ОРИГИНАЛНИ НАУЧНИ РАД
10.5937/zrpfn0-48109

Rodna Živkovska*, LL.D.,
Full Professor,
Faculty of Law Iustinianus Primus,
University Ss Cyril and Methodius Skopje,
Republic of North Macedonia
Tina Pržeska*, LL.D.,
Full Professor,
Faculty of Law Iustinianus Primus,
University Ss Cyril and Methodius Skopje,
Republic of North Macedonia

UDK: 347.23(497.7)
Рад примљен: 06.12.2023.
Рад прихваћен: 17.12.2023.

PROTECTION OF THE RIGHT TO OWNERSHIP IN MACEDONIAN PROPERTY LAW

Abstract: *The paper analyses the legal remedies for the protection of the right of ownership in Macedonian property law and in comparative law. This research focuses on the protection of ownership in the Macedonian property law system, as guaranteed by the provisions of the basic Ownership and Other Property Rights Act. This Act regulates different types of petitory actions (lawsuits) for the protection against infringement or interference with the ownership right whose scope and effectiveness will be analyzed in this paper. The analysis will extend to special laws regulating some form of protection of the ownership right. The paper also includes a comparative analysis of the legal mechanisms for protecting the right of ownership in the legal system of EU member states and other European countries, pinpointing the similarities and differences in the legal approach to protecting the right of ownership between countries. Considering that the right of ownership is protected by Protocol 1 of the European Convention on Human Rights, the paper will also address the European Court of Human Rights approach to protecting the ownership right under the Convention.*

Keywords*: ownership, protection, petitory action, property.*

* r.zivkovska@pf.ukim.edu.mk
* t.przeska@pf.ukim.edu.mk

1. Introduction

The right of ownership is unequivocally recognized as a fundamental property right that directly affects the social and economic well-being of the individual. Due to its relevance, the ownership right is regulated by both national laws and international acts.

Ownership is a right that affords the owner full and exclusive power over the object of ownership. As a result, the owner is entitled to use and dispose of the object of ownership in any way he or she finds fit while respecting the limitations imposed by the laws. By exercising the right of ownership, each owner strives to satisfy his or her economic interests and needs. For this to be possible, the contemporary legal systems need to create a legal climate where owners can peacefully enjoy their right of ownership. Multidimensional and effective protection of the right of ownership is important in creating such a legal climate. The multidimensionality of ownership right protection involves protection at different levels (national and international), protection by different authorities, implementation of alternative dispute resolution mechanisms, etc. The effectiveness of protection of the ownership right is evaluated by the availability, accessibility, and effectiveness of the legal remedies for the protection of the right of ownership, providing equality of arms, institutional diligence in the protection of the right of ownership, etc. In this paper, the protection of the right of ownership in the Macedonian property law system will be closely analyzed.

2. Constitutional guarantees for the protection of the right of ownership

The protection of the ownership right as a fundamental right is guaranteed by the highest legal act in the Macedonian legal system – the Constitution[1]. The Macedonian Constitution considers the protection of the right of ownership to be one of the fundamental values of the Macedonian constitutional system (Art. 8). By promoting the protection of the right of ownership as fundamental, the Macedonian Constitution gives clear direction on how the issue of ownership protection should be treated in the property law regulation. The Constitution also incorporates safeguards against unlawful and arbitrary deprivation of ownership. Article 30 of the Macedonian Constitution states that the right of ownership is guaranteed, and that no one can be deprived or limited in the exercise of his or her right of ownership unless it is in the public interest. The Constitution states that any limitation or deprivation of the right of ownership for the sake of public interest must be determined by law to prevent any arbi-

1 The Constitution of the Republic of North Macedonia, *Official Gazette of the Republic of Macedonia*, 52/1991.
https://www.wipo.int/wipolex/en/text/437750

trary actions on the part of state authorities. In case of limitation or deprivation of one's right of ownership, just compensation is guaranteed no less than the market value of the expropriated property. The Macedonian Constitution also protects the freedom of individuals to acquire ownership without limitations by guaranteeing free enterprise. Ownership rights of foreigners are also protected by the Macedonian Constitution (Art. 31). Foreigners are allowed to acquire ownership in the Republic of North Macedonia, under conditions specified by the basic Ownership and Other Property Rights Act [2].

The guarantees for ownership protection are not a unique feature of the Macedonian Constitution. The constitutions of many European countries (EU member states and countries aspiring to EU membership) also guarantee the right of ownership and its protection.

Article 14 of the German Constitution[3] states that property and inheritance are guaranteed within their content and limits determined by law. The German Constitution also safeguards against unlawful deprivation of property by determining that expropriation is permitted only for the public good and with guaranteed compensation for the affected party.

Article 26 of the Swiss Constitution[4] guarantees the right to own property and states that and any compulsory purchases and restrictions equivalent to compulsory purchases will be conducted with full compensation for the affected party.

The Spanish Constitution[5] recognizes the right to private property and guarantees that no one may be deprived of his or her property unless it is on the justifiable grounds of public utility and social interest (Article 33). In case of property deprivation, compensation is guaranteed in accordance with the law.

2 Ownership and other Property Rights Act, *Official Gazette of the Republic of Macedonia,* 18/2001,
https://www.libertas-institut.com/de/MK/nationallaws/law_on_ownership_and_other_real_rights.pdf

3 The German Constitution: The Basic Law for the Federal Republic of Germany (Grundgesetz) of 23 May 1949, last amended 19.12.2022; https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html

4 The Federal Constitution of the Swiss Confederation of 18 April 1999 (status as of 13 February 2022), https://www.fedlex.admin.ch/eli/cc/1999/404/en

5 The Constitution of Spain 1978 (last revised 2011), *Official State Gazette N*o. 233/2011; https://www.senado.es/web/conocersenado/normas/constitucion/detalleconstitucioncompleta/index.html#tp

The Italian Constitution[6] recognizes two types of property: private and public. The Italian Constitution guarantees private property and states that it may be acquired and exercised within the limits determined by law (Article 42). Expropriation of property is permitted only in the public interest, with just compensation for the affected party.

The Constitution of the Republic of Serbia[7] guarantees the peaceful enjoyment of property (Article 58), the equality of all types of ownership, and guarantees protection of all types of ownership (Article 86).

The Constitution of the Republic of Croatia[8] declares the inviolability of the right of ownership (Article 3). The Constitution also guarantees the right of ownership (Article 48), and safeguards against unlawful deprivation of ownership (Article 50).

The Constitution of the Republic of Slovenia[9] guarantees the right of ownership (Article 33) and safeguards against unlawful deprivation of ownership (Article 69).

The Constitution of the Republic of Montenegro[10] guarantees the right of ownership (Article 58), and promotes equality of all types of ownership (Article 139).

By analyzing the constitutional guarantees of the right of ownership and its protection we notice that these guarantees aim to create a base for further regulation of the protection of the ownership right by laws. The constitutional acts promote ownership protection supported by the notion that its protection should be a core value in the property law system. The analyzed constitutional acts also promote equality in acquiring and exercising the right of ownership for all individuals under conditions determined by the law, which among other things, translates into an obligation for the legislators to provide effective and equally available remedies for the protection of ownership. In all the analyzed

6 The Constitution of the Italian Republic of 22 December 1947, last amended on 19.10. 2020, https://www.quirinale.it/allegati_statici/costituzione/costituzione_inglese.pdf

7 The Constitution of the Republic of Serbia, *Official Gazette of the Republic of Serbia*, 98/2006. http://www.ustavni.sud.rs/page/view/en-GB/235-100028/constitution

8 the Constitution of the Republic of Croatia, *Official Gazette of the Republic of Croatia*, 56/1990, 135/97, 113/00, 28/01, 76/10 and 5/14; https://www.sabor.hr/en/constitution-republic-croatia-consolidated-text

9 The Constitution of the Republic of Slovenia, *Official Gazette of the Republic of Slovenia*, 33/1991, last amended in 2016;.https://faolex.fao.org/docs/pdf/slv129862.pdf

10 The Constitution of the Republic of Montenegro, *Official Gazette of the Republic of Montenegro*, 1/2007, last amended 2013; https://www.skupstina.me/en/the-constitution-of-montenegro

constitutional acts, safeguards are placed against unlawful and/or arbitrary deprivation of ownership on the part of state authorities. These safeguards aim to prevent deprivation of the right of ownership from one private individual for the benefit of another by determining that the deprivation or limitation of the right of ownership can only be conducted in the public interest. For the sake of predictability of the circumstances in which a person can be deprived or limited in the exercise of his or her right of ownership, the analyzed constitutional acts determine that any deprivation or limitation of the right of ownership in the public interest must be done under conditions determined by the law. The analyzed constitutional acts also promote the proportionality between public and private interest regarding the exercise of the right of ownership. In that sense, the social function of the right of ownership is highlighted, which justifies sacrificing an individual's right of ownership for the public interest, but with guaranteed compensation for the affected party.

3. Legal base for protection of the ownership right in the Macedonian property law

There are various ways of protecting the right of ownership in the Macedonian property law system regulated by the Act on Ownership and Other Property Rights (hereinafter: the Ownership Act, OA) and other laws as well.

The main source of protection of the right of ownership is the Ownership Act, a general act which contains the basic provisions on property relations in the Macedonian legal system. It regulates the right of ownership in its three basic forms: private ownership, state ownership, and municipal ownership (Article 2 OA). The legal regime of things as an object of ownership and other property rights is regulated in part. The Ownership Act also regulates neighbors' rights (Articles 17-29), different types of co-ownership (Articles 31-111), possession (Articles 167-191), and property rights of foreigners (Articles 240-252 OA). It also regulates other property rights: servitudes (personal and predial), the right of pledge (pawn/lien and mortgage), and real burdens (Articles 192- 239 OA).

Considering the scope of regulation in the Ownership Act, it is understandable why this Act regulates the petitory actions (lawsuits), which are the main type of legal actions for the protection of the right of ownership (Articles 156-166 OA). The Ownership Act regulates four types of petitory action: action for the recuperation of ownership (*actio rei vindicatio*), the action of the presumed owner (*actio Publiciana)*, the action to deny (*actio negatoria*), and the action for the protection of co-ownership and joint ownership. Besides the petitory actions as the main form of protection, the Ownership Act protects ownership via neighbors' law (Articles 17-29) and prohibition of abuse of rights (Article

9(2) OA). By invoking neighbors' law, the real estate owner can protect his or her right to peaceful enjoyment of property against the neighbors who failed to abide by the obligations and limitations imposed by the neighbors' law. Invoking the abuse of rights can protect the owner's right from infringements and interferences caused by the improper or immoral exercise of the right of ownership by another owner. The use of possessory rights protection afforded by the Ownership Act is another rather indirect way to protect ownership (Art. 184 OA). By protecting his or her possession, the owner maintains physical control over the thing he or she owns. Maintaining physical control over the thing means exercising the power to hold the object of ownership, which is one of the three main powers comprising the content of the right of ownership: the power to hold, use, and dispose of the object of ownership (Живковска, 2005:17-23). Owners who were unlawfully deprived of the peaceful possession of their property can file a possessory action against the person or persons who deprived them of possession. The proceedings for the protection of possessory rights are restricted to protecting the person who had the last peaceful possession, without assessing the quality or lawfulness of that possession, which makes them expedient and effective in offering immediate protection.

Ownership protection can be achieved by using other legal remedies, such as: the declaratory judgment action, the actions against unlawful or erroneous registration of rights in real estate, the action to exclude in bankruptcy or enforcement proceedings, claim for return of property in criminal proceedings, and de-expropriation request. They are regulated by the Civil Procedure Act, the Real Estate Cadaster Act, the Bankruptcy Act, the Enforcement Act, the Expropriation Act, and the Criminal Procedure Act.

Declaratory judgment action is regulated by Article 177 of the Civil Procedure Act.[11] By filing for a declaratory judgment, the plaintiff aims to prove the existence or non-existence of a certain right, legal relation, or validity or invalidity of a legal instrument. When filing a declaratory judgment action, the plaintiff must prove that the use of such action is permitted by law or that he or she has a legitimate interest in filing it. Related to the protection of ownership, owners have a legitimate interest to file a declaratory judgment action when they have acquired the right of ownership by way of prescription and they need a legal instrument to prove it. Another potential use of the declaratory judgment action is when the validity of the contract based on which ownership has been acquired has been disputed.

11 The Civil Procedure Act, *Official Gazette of the Republic of Macedonia*, 79/2005.

The actions against unlawful or erroneous registration of rights in real estate are regulated by Articles 237-238 of the Real Estate Cadaster Act.[12] Two types of legal actions can be filed before the Administrative Court against the Real Estate Cadaster Agency for unlawful or erroneous registration of rights in real estate.[13] The first type of legal action is against decisions of the Agency denying the registration of rights or correcting errors in the registration of rights in the Real Estate Cadaster. The second type of legal action is a request for a certain registration of rights to be removed from the Real Estate Cadaster. Owners can protect their rights by using these types of actions when they have been unlawfully denied the registration of their ownership right in the Real Estate Cadaster, when their request for correction of data affecting their ownership right has been denied, or when another person has registered a right in the Real Estate Cadaster infringing on their right of ownership.

The action to exclude is used in bankruptcy or enforcement proceedings. This action aims to exclude certain property from the proceedings by proving that it does not belong in the debtor's estate against whom the proceedings are conducted. This action is explicitly recognized in Article 125 of the Bankruptcy Act.[14] The Enforcement Act (EA)[15] does not explicitly regulate this type of action but third parties are given the right to object before the courts to irregularities in the enforcement proceeding, which may include an objection that certain property subject to enforcement does not belong to the debtor in those proceedings (Article 86 EA). In terms of ownership protection, the action to exclude boils down to an action for recuperation of ownership on things that were mistakenly included in the debtor's property during bankruptcy or enforcement proceedings.

Under Article 110 of the Criminal Procedure Act,[16] the owner may file a claim in criminal proceedings demanding the return of the property he/she was illegally deprived of.

De-expropriation request is another way for recuperating the ownership of real estate, in case the state authorities have failed to use the expropriated property

12 The Real Estate Cadaster Act, *Official Gazette of the Republic of Macedonia*, 55/2013.

13 The action against erroneous registration of ownership is also regulated by the Ownership Act, in the chapter regulating the acquisition of ownership of real estate (Art. 151 (2) OA). It has the same effect: the erroneous registration will be removed from the record. The timeline for filing this action is 3 years from the day of the erroneous registration but the action is filed before the civil courts, not the Administrative Court.

14 The Bankruptcy Act, *Official Gazette of the Republic of Macedonia*, 34/2006.

15 The Enforcement Act, *Official Gazette of the Republic of Macedonia*, 72/2016.

16 The Criminal Procedure Act, *Official Gazette of the Republic of Macedonia,* 150/2010.

for the designated purpose. According to Article 35 of the Expropriation Act[17], the owner of the expropriated property can file a request for the expropriation act to be annulled resulting in the recuperation of the expropriated real estate. When the expropriation was done to construct structures or to perform other undertakings in the public interest of the State, the de-expropriation request can be filled if the designated purpose was not realized in 10 years. If the expropriation was done for the construction purposes or performing other undertakings of local public interest, the de-expropriation request can be filed if the designated purpose was not realized in 6 years. The ultimate timeline for filing the de-expropriation request is 15 years counting from the day that the expropriation act had become final.

Considering self-protection as a form of protection of the right of ownership, scholars note that it is not the most appropriate way of protection (Gavella, Josipović, Gliha, Belaj, Stipković, 2007: 585). The owner can practice self-protection of the ownership right only in exceptional situations. In such cases, self-protection should be aimed at deflecting an immediate danger of infringement of the ownership right, rather than recuperating ownership.

All the aforesaid legal bases for protection of the ownership right afford protection in a strict sense of the word, i.e. protection against infringement or interference with an acquired ownership right. Protection of ownership in a broader sense of the word includes protection of the freedom to acquire ownership under equal terms and conditions prescribed by law, protection against arbitrary acts of state authorities aimed at preventing the acquisition or peaceful enjoyment of one's property, compensation of damages due to loss of property, protection against imposing unjust or disproportionate burdens on property owners, etc.

Although there are many forms of protection of the ownership right, the detailed comparative analysis in this paper will be limited to the protection of ownership by means of filing petitory actions.

4. Protection of the right of ownership by petitory actions

As previously stated, petitory actions are the primary manner of protection against infringement or interference with the right of ownership. When determining the nature of petitory actions, most scholars tend to differentiate between the right to take action, and the action as a formal act. The right to take action is a right emerging from the substantive law and it is linked to the right of ownership (Gavella *et al*., 2007: 580). In that sense, the right to take action (to seek protection) is guaranteed to each owner by the substantive law, and it takes

17 The Expropriation Act, *Official Gazette of the Republic of Macedonia*, No. 95/12.

effect when the right of ownership has been infringed or interfered with by a third party. Regarding the link between the right to take action and the right of ownership, scholars point out that the right to take action is not a comprising component of the right of ownership, but a co-dependent right that the owner can exercise when his or her right of ownership has been violated (Gavella *et al.,* 2007: 580). The action as a formal act is of a procedural nature; it refers to the action (formal lawsuit) that the owner files seeking protection of the right of ownership before the courts (Gavella *et al*., 2007: 581).

It is important to keep in mind that petitory actions have a dual nature. The effective use of the actions depends on them having a solid base in the substantive law, and also on them having the form and compulsory content determined by procedural law. In that sense, if a petitory action is based on the substantive law, but the action as a formal act (lawsuit) does not comply with the requirements imposed by procedural law, the courts will dismiss the action without evaluating its merit. The opposite also applies if the action as a formal act (lawsuit) complies with the requirement imposed by procedural law but it is not based on the substantive law; in such a case, the courts will deny it for lack of merit.

According to the Ownership Act (Articles 156-162 OA), petitory protection of the right of ownership includes four types of petitory action: a) the action for the recuperation of ownership (*actio rei vindicatio*), b) the action of the presumed owner (*actio Publiciana*), c) the action to deny (*actio negatoria*), and d) the action for the protection of co-ownership and joint ownership.[18] The Act also mentions the declaratory judgment action and the action to exclude as viable for protection of the right of ownership (Article 163 OA), but does not regulate them as petitory actions, thus leaving its regulation to other laws.

4.1. The action for the recuperation of ownership (actio rei vindicatio)

The action for the recuperation of ownership *(actio rei vindicatio)* is a classical petitory action dating from the period of Roman law.[19] As scholars point out,

18 The Italian Civil Code regulates the action for establishing fences and the action for affixing or re-establishing land markers as petitory actions (Art. 950 and 951). The Croatian Ownership and other Property Rights Act regulates the action to remove erroneous registration of rights in real estate as petitory action (Article 168).

19 The action for the recuperation of ownership is recognized in the Italian Civil Code (Art. 948), the Spanish Civil Code (Art. 348), the German Civil Code (Art. 985), the Slovenian Property Code (Art. 92), the Croatian Ownership and Other Property Rights Act (Art. 162), the Serbian Ownership Act (Art. 37), and the Property Relations Act of Montenegro (Art. 112). It has to be noted that the German Civil Code, and the Montenegrin Property Relations Act, and the Croatian Ownership and other Property Rights Act contain the most detailed provisions regulating this action. The German Civil Code and the Montenegrin Property

the main objective of this action is for the owner to recuperate the possession of the object of ownership (Бабић, 2021: 365).[20] Since the main objective of the action is for the owner to recuperate proprietary possession (from the holder), this action can only be filed by the owner, and not by a person holding some other possessory right over the object (for example positive predial servitudes, usufruct). However, we must keep in mind that the Ownership Act does call for the appropriate application of petitory actions in protecting other property rights. In such cases, the use of the petitory actions is modified following the nature of the other property right, meaning that these provisions are not directly applicable.

In the action for recuperation of ownership, the principal claim of the plaintiff is the reinstatement of the owner's possession over his/her property. The principal claim is not subject to prescription and it can be filed at any time. Both the plaintiff and the defendant can make additional claims based on mutual obligations related to the use of the property in question.[21] The additional claims are based on obligations, and they are prescribed over the period of 3 years, counting from the day that possession was reinstated to the plaintiff/owner.

The burden of proof for the plaintiff filing an action for the recuperation of ownership consists of proving three things: 1) one's right of ownership; 2) that the defendant is in possession of his/her property; and 3) one's identification of his/her property (Art. 156 OA).

Proving one's ownership entails proving that the plaintiff is the true and rightful owner of the property in question. The plaintiff must prove the existence of a legal base (*iustus titulus)* and a lawful manner of acquisition of the right of ownership (*modus acquirendi*). If the acquisition of the right of ownership was derivative, the plaintiff must also prove that his/her predecessor was also the true and rightful owner of the property in question. When the predecessor's acquisition of ownership was also derivative, true and rightful ownership of the person before him/her also needs to be proven, and so on, until it reaches the owner whose acquisition of the ownership right over the property in question was original. The requirement of successively proving the true and rightful

Relations Act regulate in detail the rights and obligations arising between the owner and the possessor, while the Croatian Ownership and Other Property Rights Act focuses on regulating the conditions for filing the action in detail.

20 Also see: Станковић, Орлић, 2001: 132; Kovačević Kuštrimović, Lazić, 2009: 140; Albaladejo, 2016: 213; Lacruz Berdejo, 2000: 286.

21 The plaintiff can demand the fruits that the defendant had collected, compensation for collected, sold, or destroyed fruits, and compensation for the use of the property on the part of the defendant. The defendant can ask for compensation for expenses related to the property (Articles 157-158 of the Ownership Act).

ownership over the property in question up to the original owner when filing an action for the recuperation of ownership can be rather burdensome; for this reason, the Romans called it *probatio diabolica* (devilish burden of proof). However, in contemporary law, this is not necessarily true. If the property in question is real estate, sufficient proof of ownership is the property certificate. There is a legal presumption that all owners registered in the Real Estate Cadaster are true and rightful owners[22], so no further proof of ownership is required. If the property in question is a movable thing (a chattel), the duty to successively prove the true and rightful ownership over the property in question still stands. Regarding this issue, scholars note that there is a rather practical way for the current owner to circumvent the need to prove true and rightful ownership of his/her predecessors simply by claiming that the acquisition of the ownership right was original even if it was derivative (Gavella *et al.*, 2007: 595). This kind of claim can be made under the assumption that the owner (plaintiff) or his/her predecessor meets the requirements for acquiring ownership originally (by prescription, by occupation, etc.).

The plaintiff also has the burden of proving that the defendant is in possession of the plaintiff's property. The action for the recuperation of ownership must be directed against the person in possession of the property in question, regardless of the type of possession (proprietary or non-proprietary, direct or indirect, conscientious or unconscientious, autonomous or not). According to legal scholars, the plaintiff has met this burden of proof if the defendant was in possession of the property in question at the moment when he/she received the lawsuit notice.[23] When the defendant's possession is not autonomous, he/she can call for the person who is the autonomous possessor to step into litigation (*nomination auctoris)*.[24] However, if the autonomous possessor refuses to step into litigation, the litigation will continue with the same defendant.

For the action for recuperation of ownership to be successful, the plaintiff must also identify the property in question. Due to this requirement, the action for recuperation of ownership cannot be filed for recuperation of property consisting of generic things, unless they are in some way distinctive.

22 The principle of accuracy and fate in the public records (Article 145 of the Real Estate Cadaster Act).

23 If the defendant has relinquished or transferred the possession to another person after receiving the notice, some scholars consider that the plaintiff can change the claim to a claim for damages, or the court can order the defendant to bear the costs of returning the possession from the person to whom he/she transferred the possession (Kovačević Kuštrimović, Lazić, 2009: 141; Gavella, *et al.*, 2007: 596; Rašović, 2008: 177).

24 This procedural action at the disposal of the defendant is regulated in Article 198 of the Civil Procedure Act.

The defendant may object to the action by claiming that he/she is the true and rightful owner of the property at issue, that another person is the true and rightful owner, that the plaintiff has not met the burden of proof, that possession is based on lease or another contractual relation that has not expired, that he/she is not in possession of the property, etc.

4.2. The action of the presumed owner (actio Publiciana)

The action of the presumed owner (*actio Publiciana*) is a petitory action that also dates from the period of Roman law. At the time, it was introduced by the pretor Publicius for the protection of the conscientious possessor against third parties (Kovačević Kuštrimović, Lazić, 2009: 145-155). In contemporary property law[25], this action has kept its main purpose: to protect the possessor (presumed owners) from third parties that dispossessed him/her of the property in question. The effect of the action of the presumed owner is the same as the effect of the action for the recuperation of ownership; it results in the recuperation of proprietary possession. Yet, this action is advantageous in the sense that it requires a lesser burden of proof than the action for the recuperation of ownership. The presumed owner only needs to prove qualified possession appropriate for acquiring ownership by regular prescription. As scholars note, due to its advantage, even true and rightful owners often use it to recuperate possession of their property (Rašović, 2008: 193). However, the presumed owner cannot successfully protect his/her possession against the true and rightful owner with this action.

In the Ownership Act, the action of the presumed owner has two variations (Art. 160 OA) The first variation offers protection for the presumed owner against a third party who has taken possession of the property in question without legal base, or on a weaker legal base, meaning that a third party has no legal base to claim ownership over the property in question. The second variation resolves the collision of rights when both parties in the dispute can be considered presumed owners. When there is a collision of rights, the Act favors the party who has a stronger legal base (*iustuts titulus*) in the sense that a legal base for acquisition with compensation is stronger than a legal base for acquisition without compensation. If the legal bases (*iustus titulus*) are identical, the Act favors the party holding possession

25 The action of the presumed owner is recognized by the Slovenian Property Code (Art. 98). the Croatian Ownership and Other Property Rights Act (Art. 166), the Serbian Ownership Act (Art. 40), and the Property Relations Act of Montenegro (Art. 123). The German Civil Code allows this type of action only in favor of the presumed owner of a movable chattel (Art. 1006).

The plaintiff filing an action of the presumed owner needs to identify the property in question (non-generic specification), to prove that he/she has a legal base for lawfully acquiring ownership, and to prove that the defendant is in possession of the property at issue.

The defendant may object that he/she is the true and rightful owner of the property in question, that he/she has a stronger legal base for possession, that the plaintiff has not met the burden of proof, that the plaintiff is the unconscientious party, etc.

4.3. The action to deny (actio negatoria)

The action to deny (*actio negatoria*) is a type of petitory action aimed to protect the owner, or the presumed owner, from interference with his/her property.[26] Legal scholars point out that there are two main differences between the action to deny and the action for the recuperation of ownership: 1) the action to deny is used when the owner is in possession of his/her property but endures interference with his/her right to peaceful enjoyment of that property by a third party, while the action for the recuperation of ownership is used when the owner is deprived of possession of his/her property; 2) when using the action to deny, the owner is not obligated to prove that he/she is the true and rightful owner but only that he/she is in possession of the property; when using the action for the recuperation of ownership, the owner is obligated to prove not just his/her right of ownership but also the right of ownership of his/her predecessors (Станковић, Орлић, 2001:141; Kovačević Kuštrimović, Lazić, 2009:143-144; Бабић, 2021: 367-368).

By filing the action to deny the plaintiff (the owner or the presumed owner) aims to remove the interference with his/her property, to reinstate the previous condition of his/her property, and to prevent further (same or similar) interferences. The Ownership Act does not define what constitutes interference with the owner's (or presumed owner's) property. According to civil doctrine, any unlawful (verbal or physical) act committed continually[27] (either by performance or omission), without the permission and/or against the will of the owner, except dispossession, constitutes interference. The substantive base for the protection of the ownership right by using the action to deny is found in the very nature of

26 The action to deny is recognized by the Italian Civil Code (Art. 949), the German Civil Code (Art. 1004), the Slovenian Property Code (Art. 99), the Croatian Ownership and Other Property Rights Act (Art. 167), the Serbian Ownership Act (Art. 42), and the Montenegrin Property Relations Act (Art. 126). Notably, the Italian Civil Code regulates the declaratory judgment action as a variation of the action to deny (Art. 949).

27 Some scholars consider that even a one-time act can constitute interference if there is a justifiable expectation that the act would be repeated (Gavella, *et al,* 2007: 627).

the right of ownership as a full and exclusive right (Kovačević Kuštrimović, Lazić, 2009: 143). Along with the principal claim, the plaintiff may file an additional claim for damages. Unlike the principal claim, which is not subject to prescription, the additional claim for damages is prescribed by the Civil Obligations Act.

The plaintiff must prove the existence of the act of interference with his/her property at the time of filing the action to deny but he/she does not need to prove that the interference is unlawful or unauthorized.[28] As for proving the plaintiff's right of ownership, the burden of proof is very alleviated. The plaintiff only needs to prove that he/she holds proprietary possession. According to legal scholars, proprietary possession is sufficient for the action to deny because it is based on the legal presumption that the proprietary possessor is the likely owner of the property (Станковић, Орлић, 2001: 142).

The defendant is a person who has committed the act of interference. If the defendant has committed the act of interference by acting on someone else's orders, he/she can call for that person to step into litigation. The defendant may object to the action to deny (*actio negatoria*) by claiming that he/she has a legal right to commit the disputed act. For example, there is no trespass if the person has the right of way, as long as that person has acted in line with the established right of way. When the defendant claims to have had a legal right to commit the disputed act, he/she is obligated to prove it.

4.4. The action for the protection of co-ownership and joint ownership

The action for the protection of co-ownership and joint ownership regulated by Ownership Act is not a specific type of petitory action *per se.*[29] Article 162 of this Act specifies that each co-owner or joint owner individually has the right initiate a lawsuit to protect the right of ownership over the entire co-owned or jointly owned property. The Ownership Act refers to protection against third parties by using all the available petitory actions (action for the recuperation of ownership, action of the presumed owner, the action to deny, and any other appropriate legal remedy). Yet, the Macedonian Ownership Act does not state whether the co-owner or the joint owner can file a petitory action against another co-owner or joint owner in case they infringe or interfere with his/her right of

28 The plaintiff is not required to prove that the act was unauthorized or unlawful because there is a legal presumption that the ownership right is unlimited unless proven otherwise (Станковић, Орлић, 2001: 142).

29 The action for the protection of co-ownership and joint ownership is regulated in the Slovenian Property Code (Art. 100), the Serbian Ownership Act (Art. 43), and the Property Relations Act of Montenegro (Art. 130).

ownership over the co-owned or jointly owned property.[30] The judicial practice is divided on this issue.

Some legal practitioners consider that the co-owners and joint owners cannot file petitory action against each other; instead, they should file a lawsuit demanding the regulation of their inner relationship by the courts (Чавдар, Чавдар, 2012:485). Others see no legal impediments for co-owners and joint owners to file petitory action against each other since they all have ownership over the property in question (Чавдар, Чавдар, 2012:486-487). We agree with the latter. The principle of equality in civil law relations, including the equality of arms, is one of the fundamental principles regulating all civil law relations. There is no justification for denying any form of protection to individuals who enjoy the same type of (ownership) right under the same conditions prescribed by the law. Regarding the argument that co-owners and joint owners have other legal remedies at their disposal for regulating their inner relationship, we note that this alternative way of protection may have limited effect when there is an interference with the right of ownership of the co-owner or the joint owner by other co-owners or joint owners. However, if there is an infringement of his/her right, and the co-owner or joint owner is dispossessed of the property in question, petitory actions may be the only remedy for recuperating possession and obtaining effective protection.

Evaluating the effectiveness of the petitory action, we note that the Ownership Act is in line with the contemporary legal systems regarding the regulation of petitory actions as a form of ownership protection. Along with the fact that there are alternative ways for the protection of ownership regulated both in the Ownership Act and other special laws, this makes the case for the availability of legal remedies. The constitutional guarantees for legal protection of ownership, complemented with the guarantees of equal protection under the Ownership Act for all owners (private individuals, the State, or municipalities) attests to the accessibility to legal remedies and equality of arms. Alternative dispute resolution is also possible for all property disputes. Two types of alternative dispute resolution mechanisms are available in the Macedonian legal system: mediation[31] and arbitration[32]. Institutional diligence

30 By comparison, the Slovenian Property Code, the Serbian Ownership Act, and the Montenegrin Property Relations Act state that the co-owner is entitled to protect his/her part of the co-ownership against other co-owners. However, according to these laws, the same does not apply to joint owners.

31 Mediation as a mechanism for alternative dispute resolution is regulated by the Mediation Act (*Official Gazette of the Republic of Macedonia,* 294/2021)

32 The Republic of North Macedonia passed the International Trade Arbitration Act in 2006 (*Official Gazette of the Republic of Macedoni*a, 39/2006). Many special laws refer to dispute resolution by arbitration in trade matters, consumer protection, etc. The Civil Procedure Act regulates arbitration proceedings (Art. 439-460); its provisions are applicable in all arbitration proceedings, except for those regulated by a special law.

has also increased by implementing regulations intended to speed up the litigation proceeding and provide effective legal remedies.[33] Overall, it may be concluded that there has been progress in modernizing and adapting the Macedonian property law system to EU standards and requirements.

However, despite all these efforts, some important issues have been neglected. The basic Ownership Act was omitted in the process of upgrading and modernizing Macedonian property law. It is overdue for revision due to the number of changes in the property law system brought on by special laws. Civil litigation has become more expensive and, as a result, less accessible to vulnerable groups. Arbitration and mediation as alternative dispute resolution mechanisms are seldom used by private individuals, and there is no visible effort to promote their use. The public trust in the judicial system has reached a record low (4% according to a poll presented by the International Republican Institute)[34]. It has also been noticed that the courts have some degree of bias in property disputes in favor of the State. Serious issues such as these have undermined the efforts to provide effective legal protection of all rights, including ownership rights, in the Macedonian legal system. Thus, they need to be addressed as soon as possible.

5. Protection of the ownership right under the European Convention on Human Rights

The European Convention on Human Rights (ECHR, 1950)[35] is considered to be one of the most important international documents providing for the protection of human rights of individuals. The ECHR was inspired by the Universal Declaration of Human Rights (1948) and its aim to provide universal and effective recognition and observance of human rights. As stated in its Preamble, the purpose of the ECHR is the collective enforcement of human rights stated in the

33 For example, the courts or appeals have been limited on the number of times they may return the case to the first instance courts for reevaluation; now they may do it only once. The right to a fair and public trial within a reasonable time by an independent and impartial court was explicitly prescribed in Article 6 of the Courts Act (*Official Gazette of the Republic of Macedonia,* 58/2006). The Supreme Court was given the authority to rule on citizens' complaints concerning their right to a trial within a reasonable time (Art. 35(5) of the Courts Act). An Automated Court Case Management Information System was set up to provide for efficient and impartial distribution of court cases.

34 National poll of North Macedonia, Center for Insights in Survey Research, International Republican Institute, September - October 2022
North-Macedonia_October-2022_Poll_Updated-5.17.23.pdf

35 The European Convention on Human Rights (ECHR), Council of Europe, Strasbourg (adopted in 1950 and entered into force in 1953); https://www.echr.coe.int/documents/d/echr/convention_ENG

Universal Declaration and reaffirmed by the ECHR in accordance with the principle of subsidiarity. In line with this principle, the contracting parties have the primary obligation to observe and protect the rights and freedoms guaranteed under the Convention. The countries are given a margin of appreciation (i.e. they have a leeway in choosing the manner of protecting the rights and freedoms guaranteed by the ECHR) but they are subjected to the supervisory jurisdiction of the European Court of Human Rights (ECtHR).

The Republic of North Macedonia ratified the ECHR in 1997 and, by doing so, became bound by it. Pursuant to the Macedonian Constitution, ratified international treaties become an integral part of the Macedonian legal system and they cannot be changed by domestic law (Art. 118). In essence, this means that domestic courts are bound by the ECHR just as they are bound by domestic law. Considering the supervisory jurisdiction of the ECtHR, it is important for judicial practice and legal practitioners to be informed about the fundamental judgments and decisions that shape the way that the ECHR is implemented in practice.

Article 1 of Protocol No.1 to the ECHR guarantees the right to peaceful enjoyment of property. It is important to note that the concept of property (under Article 1) is rather broad and includes all types of property rights and proprietary interests that transcend the traditional concept of what constitutes property.[36] However, there is no doubt that the right of ownership is protected under Article 1 (Protocol No. 1). Regarding the protection of the ownership right, we note that it extends to protection in a strict and in a broad sense. As the case-law analysis has shown, Article 1 applies to "existing possession" and to "legitimate expectation of obtaining possession" (CoE/ECtHR, 2022: 7). In terms of ownership, it translates to the acquired ownership rights and ownership that a person had a legitimate expectation to obtain.

In assessing a violation of Article 1 of Protocol No.1 to the ECHR, in the form of interference with a person's right to peaceful enjoyment of property, the ECtHR applies the so-called "three rules approach". It involves assessing whether there is deprivation of property, whether there is control of use of property in accordance with the general interest, and whether the general rule applies (in case of interference that cannot be classified as either deprivation or control of use). (CoE/ECtHR, 2022: 19).

The first step is the assessment of whether there is an interference with the right to the peaceful enjoyment of property. If some form of interference is

36 CoE/ECtHR (2022): Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights: Protection of Property, Council of Europe/European Court of Human Rights, 31 August 2022 (p. 7);. https://www.echr.coe.int/documents/d/echr/Guide_Art_1_Protocol_1_ENG

established, the ECtHR proceeds to the second step: assessing whether the interference complies with or is contrary to Article 1 (Protocol 1). There are three basic criteria that the ECtHR uses in assessing whether interference with property is compatible with Article 1 (CoE/ECtHR, 2022: 19):

the interference must be lawful, i.e. it has to be based on a regulation that is clear, precise and publicly accessible, to protect from arbitrary behavior of authorities and lead to foreseeable results (consequences) in its application;

it must pursue a legitimate aim, which is rooted in the legitimate public interest;

it must be proportionate to the aims pursued, i.e. it has to ensure a fair balance between the public interest and the private interest of the individual who suffers the interference; the interference cannot create a disproportionate or excessive burden on the individual and be justified as public interest.

Under Article 1 of Protocol No. 1 ECHR, protection of the ownership right is provided whenever it is established that there has been an interference with one's property that is inconsistent with the provisions of Article 1 (Protocol 1). The criteria and principles that the ECtHR uses in assessing each individual case and establishing violations of the guaranteed right to peaceful enjoyment of one's property are well structured and should be considered and further developed by domestic judicial practice as well.

References

Albaladejo, M. (2016), *Derecho Civil III*, Derecho de Bienes, Madrid: Edisofer S.L.;

Бабић И. (2021). *Увод у грађанско право и стварно право* (9. издање). Приручници за полагање правосудног испита. Књига 2. Београд: ЈП Службени Гласник;

Gavella, N., Josipović T., Gliha I., Belaj V., Stipković Z. (2007) *Stvarno pravo*. Svezak 1. Zagreb: Narodne Novine d.d;

Lacruz Berdejo, J.L. (2000). *Elementos de Derecho Civil III, Derechos Reales,* Vol.1, Posesión y propiedad, Madrid: Dyckinson;

Kovačević Kuštrimović, R., Lazić M. (2009). *Stvarno pravo*. Nish: Punta;

Rašović, Z. P. (2008). *Stvarno pravo.* Podgorica;

Станковић. О., Орлић М. (2001). *Стварно право*. Београд: Номос.

Живковска, Р. (2005). *Стварно право*. Скопје: Европа 92;

Чавдар К., Чавдар К. (2012). *Коментар на Законот за сопственост и други стварни права*. Скопје: Академик.

Legal documents

The European Convention on Human Rights (1950), Council of Europe, Strasbourg; https://www.echr.coe.int/documents/d/echr/convention_ENG

CoE/ECtHR (2022): Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights: Protection of Property, Council of Europe/European Court of Human Rights, 31 August 2022; https://www.echr.coe.int/documents/d/echr/Guide_Art_1_ENG

The German Constitution: The Basic Law for the Federal Republic of Germany (Grundgesetz) of 23 May 1949, last amended 19.12.2022; https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html

The Federal Constitution of the Swiss Confederation of 18 April 1999 (status as of 13 February 2022), https://www.fedlex.admin.ch/eli/cc/1999/404/en

The Constitution of Spain 1978 (last revised 2011), *Official State Gazette N*o. 233/2011; https://www.senado.es/web/conocersenado/normas/constitucion/detalleconstitucioncompleta/index.html#tp

The Constitution of the Italian Republic of 22 December 1947, last amended on 19.10. 2020, https://www.quirinale.it/allegati_statici/costituzione/costituzione_inglese.pdf

The Constitution of the Republic of Serbia, *Official Gazette of the Republic of Serbia*, 98/2006. http://www.ustavni.sud.rs/page/view/en-GB/235-100028/constitution

The Constitution of the Republic of Croatia, *Official Gazette of the Republic of Croatia*, 56/1990, 135/97, 113/00, 28/01, 76/10, 5/14; https://www.sabor.hr/en/constitution-republic-croatia-consolidated-text

The Constitution of the Republic of Slovenia, *Official Gazette of the Republic of Slovenia*, 33/1991, last amended in 2016;.https://faolex.fao.org/docs/pdf/slv129862.pdf

The Constitution of the Republic of Montenegro, *Official Gazette of the Republic of Montenegro*, 1/2007, last amended 2013; https://www.venice.coe.int/webforms/documents/?pdf=CDL(2005)096-e

The German Civil Code of 1900 (*Bürgerliches Gesetzbuch – BGB*); https://www.gesetze-im-internet.de/englisch_bgb/

The Italian Civil Code of 1942 (Codice civile); https://faolex.fao.org/docs/pdf/ita197336.pdf

The Spanish Civil Code of 1889 (Código Civil); https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/Spanish_Civil_Code_(Codigo_Civil_Espanol).PDF

The Slovenian Property Code, *Official Gazette of the Republic of Slovenia*, No. 87/2002; https://www.ebrd.com/downloads/legal/core/slolom.pdf

Ownership and Other Property Rights Act. *Official Gazette of the R. Croati*a, No. 91/1996; https://www.pak.hr/cke/propisi, zakoni/en/OwnershipandOtherRealRights/EN.pdf

Act on Basic Ownership and Proprietary Relations (Zakon o osnovama svojinskopravnih odnosa), *Official Gazette of R. Serbia No..* 115/2005; https://www.osce.org/files/f/documents/1/d/34272.pdf

Zakon o svojinsko-pravnim odnosima (the Property Relations Act), *Službnemi glasnik Republike Crne Gore*, br. 19/2009; https://www.paragraf.me/propisi-crnegore/zakon-o-svojinsko-pravnim-odnosima.html

Macedonian legislation

The Constitution of the Republic of Macedonia, *Official Gazette of the Republic of Macedonia*, 52/1991; https://www.wipo.int/wipolex/en/text/437750

The Act on Ownership and other Real Property Rights, *Official Gazette of the R. Macedonia,* 18/2001, https://www.libertas-institut.com/de/MK/nationallaws/law_on_ownership_and_other_real_rights.pdf

The Act on Real Estate Cadaster. *Official Gazette of the Republic of Macedonia*, No. 55/2013 https://faolex.fao.org/docs/pdf/mac129800.pdf

The Bankruptcy Act, *Official Gazette of the Republic of Macedonia*, No. 34/2006; https://www.wto.org/english/thewto_e/acc_e/mkd_e/wtaccmkd6_leg_1.pdf

The Criminal Procedure Act, *Official Gazette of the Republic of Macedonia,* No. 150/2010; https://sherloc.unodc.org/cld/uploads/res/document/mkd/1996/criminal-procedure-code-of-the-republic-of-macedonia-as-of-2010_html/FYROM_Criminal_procedure_code_as_of_2010_English.pdf

The Courts Act, *Official Gazette of the Republic of Macedonia*, No. 58/2006; https://vlada.mk/sites/default/files/dokumenti/zakoni/law_on_courts.pdf

Закон за парничната постапка (Civil Procedure Act), *Службен весник РМ,* бр.79/05, 110/08, 83/09, 116/10, 124/15; https://www.slvesnik.com.mk/Issues/C727BE1C5EE5A648A4663606B7FBD8BD.pdf

Закон за експопријација (Expropriation Act), *Службен весник на R. Makedonija,* br. 33/95, 20/98, 40/99, 31/03, 46/05, 10/08, 106/08, No. 95/12.

Закон за извршување (Enforcement Act), *Службен весник на Р.М*акедонија, br 72/2016.

Закон за катастар на недвижности (The (Real Estate Cadaster Act), *Службен весник на Р. Македонија",* br.55/2013, 41/2014, 115/2014; 116/2015, 153/2015 and 192/2015.

Закон за медијација (Mediation Act), *Службен весник на Р. Македонија",br.* 294/2021.

Закон за меѓународна трговска арбитража на република (International Trade Arbitration Act), *Службен весник на Р. Македонија,* br. 39/2006.

Reports

National poll of North Macedonia, Center for Insights in Survey Research, International Republican Institute, September - October 2022; North-Macedonia_October-2022_Poll_Updated-5.17.23.pdf

Др Родна Живковска,
Редовни професор,
Правни факултет „Јустинијан Први", Универзитет „Св. Кирил и Методиј", Скопље
Др Тина Пржеска,
Редовни професор,
Правни факултет „Јустинијан Први", Универзитет „Св. Кирил и Методиј", Скопље
Република Северна Македонија

ЗАШТИТА ПРАВА СВОЈИНЕ У МАКЕДОНСКОМ СТВАРНОМ ПРАВУ

Резиме

Уставне гаранције права својине и његове заштите представљају основ за даље регулисање заштите права својине посебним законима. Уставним актима се гарантује заштита својине као суштинске і темељне вредности, промовише једнакост у стицању и остваривању права својине, штите за сва лица од незаконитог и/или произвољног лишавања својине од стране државних органа. и промовише пропорционалност између јавног и приватног интереса.

Заштита својине у македонском стварно-правом систему регулисана је Законом о својини и другим стварним правима. Као примарни извор заштите ових права, Закон предвиђа петиторне тужбе као главни инструмент за заштиту права својине. Својина је такође заштићена одредбама о суседском праву, забрани злоупотребе права, и индиректно одредбама о заштити државине. Заштита својине се може остварити и употребом других правних лекова, као што су декларaторна тужба, тужба против незаконитог или погрешног уписа права на непокретности, захтев за изузеће у стечајмом или извршном поступаку, захтев за повраћај имовине у кривичном поступку, и захтев за де-експропријацију, који су прописани одредбама других закона.

Закон о својини регулише четири врсте петиторних тужби: ревиндикациона тужба за повраћај ствари (actio rei vindicatio); публицијанска тужба (actio Publiciana); негаторна тужба због узнемиравања својине (actio negatoria); и тужба за заштита сусвојине и заједничке својине. Основни циљ ревиндикационе тужбе је повраћај ствари која се налази у државини другог лица. Циљ публицијанске тужбе је да заштите претпостављеног власника од трећих лица која су узела ствар из његовог поседа. Негаторна тужба због узнемиравања/ометања права својине штити власника (или претпостављеног власника), било враћањем у претходно стање или забраном даљег ометања. Тужба за заштиту сувласништва и заједничког власништва овлашћује сваког сувласника или заједничког власника да заштити својинска права на ствар у целини.

Европска конвенција о људским правима гарантује заштиту права на имовину (члан 1, Протокола бр. 1 Конвенције). У циљу заштите права на имовину, Европски суд за људска права врши процену кршења члана 1, Протокола бр. 1. Први корак је утврђивање да ли постоји ометање права на мирно уживање права на имовину; у том процесу се користе "три правила": да ли постоји лишавање имовине, контрола коришћења од стране државе, или важи опште правило. Када се утврди постојање задирање у гарантовано право, Суд предузима други корак: утврђивање да ли је интервенција компатибилна са чланом 1 (Протокола 1). Да би била у складу са чланом 1, интервенција мора бити законита, мора имати легитиман циљ, и мора бити у складу са принципом пропорционалности. Ако не испуњава ове стандарде, утврђена сметња представља повреду члана 1 Протокола бр. 1 Европске конвенције.

Кључне речи: *својина, заштита, петиторна тужба, имовина.*