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PROPERTY RIGHTS RESTRICTIONS IN THE CONTEXT OF THE COVID-19 PANDEMIC²

ABSTRACT: This paper will examine the impact of certain restrictive measures introduced during the COVID-19 pandemic, in the context of transformation of property rights from a liberal concept to increasingly frequent government interventionism, along with the limitation of three basic ownership rights — possession, use and disposal. As property rights have a social function, this paper examines the new functions that emerged during the pandemic. With respect to the practice of the European Court of Human Rights and recent verdicts of American and French courts, the paper further deals with restricting private ownership rights and ways in which these rights were regulated by the state authorities in an attempt to protect public health and prevent the spread of infection.

KEYWORDS: property rights, property rights restrictions, human rights, COVID-19 pandemic.

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Introduction

The complex social relations worldwide, further complicated by the COVID-19 pandemic, have raised many issues centred on establishing a balance between private and public interests. The state of emergency and restrictive epidemiological measures that frequently involved prohibiting or restricting movements, gatherings and the way of conducting business, together with the economic crisis that followed, fundamentally changed the way people live and work the world over.

As was expected, basic legal institutes and social values experienced certain changes in the new situation. This also applies to the right to property, as the central institution of every legal system. For some time, it has been undergoing major changes, due to increasingly frequent government interventionism, and the limitation of three basic ownership rights — possession, use and disposal. During the pandemic, owners were prevented or limited from exercising their ownership rights by the introduction of restrictive measures.

The current situation has shown that the liberal concept of ownership rights as the right to use and dispose of things in the most absolute way, where the owner's powers are limited only by the rights of other persons, has been abandoned. The atmosphere of crisis, fear, and the need to prevent the spread of the infection imposed the need to limit ownership rights, especially for owners of immovable property. This confirmed the validity of 19th and 20th century concepts about ownership rights: according to Léon Duguit, the right to property is not a right in the classical sense, but rather a social function, exercised not only in the private, but also in the public interest (Nikolić & Midorović, 2020; Medić, 2020; Nikolić, 2014). Such notions later gained numerous advocates and exerted a significant influence on many legislations, as well as on the creation of adequate judicial practices.

These ideas offer an incentive to closely examine how the traditional concept of property rights fared during the pandemic, what functions it had, and how the state arranged the exercise of this right in the interest of public health.

1. The grounds for ownership restrictions during the COVID-19 pandemic

During the COVID-19 pandemic nearly every country in the world introduced restrictive measures to suppress the spread of the infection, limiting some of the basic rights and freedoms of citizens guaranteed by the Universal Declaration of Human Rights from 1948, the International Covenant on Civil and Political Rights and the International Covenant on economic, social and cultural rights from 1966, as well as the European Convention on the Protection of Human Rights and Fundamental Freedoms from 1950 (hereinafter: ECHR). Due to the threat to people's lives and health, almost all European countries (except for Germany) introduced a state of emergency by a parliament vote. In Serbia this was the government's responsibility, while in Romania the decision was that of the president, but not without the parliament's approval. The parliaments of France and Italy delegated their respective decisions to their governments. In such circumstances, private property rights, which are most often limited by law, rarely by the constitution, acts of executive power, or even decisions of the highest courts, were subject to numerous direct or indirect restrictions (Nikolić, 2014).

Today, it is widely accepted that private property can be confiscated or limited only in the public interest, with compensation that cannot be lower than the market price, in accordance with the principles of legality and legal certainty. In addition to guaranteeing ownership rights to every person, the Universal Declaration of Human Rights also states that no one may be arbitrarily deprived of property. Two years after the adoption of ECHR, through supplementary Protocol 1, every legal and natural person is guaranteed the right to peaceful enjoyment of possessions (Bubnjak, 2019). The Protocol further states that no one can be deprived of property, except in the public interest and under conditions provided by law and general principles of international law. However, the ECHR does not contain the concept of property and therefore assumes that the rights protected by it should not be interpreted narrowly (Komnenić, 2017). Thus, thanks to the European Court of Human Rights, an autonomous concept of property was created – independent of those represented in national laws, but also broader than the concept of

property in the traditional sense based on Roman law (Komnenić, 2017, p. 66). In this context property refers not only to exclusive ownership of movable, tangible, and intangible things, but also to all rights or economic interests that have property value (Komnenić, 2017, p. 67). This primarily refers to the right to rent, compensation for damages, interest in running a business, obtained licences to perform a certain activity (*Tre Traktörer Aktiebolag v. Sweden*), the clientele created during one's long-term work (*Iatridis v. Greece*), as well as various corporate rights particularly affected by the government's restrictive measures during the pandemic (Komnenić, 2017, p. 67). However, the concept of property does not refer to lost profits, as pointed out in *Van der Musselle v. Belgium*. In contrast, by carrying out a certain activity, the expected increase in property constitutes property, according to Article 1 of Protocol 1 of the ECHR (*Pine Valley Developments v. Ireland*).

The right to peaceful enjoyment of possessions is of general nature and implies two rules — no one can be deprived of property by actions or decisions that are illegal and not undertaken in order to protect the public interest: governments exercise control of the use of property under certain conditions. Therefore, in matters concerning enjoyment of possessions all government interference must rest on a certain legal basis. Hence, the necessity of applying any restrictive measures is decided by the governments themselves, but under the supervision of the European Court of Human Rights in order to establish a balance between the need to comply with the provisions of the ECHR and the socio-economic conditions in the respective countries (Komnenić, 2017).

The European Court of Human Rights mostly considers cases of direct expropriation as deprivation of possession; occasionally, the court also considers a set of measures that have a significant impact on property and can consequently be equated with deprivation (Braithwaite, Harby & Miletić, 2020, p. 129). The restrictions of a more lenient nature fall under property control cases, including changes in market conditions, rent control systems and suspension of eviction orders for tenants who have stopped paying rent, all of which were relevant during the pandemic (*Pine Valley Developments v. Ireland*).

2. Examining the validity of restrictive measures

The circumstances during the pandemic invite the examination of the validity of the restrictive measures taken by the state. In accordance with the ECHR, this primarily refers to the conditions of legality, legitimacy, as well as necessity in order to establish a balance between private and public interests, which must be fulfilled cumulatively in every case. This procedure will certainly enrich the practice of domestic and international courts in the future.

Legality does not only concern laws in the formal sense, but also the constitution, international treaties, and by-laws. Specifically, a state of emergency in Serbia was introduced based on Article 200 of the Constitution of the Republic of Serbia (“Official Gazette of the Republic of Serbia” No. 98/2006, 115/2021), which stipulates that due to a public danger threatening the survival of the state or citizens, there is a possibility of deviation from certain guaranteed human and minority rights. Because of the Assembly’s inability to meet, the decision to declare a state of emergency was made by government decree, with the president’s signature. Moreover, a number of decisions, decrees, decisions, orders, or conclusions of importance for citizens and legal entities that operate in conditions of public danger were made in Serbia throughout this period. Some of them refer to the restriction of use or deprivation of ownership rights, for which, according to the Constitution, adequate compensation follows and cannot be lower than the market rate (Article 58 of the Constitution of the Republic of Serbia).

The legitimacy of the measures taken in order to prevent the spread of the infection gives governments the possibility to make different decisions given the circumstances and according to their free assessment, such as: restricting businesses, temporarily assigning certain facilities designated for quarantine or prohibiting forced eviction of tenants due to late payment of rent. In such situations, the European Court of Human Rights gives governments a high degree of freedom in choosing measures and respects their assessments, unless they are clearly unfounded (Braithwaite et al., 2020).

To determine the necessity of the restrictive measures aimed at achieving the balance between individual and public interests, it is important to understand their duration and circumstances surrounding them. The European Court of Human Rights is not expected to call into question either the emergency response decisions of individual governments or the packages of economic measures they adopted, albeit the latter may result in the shutdown of business and subsequent loss of jobs. The Court is unlikely to rule in citizens' favour in such cases, especially if one was fired in accordance with the terms and conditions of an employment contract.

Obvious disproportionality in measures taken may exist in situations where certain groups of individuals have to shoulder excessive financial burdens, i.e., they are treated less favourably by the relevant authorities. Some examples include previous court rulings on the issue of rent control measures in Malta by which the government imposed a disproportionate financial burden on lessors (Braithwaite et al., 2020). In Serbia, where most retail facilities were closed during the pandemic, lessors came under heavy strain due to rent freezes. Subsidising rent payments, as was done in Kosovo, makes one alternative strategy that the government could have pursued. In fact, lessors of catering establishments in Serbia's temporarily closed shopping centres could plead unfavourable treatment, given that bars and restaurants outside of malls were allowed to work as per usual.

Permanent measures are much more likely to be deemed disproportionate than the temporary ones. During the course of the pandemic, as the number of COVID-19 cases fluctuated, many measures were being imposed, removed, and then reinstated, thus in such circumstances, time frames tend to be relative. Nevertheless, all individuals should be offered a formal assurance of their legal capacity to, at any given time, request that the legality, legitimacy, and necessity of each individual restriction be reassessed.

Assessing the necessity of a particular measure becomes especially important in regard to the confiscation of assets. The amount of compensation that must be awarded in the event of expropriation is an important factor in achieving a fair balance between the public and injured

party's interests. The implementation of certain measures of economic policy or achievement of a greater degree of economic justice (*Lithgow and Others v. The United Kingdom*) can sometimes justify lower-than-the-market-value compensation amounts (Komnenić, 2017). Disposition of privately owned property without compensation is admissible only in exceptional circumstances, which make precedents in the practice of the European Court of Human Rights. Such was the case of *Jahn and Others v. Germany*, which involved specific political circumstances and land dispossession under the land reform following the reunification of Germany. Heirs to the parcels redistributed under the land reform had to farm the land prior to the adoption of new regulations, otherwise, the state was free to repossess it without any compensation. Still, extraordinary circumstances, such as those brought about by the COVID-19 pandemic and its preventative measures, have generally justified temporary restrictions on ownership rights. Expropriation with the aim of building COVID-19 hospitals – which were built extensively in prior years – can occur, but only with compensation that is in line with market conditions.

3. Instances of ownership rights restrictions during the COVID-19 pandemic and first court proceedings

As the pandemic progressed and the virus mutated, authorities around the world attempted to contain the spread of the new strains. This was done not only by means of imposing various restrictive measures and declaring states of emergency, but also through, either direct or indirect, restrictions on individual ownership rights. In Serbia, the *Decision on proclaiming COVID-19 disease caused by SARS-CoV-2 virus as infectious disease* was the basis for the ensuing restrictive measures (“Official Gazette of the Republic of Serbia”, No. 23/2020). Thus, numerous hotels, motels, spa and health resorts, schools, sports facilities, as well as event halls and venues were adapted for those needs. In the UK, Former Manchester United players, Gary Neville and Ryan Giggs, as well as the Russian billionaire and Stamford Bridge Millenium Hotel owner, Roman Abramovich, all made their hotels available to the country's medical employees. There were also examples of governments

buying these types of facilities and transforming them, with minimal investment, into quarantine spaces. In the USA, such was the case with one of the motels that used to be part of a large Econo Lodge motel chain. Furthermore, luxurious and immensely profitable Asilomar Hotel & Conference Grounds in California was designated as a quarantine area for the infected passengers of the Grand Princess cruise ship, one of the first COVID-19 infection hotspots (Malenica, 2020).

During the state of emergency in Serbia, farmers faced major problems due to movement restrictions. Individuals with land divided by administrative lines were prevented from farming it and some even owned entire estates in neighbouring countries that suddenly became unreachable due to border closures. Problems arising from limits on freedom of movement during the curfew were solved quickly with the issuance of special permits. At one point, people over the age of 65 who lived in Serbia – this also included farmers and cattle breeders from Vojvodina – were prohibited from leaving their homes; all of this complicated the situation even further.

Due to the border closures, most people who owned real estate and sailing craft abroad were not able to access their property. International, regional, and even local trade in goods, labour, capital, and services was subjected to major limitations. Following the initial hurdles and lockdowns placed on numerous cities, regions, and countries, the situation gradually normalised.

The validity of restrictions on ownership rights was generally not questioned, as the strong spirit of solidarity unified people in the fight against the virus. Many property owners even temporarily renounced their ownership rights to protect the interests of society as a whole. Still, some disputes concerning the restrictions imposed did occur; one of the first was *Dodero v. Walton County*. A group of beachfront property owners in Walton County, Florida filed a lawsuit against the local authorities after an ordinance that temporarily forbids access to the beach behind their houses was passed. The plaintiffs claimed the county had violated both Florida's constitutional right to privacy and the Fifth Amendment to the United States Constitution, among other claims. The district court denied their motion and noted that the plaintiffs were not

the only ones who had had their rights limited during the pandemic, in fact, many business activities deemed non-essential by the state had to be temporarily suspended under the new circumstances. In addition, the court concluded that there was no violation of the right to privacy, as the situation in question was explicitly linked to individual ownership rights (Budak, 2019, Sjuggerud, 2020). The court further stated that whatever injury the plaintiffs might have suffered due to the temporary restrictions on beach/ocean access was negligible compared to the potential threats in the event of the spread of the infection. The district court's order provided no additional commentary regarding the plaintiffs' allegations.

In contrast, one Pennsylvania Supreme Court ruling included a detailed analysis of the effect of emergency epidemiological measures on property rights. In *Friends of Danny Devito v. Wolf*, four businesses and one entrepreneur filed a lawsuit against Pennsylvania Governor's order restricting all non-vital economic activities in order to reduce the spread of the virus. The plaintiffs claimed the government had acted contrary to the Pennsylvania Constitution and the Fifth Amendment to the United States Constitution by ordering a taking of their private property. The Supreme Court of Pennsylvania relied on two previous cases – *Tahoe-Sierra Press. Council, Inc. v. Tahoe Reg'l Planning Agency* and *Nat'l Amusements Inc. v. Borough of Palmyra* from 2002. and 2013. respectively – in support of its decision to reject the claim. According to the ruling, the plaintiffs failed to prove that a regulatory taking had, in fact, occurred. Furthermore, the court found that the governor's emergency order, which was limited to 90 days and revocable by the General Assembly at any time, seemed no different from the activities that police officers engage in during a crisis (Sjuggerud, 2020). This ruling was later challenged at the U.S. Supreme Court which denied the plaintiffs' appeal with a remark that in the absence of the government's confiscation of a specific asset, property owners will find it difficult to protect their rights when temporary measures aim to protect public interests (Sjuggerud, 2020).

In May 2021, the Paris Commercial Court ruled in favour of Stéphane Manigold, one of the most famous restaurateurs in France, after his insurer, AXA, refused to cover the losses incurred as a result of

a temporary government-mandated closure of restaurants and other non-essential businesses. The insurer was ordered to perform its part of the contract and pay Manigold two and a half months' worth of average monthly revenue, albeit he had asked for four. Subsequently, AXA put forward a proposal to pay most of its policyholder restaurants 20 percent of their average monthly income for the prior four months, on condition that they do not press charges. In contrast, American insurance companies are refusing to cover the business losses caused by government shutdown orders, as they do not deem the current pandemic foreseeable by their insurance policies.

4. Further interpretations of ownership rights restrictions

All the rulings mentioned will affect the subsequent court actions in cases of ownership rights restrictions due to various epidemiological measures. Whether there are grounds for damages is a key question that requires an individual assessment. Except for expropriation, which normally involves compensation, temporary restrictions on ownership rights caused by the adoption of public health measures are not expected to result in damages. Even though the temporary suspension of business activities leads to the loss of future income, which is regarded as property within the meaning of Protocol No. 1 to the ECHR and thus requires compensation, governments opted for offering incentives and financial assistance programs instead of awarding damages (Nekit, 2021).

The traditional view of private property law as sacrosanct can no longer be maintained. Split between protecting the public and private interests, property law is currently – considering the highly unpredictable new circumstances for all of humanity – undergoing a transformation. The pandemic and protection of public health have proven to be justifiable reasons for further re-examination of the significance, purpose, prospects, and validity of the temporarily imposed restrictions on property rights.

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OGRANIČENJE PRAVA SVOJINE I NJENE FUNKCIJE U USLOVIMA PANDEMIJE COVID-19

REZIME: U radu su analizirani uticaj pojedinih restriktivnih mera u uslovima pandemije COVID-19 na institut prava svojine u kontekstu njegove transformacije od liberalnog koncepta do sve češćeg državnog intervencionizma i ograničavanje tri osnovna svojinska ovlašćenja, tj. držanje, korišćenje i raspolaganje. Shvatanje prava svojine, kao instituta koji ima socijalnu funkciju, bio je podsticaj da se sagleda kakve je sve nove uloge dobio u okolnostima pandemije. Takođe, autor ispituje, oslanjajući se na raniju praksu Evropskog suda za ljudska prava i najnovije presude američkih i francuskih sudova vezane za ograničenje prava svojine, kako su organi državne vlasti uredili ostvarivanje ovog prava u svrhu zaštite zdravlja i sprečavanja širenja zaraze.