purpose to ensure payment of taxes, the Public Revenue Office is authorized to enact forced collection of taxes according to the Law for Tax Procedure²⁶. Subject to the forced collection are all property rights, proprietary interest and claims of the tax debtor (art. 130). In the proceedings for forced collection of taxes, the Public Revenue Office is authorized to enact control over the property of the debtor to secure the payment of the taxes by placing a pawn of a mortgage over his properties. The Public Revenue Office for payment of taxes is also authorized to deprive the debtor of his properties by transfer of funds from the account of the debtor into the account of the Public

²⁵ See: art. 241- 250, Law of Non-Litigious Civil Procedure, Official Gazette of the RM, No. 9/08.

²⁶ Law for Tax Procedure, Official Gazette of the RM, No. 13/06.

Revenue Office, by transfer of claims, or by seizing and auctioning off movable and immovable properties of the debtor (art. 140).

ii. Enforcement of Penalties

The Macedonian Penal Code²⁷ regulates confiscation as a penal measure. Subject to confiscation are all properties that were directly or indirectly procured by perpetrating a criminal act regardless of whether they belong to the perpetrator of the criminal act or were transferred to third parties (family member or others). If the confiscated property belonged to the victim of the crime, then it is returned to him or her, if not, the confiscated property becomes property of the State (art. 98). The Penal code also allows for authorities to impound a person's property intended to be used or had been used during the commitment of a crime, regardless of whether they belong to the perpetrator or a third party who was or should have been aware of the unlawful use of his or her property (art. 100-a)

Confiscation and impoundment as penal measures may also be used against perpetrators of criminal infractions according to the Law on Criminal Infractions (art. 40)²⁸.

Property belonging to the perpetrator of a crime or a criminal infraction is also subject to enforcement proceedings for payment of criminal fines or infraction fines and fees. Criminal and infraction fines are enforced based on an enforcement order issued by the courts in accordance with the Law for Enforcement of Sanctions²⁹, while infraction fees are enforced by the Public Revenue Office in accordance with the Law for Tax Procedure.

IV. COMPLIANCE WITH THE RULES AND STANDARDS FOR PROTECTION OF PROPERTY SET BY THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The European Convention on Human Rights (ECHR) is a legally binding document that guarantees property on an international level. By ratifying the ECHR the Republic of North Macedonia has adopted it as an integral part of its legislation. In regard to the binding power of ratified international documents, the constitutional provisions are unequivocal. According to article 118 of the Macedonian Constitution: "*the international treaties ratified in accordance to the Constitution are part of the internal legal order...*". Further, Amendment XXV of the Constitution is declared that: "*Courts pass judgments in accordance with the Constitution, the laws and the ratified international treaties...*". These provisions of the Macedonian Constitution place duty for national courts and also for other national authorities to comply with the rules and standards for the protection of property set by the ECHR.

Protection of property in article 1 of Protocol 1 of the ECHR is based on three rules derived from its provisions. The first rule introduces a general guarantee for peaceful enjoyment of property (*Every natural or legal person is entitled to the peaceful enjoyment of his possessions*). What this rule affirms is the person's freedom to use and dispose of their property rights at will, without them being subjected to interferences by public authorities or third parties. The second rule places a safeguard against arbitrary and unlawful deprivation of one's property rights (*No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for*

²⁷ Penal Code, Official Gazette of the RM, No. 37/96.

²⁸ Law on Criminal Infractions, Official Gazette of the RNM, No. 96/19.

²⁹ Law for Enforcement of Sanctions, Official Gazette of the RNM, No. 99/19.

by law and by the general principles of international law). The third rule reaffirms the prerogative of the state to impose limitations on the use of the property on one hand, and on the other, places standards for what could be construed as acceptable control over the use of property - public interest, securing the payment of taxes and other contributions or penalties (*The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties*)³⁰.

The analysis of the three rules derived from the provisions of article 1 of protocol 1 leads us to conclude that the ECHR guarantees persons right to hold property and to make use of that property by his or her own volition and it safeguards from unlawful and arbitrary deprivation or interference with that property.

Guarantees and safeguards found in article 1, Protocol 1 of the ECHR are not absolute. The guarantee of peaceful enjoyment of property refers to the acquired property rights. It doesn't extend to those rights that a person aims or hopes to acquire unless there is a legitimate expectation as to the acquisition of those rights. A legitimate expectation, as we can see from the case law, should be founded on substantial bases such as meeting the legal requirements for obtaining certain property rights, fulfilling conditions prescribed by law, undertaking required legal actions, etc³¹. Apart from this, when there is no legitimate expectation for a right to be acquired, only a mere hope or an aspiration the guarantee doesn't apply. Safeguards from deprivation or interference with a property also have limitations. As it is clearly stated in the provisions, property may be subject to acts of deprivation or interference on part of the State when public interest is involved. The European Court of Human Rights (ECtHR) has recognized that the contracting states have a lot of leeway with respect to determining what is or isn't a public interest. However, when assessing if the deprivation or control of the use of property can be justified as being in the public interest, the ECtHR follows three guidelines or principles: it must be determined by law or other binding documents of similar nature, meaning it must be lawful; it must have a legitimate aim, meaning that there must be an adequate balance between the public and the private interest of the individual; it must be proportional, meaning that it must not impose an unjustified and excessive burden on the individual³². As for imposing taxes, other contribution or penalties, the ECtHR also recognizes that the ECHR in no way tends to limit the discretion of the contracting states in imposing taxes, contributions and penalties in their national legislation³³. It is considered to be a control of the use

³⁰ See: A. Grgiæ, Z. Mataga, M. Longar, A. Vilfan, *The Right to Property under the European Convention on Human Rights*, (Human rights handbook, No. 10, Council of Europe, 2007) 10-12.

³¹ See: A. Grgiæ, Z. Mataga, M. Longar, A. Vilfan, *The Right to Property under the European Convention on Human Rights...op.cit.*, 7; L. Sermet, *The European Convention on Human Rights and Property Rights* (Council of Europe Publishing, Human rights files, No, 11 rev. 1999) 14.; S. Schonberg, *Legitimate Expectation in Administrative Law* (Oxford University, Oxford, 2000); E. Sharpston, *European Community Law and the Doctrine of Legitimate Expectations: How Legitimate, and for Whom*, Northwestern Journal of International Law & Business, Volume 11, Issue 1, Spring, [1990].

³² *Beyeler v. Italy* App no 33202/96 (ECtHR, 05/01/2000); *Sporrong and Lönnroth v. Sweden* App no 7151/75 7152/75 (ECtHR, 18/12/1984); *Hentrich v. France* App no 13616/88 (ECtHR, 22/09/1994); *Romeva v. North Macedonia* App no 32141/10 (ECtHR, 12/03/2020).

³³ *Gasus Dosier-Und Fördertechnik GmbH v. The Netherlands* App no 15375/89 (ECtHR 23/02/1995); "*Bulves*" *Ad v. Bulgaria* App no 3991/03 (ECtHR, 22/04/2009).

of property that is mainly out of the preview of the ECtHR as long as it is not perceived as an excessive and disproportional burden on a person's property³⁴.

Viewing the standard and rules for the protection of property set by article 1 of Protocol 1 of the Convention we note that the Macedonian legal system has provided fairly clear and comprehensive legislation guaranteeing the protection of property and placing safeguards against unlawful interference or deprivation of property. Unfortunately, the practical implementation of that legislation has been noted to have some shortcoming and generated disputes before the ECtHR. In the case of *Arsovski v. FUR Macedonia*³⁵ the ECtHR found that the expropriation of the applicant's property was lawful and in the public interest but did not meet the standard of proportionality and found that have been a violation of Article 1 of Protocol 1. The ECtHR noted that the State gave no justification as to why deprivation of property as a more drastic measure was used instead of the less restrictive ones available in national laws, and why the exploitation of mineral water as public interest would necessitate expropriation in favour of a private entity. In the ruling, the ECtHR also emphasized that "*compensation awarded by the domestic courts is insufficient to offset the burden born by the applicants*". In the case *Euromak Metal DOO v. FUR Macedonia*³⁶ the ECtHR found that had been a violation of Article 1 of Protocol 1 due to interference for securing the payment of taxes. The ECtHR recognized that the State is afforded a wide margin of appreciation in the area of taxation, but despite that, the principle of "*fair balance*" must be observed. Also, the ECtHR noted that the circumstances of the case indicated that the applicant had the "*legitimate expectation*" to receive a tax deduction but was denied, which constituted an interference with the applicant's property. As for the claims of the State that the applicant had at his disposal ways to alleviate the financial burden in civil or criminal proceedings initiated against his suppliers, the ECtHR noted that there have been no assurances that such remedies were available to the applicant or that they could have been effective. In the case *Andonovski v FUR Macedonia*³⁷ a violation of article 1, protocol 1 was found resulting from interference with the applicant's right of peaceful enjoyment of property by confiscation. ECtHR examining the compliance of the penal measure with article 1 of Protocol 1 found that the interference with the applicant's property had met the standard of "*lawfulness*" and "*legitimate aim*", but failed to meet the standard of "*fair balance*". The ECtHR concluded that confiscation of the applicant's car, which he used to provide for his livelihood as a taxi driver, was "*disproportionate*" and "*imposed an excessive burden*" in light of the circumstances of the case (no criminal charges filed against him; no indication of his conscious involvement in the transport of illegal immigrants; no indication that he used or would use the car for committing crimes and no effective legal remedies at his disposal to dispute the confiscation).

Macedonian legislation also aims to meet the standards of providing "a fair trial" and "effective legal remedy" set in the ECHR, by introducing a variety of legal remedies for the protection of property rights, undertaking steps to increase the efficiency of the proceedings in which the protection of property rights takes place, strengthening the impartiality and increasing the

³⁴ *Buffalo S.r.l. in liquidation v. Italy* App no 38746/97 (ECtCH, 03/07/2003); *Denisova and Moiseyeva v. Russia* App no 16903/03 (ECtHR, 04/10/2010); *Andonoski v. "The Former Yugoslav Republic of Macedonia"* App no 16225/08 (ECtHR, 17/12/2015).

³⁵ *Arsovski v. "The Former Yugoslav Republic of Macedonia"* App no 30206/06 (ECtHR, 15/04/2013).

³⁶ *Euromak Metal Doo v. "The Former Yugoslav Republic of Macedonia"* App no 68039/14 (ECtHR, 08/10/2018).

³⁷ *Andonoski v. "The Former Yugoslav Republic of Macedonia"* App no 16225/08 (ECtHR, 17/12/2015).

responsibility of the courts and state authorities³⁸. The standards deriving from the right of a fair trial (art. 6) and the right of effective legal remedy (art. 13) are generally applied and interlaced with all rights guaranteed by the ECHR including the protection of property³⁹. Full compliance with these standards in the area of protection of property rights doesn't just entail drafting the appropriate legislation but also provide the conditions for such legislation to be fully enforced. The ECtHR on several occasions has ruled that the State (Republic of North Macedonia) has violated the individual's right to a fair trial and the right to an effective legal remedy with respect to protection of property rights. In the case *Jankulovski v. FUR Macedonia*⁴⁰ the ECtHR found that the State has failed to comply with its positive obligation "to organize an effective system for enforcement of judgments as an integral part of the trial". By failing to do so the State violated the applicant's right to a fair trial, which by the opinion of the ECtHR "needs to be both public and expeditious". Violation of the applicant's right to a fair trial also led to a violation of his property rights due to the unreasonable delay of the enforcement proceedings. In the case of *Kostovska v. FUR Macedonia*⁴¹ the ECtHR found that there are no circumstances that can "justify laps of time of more than twenty years in the overall duration of the proceedings", and ruled that the State has "failed to satisfy the reasonable time requirement so there has been a violation of article 6, par. 1". In addition, the ECtHR found a violation of article 13 of the Convention since "the applicant had no effective remedy to enforce her right to a hearing within a reasonable time. In the case of *Adilovska v North Macedonia*⁴² the ECtHR found a violation of article 6, paragraph 1 of the Convention "in respect to the applicant's right of access to a court". The applicant's civil actions brought before the courts had been dismissed on procedural grounds because several of the legal heirs had refused to join the proceedings. ECtHR has found "that by dismissing the legal action purely on procedural grounds the Court of Appeal had imposed a disproportionate burden on the applicant in her attempt to secure the determination of her civil claim".

V. CONCLUSION

The Macedonian Constitution from 1991 guarantees property as a right of individuals and reinforces that guarantee with the proclamation that protection of the property is one of the fundamental values of the Macedonian constitutional order. Constitutional guarantees however do not exclude the lawful interference or deprivation of an individual's property by the state authorities provided that they benefit the public interest and are prescribed by law.

According to the Constitution and the laws the term "property" refers to rights in rem as proper rights (ownership, servitudes, pledge, real burdens and long term lease on construction land).

The Law of Ownership and Other Real Rights guarantees peaceful enjoyment of property rights in accordance with the principle of free disposition and limits determined by law. Protection of property is also guaranteed under predetermined conditions for use of legal actions (lawsuits) by the owner before the courts

³⁸ See: art. 6 and 13, European Convention on Human Rights. See also: W. Piątek, *The right to an effective remedy in European law: significance, content and interaction* (China-EU Law J 6, 2019) <<https://doi.org/10.1007/s12689-019-00086-3>>.

³⁹ See: K. Gutman, *The Essence of the Fundamental Right to an Effective Remedy and a Fair Trial in the Case-Law of the Court of Justice of the European Union: The Best Is Yet to Come?* (German Law Journal, 2019).

⁴⁰ *Jankulovski v. "The Former Yugoslav Republic of Macedonia"* App no 6906/03 (ECtHR, 3/10/2008).

⁴¹ *Kostovska v. "The Former Yugoslav Republic of Macedonia"* App no 44353/02 (ECtHR, 15/09/2006).

⁴² *Adilovska v. North Macedonia* App no 42895/14 (ECtHR, 22/06/2020).

Protection of property rights is also afforded by other (special) laws that don't regulate strictly or exclusively property relations such as the Law of Civil Procedure and the Law for Bankruptcy. Up to a certain extent Macedonian special laws also afford protection for property rights that a person has a "legitimate expectation" to acquire under the condition specified by law, such as property rights acquired by way of denationalization, privatization, construction and legalization. Lawful interference or deprivation may be conducted under conditions specified by special legislation. For the purpose of public interest expropriation of property is allowed in accordance with the Law on Expropriation. For payment of taxes, the Public Revenue Office is authorized to enact forced collection of taxes over property rights, proprietary interest and claims of the tax debtor. Confiscation and impoundment as penal measures may be used against perpetrators of crimes and criminal infractions. Property belonging to the perpetrator of a crime or a criminal infraction can also be subject to enforcement proceedings for payment of criminal fines or infraction fines and fees.

ECHR guarantees the person's right to hold property and to make use of that property by his or her own volition and it safeguards from unlawful and arbitrary deprivation or interference with that property. The guarantee of peaceful enjoyment of property refers to the acquired property rights and rights that a person has a legitimate expectation to acquire. Guarantees set by the ECHR do not exclude the possibility of interference or deprivation of property on part of the State in public interest, payment of taxes, penalties, etc.

Macedonian legal system aims to comply with the rules and standard of the ECHR by providing fairly clear and comprehensive legislation guaranteeing the protection of property and placing safeguards against unlawful interference or deprivation of property. The legal system also aims to meet the standards of providing "a fair trial" and "effective legal remedy" set in the ECHR, by introducing a variety of legal remedies for the protection of property rights, undertaking steps to increase the efficiency of the proceedings in which the protection of property rights takes place, strengthening the impartiality and increasing the responsibility of the courts and state authorities.

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