

# In search of the importance of Article 1 Protocol No 1. ECHR to private law

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## 1 INTRODUCTION

For anyone trained in the private law tradition, there is at first sight no connection between private law claims and human rights. However, appearances can be deceptive. As the Dutch professor of law J.L.M. Elders notes:

The raising of the subject of the relationship between private law and fundamental rights is based on the fairly generally accepted view that the two areas of law are more or less unrelated and perhaps also on the observation that a certain tension can exist between civil rights and fundamental rights. (...) It is, however, incorrect to juxtapose private law and fundamental rights solely on the basis of an alleged contrast between them. If we examine the essence of a number of typical civil rights, we find rights or principles of law which have either been 'positivised' as fundamental rights or are protected as fundamental rights.<sup>1</sup>

This observation will be true of many fundamental rights. But is it also true of Article 1 Protocol No. 1? In this contribution we first examine the Protocol in the context of the Dutch concept of ownership (§ 2) and then deal with the role of Article 1 for private law in general, in terms of its effect first of all between individuals and, second, between individuals and the State (section 3). We then go on to consider the importance of Article 1 at a more practical level. The national literature suggests that the Protocol does impose limits, in particular in respect of the restrictions imposed by the State in the law on damages. We will examine mandatory participation in settlement funds, statutory limitation of liability and the concept of periods of prescription within which individuals must enforce their rights (§ 4). This contribution ends with a brief conclusion (§ 5).

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1 J.L.M. Elders, *Privaatrecht en grondrechten*, Consultative Report for the Private Law Association, Lelystad: Koninklijke Vermande 1986.

## 2 ARTICLE 1 PROTOCOL NO. 1 ECHR AND THE DUTCH CONCEPT OF OWNERSHIP

## 2.1 Ownership in the Civil Code

Private law practitioners who are concerned with the issue of the protection of possessions under human rights law must above all realise that the concept of '*eigendom*' [ownership] as used in the Dutch translation of Article 1 Protocol No. 1 – '*Iedere natuurlijke of rechtspersoon heeft recht op het ongestoord genot van zijn eigendom*' [Every natural or legal person is entitled to the peaceful enjoyment of his possessions] – is by no means limited to the technical concept of ownership as used in the domestic law of the Netherlands.

In accordance with Roman law and in imitation of the French *Code Civil* of 1804 the old Civil Code introduced in the Netherlands in 1838 was based on the premise that there can be ownership of both corporeal objects and patrimonial rights (incorporeal objects). However, the private law concept of ownership in the new Civil Code that has been in force since 1 January 1992 is much narrower. Section 1 of Book 5 of the Civil Code reads as follows:<sup>2</sup>

Ownership is the most comprehensive right which a person can have in a thing ('zaak'). To the exclusion of everybody else, the owner is free to use the thing, provided that his use is not in violation of the rights of others and that it respects the limitations based upon statutory rules and rules of unwritten law. (...)

As a result of the influence of its author Professor E.M. Meijers of Leiden University (1885-1954), the concept of ownership is reserved for the most comprehensive right to 'things'. A *zaak* [thing] is defined in Section 2 of Book 3 of the Civil Code as follows: 'Things are corporeal objects susceptible of human control'. It follows that there can no longer be said to be ownership of patrimonial rights. At most such rights 'belong to' a person or a person is 'entitled to' them.

What were previously termed 'incorporeal objects' are now designated as *vermogensrechten* [patrimonial rights]. See the definition in Section 6 of Book 3 of the Civil Code:

Patrimonial rights are those which, either separately or together with another right, are transferable; rights which are intended to procure a material benefit to their holder; or rights which have been acquired in exchange for actual or expected material benefit.

They may therefore be encumbrances on a thing (for example the usufruct of a house), rights of action under a contract or the law (for example, a claim to damages in tort) or encumbrances on patrimonial rights (e.g. a pledge of a right of action).

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2 Translation taken from P.P.C. Haanappel and Ejan Mackaay, *New Netherlands Civil Code, Patrimonial Law*, Deventer: Kluwer 1990.

Things and patrimonial rights are together designated by the umbrella term *goed* [property]. See Section 1 of Book 3 of the Civil Code.

Property is comprised of all things and of all patrimonial rights.

## 2.2 'Possessions' within the meaning of Article 1 Protocol No. 1 ECHR

Article 1 Protocol No. 1 ECHR protects not only the right of ownership of things. This is evident from the French and English texts which refer to 'biens' and 'possessions' respectively. This broader scope even surpasses the definitions under national law, as is apparent from the case law of the European Court of Human Rights itself:<sup>3</sup>

The Court recalls that the notion of 'possessions' (in French 'biens') in Article 1 Protocol No. 1 has an autonomous meaning which is certainly not limited to ownership of physical goods: certain other rights and interests constituting assets can also be regarded as 'property rights', and thus 'possessions', for the purposes of this provision.<sup>4</sup>

The Dutch translation of Article 1 Protocol No. 1 ECHR, which refers in brief to ownership (*eigendom*), is therefore misleading. The protection of the ECHR comprises more than ownership in the technical private law sense of Section 1, Book 5, of the Civil Code as referred to above.

To what extent does the protection of the ECHR therefore extend? The precise scope of its application has not yet crystallised, but from the private law perspective we see no reason for a limitation. In our view, the terms 'possessions' and 'biens' used in the Protocol can, in principle, cover all private law claims which come under the definition of *goed* [property] in Section 1 of Book 3 of the Civil Code. This means that protection is afforded not only to the right of ownership as the most comprehensive right to corporeal objects (things) but also to all patrimonial rights. Examples are the rights that flow from contract, for example the right to delivery of a thing purchased under a contract of sale and purchase.

This view finds support in a recent judgment of a Dutch court.<sup>5</sup> The case concerned what are known as 'manure production rights', which entitle pig breeders to have a given number of pigs. The court was required to assess whether the rights granted by the State to Dutch pig breeders were protected by the Protocol. It answered the question in the affirmative:

3 For a more detailed account see the contribution by Hartlief in this volume.

4 ECtHR 23 February 1995 (Gasus Dosier- und Fördertechnik/The Netherlands), *Series A* vol. 306-B, § 53.

5 RB Den Haag 23 December 1998, (Nederlandse Vakbond Varkenshouders and others/State of the Netherlands), *NJCM-Bulletin* 1999, p. 494-511, with note by T. Barkhuysen and M.L. van Emmerik; Hof Den Haag 20 January 2000, 18; *JB* 2000, no. 59, annotated by F. Vernimmen-de Jong, also published in *NJ-KORT* 2000, 18.

The (autonomous) concept of 'possessions' in Article 1 Protocol No. 1 to the ECHR covers rights which may be regarded as patrimonial assets. The available, unencumbered manure production rights (...) are patrimonial assets. These rights may, after all, be transferred to other farm businesses and have a value on the open market. After they have been converted into pig and breeding sow rights, they remain (to a limited extent) marketable in so far as they have not been rounded. (...)

The fact that the manure production rights were not intended by the authorities to create patrimonial rights does not mean that they have not become patrimonial assets (...). Even if they are merely temporary rights, this does not detract from their nature as patrimonial assets (...). It may, however, influence their value.

Although the pig rights were described in the judgment as *vermogensbestanddelen* [patrimonial assets] – a term unknown to the Dutch Civil Code itself – it can be inferred from the test by reference to the criteria of 'value in economic circulation' and 'marketability' that the court regards the production right of a pig farmer as a patrimonial right within the meaning of Section 6, Book 3, of the Civil Code. It thus comes within the definition of 'possession' in Article 1.<sup>6</sup>

### 2.3 When does a right of action exist?

We mentioned above that we would, in principle, classify all claims that come within the definition of 'property' under the Dutch Civil Code as 'possessions'. We have added the qualification 'in principle' because there is an important point in the case law of the European Court of Human Rights which could easily be overlooked, but which plays a role in particular in relation to rights of action.

It is assumed that there must be a concrete and sufficiently specified right if it is to qualify as a 'possession' within the meaning of the Protocol. It follows that a contractual right to remuneration for services rendered is a possession, whereas an expectation based on existing legislation that services to be rendered in the future will be remunerated in a given way is not.<sup>7</sup> The latter is no more than an expectation: there is no claim against a specific debtor.<sup>8</sup>

Reference should also be made to the judgment in the well-known *Marckx* case, in which the European Court of Human Rights held that the disadvantaged position of an illegitimate child under the Belgian law of succession is contrary to Article 1 Protocol No. 1, and Article 14. The right

6 The court then concluded that the limitation of these rights constituted a 'deprivation' within the meaning of Article 1. The correctness of this conclusion has given rise to an exchange of views in the Dutch literature.

7 EComHR 1 April 1974 (X/Germany), *Yearbook ECHR* 1974, p. 148.

8 On this point see the contribution by Hartlief in this volume.

that has been violated here is not that of the *child* itself as heir. The violated right is that of the child's *mother*, Paula Marckx, to dispose of her own property, in the sense that under Belgian legislation it is impossible for her to leave her property fully to her child.<sup>9</sup> It is indeed true that as long as the succession has not taken effect the child has no more than an expectation of succeeding to the property of the testatrix.<sup>10</sup>

One may also wonder whether there can be said to be a 'possession' in the case of a right of action the existence of which has not been categorically established between the parties and about which the court has not yet expressed an opinion. A classic example from the textbooks is the case of a road accident caused by a hit-and-run driver. Although the offender must still be traced, the victim has a right to damages in tort. This right of action arises as a result of the offence itself.

Suppose for a moment that the offender has been caught, but denies his liability. This does not change the existence of the right of action. The judgment of the court in which liability is determined is declaratory, not constitutive. The court simply declares in its judgment what the law is. Such rights of action are therefore regarded under Dutch law as a patrimonial right, provided that the right of action is sufficiently specific. The right of action may, for example, be assigned even if it is disputed and even, indeed, if the debtor is still unknown.

It might actually be argued that in this respect the European Court of Human Rights imposes a stricter criterion than the national legislature. In the 1994 case of *Stran Greek Refineries and Stratis Andreadis* the European Court, in assessing whether rights of action held to be null and void by the Greek authorities could be regarded as a possession, emphatically stated that the arbitration award in which these rights of action were granted was final and binding between the parties:

In order to determine whether the applicants had a 'possession' for the purposes of Article 1 Protocol No. 1, the Court must ascertain whether judgment no. 13910/79 of the Athens Court of First Instance and the arbitration award had given rise to a debt in their favour that was sufficiently established to be enforceable. (...)

The Court agrees with the Government that it is not its task to approve or disapprove the substance of that award. It is, however, under a duty to take note of the legal position established by that decision in relation to the parties. According to its wording, the award was final and binding; it did not require any further enforcement measure and no ordinary or special appeal lay against it (...) At the moment when Law no. 1701/1987 was

9 ECtHR 13 June 1979 (Marckx/Belgium), *Series A* vol. 31, § 65.

10 ECtHR 13 June 1979 (Marckx/Belgium), *Series A* vol. 31, § 50: 'The Court in fact excludes Article 1 of Protocol No. 1: like the Commission and the Government, it notes that this Article does no more than enshrine the right of everyone to the peaceful enjoyment of 'his' possessions, that consequently it applies only to a person's existing possessions and that it does not guarantee the right to acquire possessions whether on intestacy or through voluntary dispositions.'

passed the arbitration award of 27 February 1984 therefore conferred on the applicants a right in the sums awarded. Admittedly, that right was revocable, since the award could still be annulled, but the ordinary courts had by then already twice held – at first instance and on appeal – that there was no ground for such annulment. Accordingly, in the Court's view, that right constituted a 'possession' within the meaning of Article 1 Protocol No. 1.<sup>11</sup>

The case of National & Provincial Building Society three years later is less clear in this respect. Here the European Court did not express an opinion on the correctness of the applicant's submission that despite the absence of 'an enforceable final judgment' there could still be a 'possession' within the meaning of Article 1 if there was a 'clear legitimate expectation' based on a favourable judgment in a comparable case.<sup>12</sup> This concerned an unproven claim for restitution of excess tax. The basis of the right of action was the invalidity of the transitional legislation under which the tax had been collected. This invalidity had been established in an earlier case instituted by a party (Woolwich) which was in a position comparable to that of the applicants. The British authorities subsequently introduced amending legislation to close the gap with retroactive effect. The applicants submitted that this constituted a violation of Article 1. The European Court did not deal with the question of whether there was a possession in this case, since it assessed the case by reference to Article 1:

on the working assumption that in the light of the Woolwich 2 ruling the applicant societies did have possessions in the form of vested rights to restitution which they sought to exercise in direct and indirect ways in the various proceedings instituted in 1991 and 1992.<sup>13</sup>

As it ultimately transpired that there had been no violation of Article 1, the European Court did not need to consider the question of whether a claim is indeed a possession within the meaning of the Article and therefore disregarded it.

As regards liability in tort, the European Court took a much broader position in the 1995 judgment in the case of *Pressos Compania Naviera*.<sup>14</sup> In this case the Belgian Government had restricted liability for the errors of its pilots to cases of intent or gross negligence and had directed that this should be retrospective for no less than thirty years. This legislation was a reaction to a judgment of the *Court de Cassation* in 1983 in which it held that, notwithstanding the previous interpretation of the relevant provisions of the Belgian Civil Code, a pilot could be liable for the damage caused by his errors.

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11 ECtHR 9 December 1994 (*Stran Greek Refineries and Stratis Andreadis/Greece*), *Series A* vol. 301-B, § 59, 61-62.

12 ECtHR 23 October 1997 (*National & Provincial Building Society/UK*), *RJ&D* 1997- VII, no. 55, p. 2325.

13 § 70.

14 ECtHR 20 November 1995 (*Pressos Compania Naviera/Belgium*), *Series A* vol. 332.

The question before the European Court was whether the Belgian authorities had violated Article 1 by depriving the applicants of the right to damages. The European Court answered in the affirmative the question of whether these claims could be treated as a possession within the meaning of Article 1, in any event in respect of cases of damage which occurred before the introduction of the limiting legislation:

In order to determine whether in this instance there was a 'possession', the Court may have regard to the domestic law in force at the time of the alleged interference, as there is nothing to suggest that that law ran counter to the object and purpose of Article 1 Protocol No. 1.

The rules in question are rules of tort, under which claims for compensation come into existence as soon as the damage occurs.

A claim of this nature 'constituted an asset' and therefore amounted to 'a possession within the meaning of the first sentence of Article 1. This provision was accordingly applicable in the present case' (see, *mutatis mutandis*, *Van Marle and Others v. the Netherlands*, judgment of 26 June 1986, *Series A* no. 101, p. 13, § 41).

On the basis of the judgments of the Court of Cassation of 5 November 1920, 15 December 1983 and 17 May 1985 (see § 17 above), the applicants could argue that they had a 'legitimate expectation' that their claims deriving from the accidents in question would be determined in accordance with the general law of tort.<sup>15</sup>

For Article 1 to be applicable it is therefore sufficient that there is an act or complex of acts that can be described as tortious. A claim arises at this juncture. Questions about the causal connection between act and damage, the imputability of the act to the perpetrator and whether the existence of a ground of justification deprives the act of its unlawful nature<sup>16</sup> need not already have been answered by the domestic courts in order to be able to invoke the protection of Article 1.

### 3 THE IMPORTANCE OF THE PROTOCOL TO CIVIL LAW

#### 3.1 Between individuals

What role does the protection of possessions in the ECHR play in private law relationships? In day-to-day practice this role seems to be limited. National case law on Article 1 is in any event sparse. Unlike Article 6 (right to a fair hearing) and Article 8 (right to family life), Article 1 has not yet really become a commonly cited provision in private law proceedings in the Netherlands. Only sporadically do parties invoke the protection afforded by the right to peaceful enjoyment of possessions in the ECHR. Nor do we expect things to be much different in the future.

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<sup>15</sup> § 31.

<sup>16</sup> For these requirements under Dutch law see Section 162, Book 6, Civil Code.

The limited role of Article 1 in daily practice can be explained by the nature of civil law itself. It relates primarily to the rights and duties of individuals in their dealings with one another. Invoking a fundamental right of ownership in a dispute between two private individuals would be fairly pointless. Even if one takes the view – like Elders, who was quoted in the introduction – that this fundamental right provides the foundation for the protection of the individual against violation of his rights as laid down in practice in the rules of private law, one must still acknowledge that in a private law dispute between individuals this fundamental right does not provide any criteria by reference to which it is possible to determine whether there has indeed been a violation of this kind.

This may be illustrated by an example drawn from the case law of the Supreme Court of the Netherlands.<sup>17</sup> The owner of a plot of land converts it into a rubbish dump. The owner of an adjoining cherry orchard sees that the birds attracted by the rubbish dump have soon consumed the cherries on his trees. He claims compensation from his neighbour for the damage suffered. The owner of the orchard can naturally base his right to compensation on the violation of his *fundamental right* to the peaceful enjoyment of his possession. But invoking the ECHR would not provide him with any extra arguments in the proceedings. The question whether there has been an unlawful violation of the enjoyment of the possession is and remains a question that must be answered by reference to private law criteria and the private law definition of these criteria. Whether the actions of the neighbour mean that he is liable to pay compensation to the owner of the orchard has to be answered by reference to the criterion of due care as contained in the Civil Code.

### 3.2 Between individuals and the State

The ECHR does, however, become relevant when it is the State which violates the enjoyment of private law rights of the individual. This is the function of human rights in the most classical sense: protection of the individual against an authority which limits his rights or even deprives him entirely of his rights. Such cases involve, first of all, direct violations such as expropriation, destruction or the imposition of limitations.

An example of the application of Article 1 Protocol No. 1 ECHR by the Dutch domestic courts is the ruling on 'Het witte paard'. A chess club rented premises for its activities, but lost the enjoyment of the premises as a result of the expropriation of the building in which the club met. Section 42,

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17 HR 10 March 1972, NJ 1972, 278 (Vermeulen/Lekkerkerker).

subsection 2, of the Dutch Expropriation Act provides that the compensation payable to the tenant of non-commercial premises is twice the annual rent. The club would therefore have been entitled to compensation of NLG 27,630 (€ 12,537), whereas it could show that the actual damage was many times this sum, namely NLG 116,500 (€ 52,865).

Here the ECHR comes to the assistance of the tenant. The Supreme Court of the Netherlands held, first of all, that the tenant could derive the same protection as an owner from the Protocol. The tenancy was therefore deemed to be a 'possession' within the meaning of this Article. The Supreme Court went on to hold that the deprivation of this right in exchange for the above-mentioned liquidated damages was not in reasonable proportion to the value of the right. This constituted a violation of the Protocol, unless the rule was based on 'legitimate objectives of public interest'. Since this was not case, Article 1 Protocol No. 1 had been violated.

The case is a good example of a direct violation by the State of the right of an individual against which Article 1 Protocol No. 1 affords protection. Although the national legislature had precisely defined the extent of the compensation owed, the Supreme Court held that this compensation was incompatible with Article 1. Similar examples can be found in Drupsteen's contribution in this volume.

Another violation can occur if the State provides insufficient guarantees for the peaceful enjoyment of rights by individuals, albeit not on this occasion in the relationship between individuals and the State but in the private law relationship *between individuals*. Let us now go back to the example of the rubbish dump and the cherry-eating birds given in section 3.1. The State would violate the right of the owner of the cherry orchard to peaceful enjoyment of his possession if it were to stipulate by law that owners of rubbish dumps may never be held liable for nuisance caused to the surrounding area by the presence of the rubbish dump.

Such an interference is naturally also conceivable in purely contractual relationships. The European Court of Human Rights has indeed held that the Protocol is applicable to interference by the State in the enjoyment of rights resulting from transactions between private individuals:

Admittedly, the State may be responsible under Article 1 for interferences with peaceful enjoyment of possessions resulting from transactions between private individuals.<sup>18</sup>

An interference of this kind may well occur more often than one might suppose. An example is the recent Dutch legislation on solving overindebtedness for natural persons. Similar legislation exists in other European countries and in the United States of America. What does it involve? Before

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18 ECtHR 25 April 1996 (Gustafsson/Sweden), *RJ&D* 1996-II, no. 9, p. 637 ff, § 60. With reference to ECtHR 21 February 1986 (James and others/UK), *Series A* vol. 98, § 35-36.

the *Wet Schuldsanering Natuurlijke Personen*<sup>19</sup> (WSNP) [Natural Persons Debt Settlement Act] entered into effect in late 1998 debtors were dependent upon the co-operation of their creditors for a solution to their debt burden. If creditors did not agree to a repayment scheme, the debtor could be harried for many years, for example by means of attachment of earnings or threats of foreclosure on his home. In other words, although the creditor was in many cases unable *de facto* to recover his claim owing to the insolvency of his debtor, he retained his right of action *de jure*. In order to provide debtors with a definite way out of their difficulties ('a fresh start'), the Natural Persons Debt Settlement Act was introduced as a supplement to the existing possibility for individuals to petition for bankruptcy.<sup>20</sup> The provisions of the Act have been included in the existing Dutch Bankruptcy Act (section 284 *et seq.*).

If creditors do not agree to an amicable settlement a debtor may now apply to the courts for an arrangement. In general such an arrangement will last three years. After its expiry, the remaining debt is converted into a natural obligation.<sup>21</sup> This means that although the debt continues to exist, it can no longer be claimed. In other words, the creditors can ultimately lose their right of action as a result of a voluntary arrangement.<sup>22</sup> Such legislation therefore constitutes, in principle, an 'interference with the peaceful enjoyment of possessions'.

#### 4 ARTICLE 1 AND THE LAW OF TORTS AND COMPENSATION

##### 4.1 General

In the previous sections we have examined the question of when there is possession within the meaning of Article 1. We have also seen that in the context of civil law relationships the Article mainly derives its significance from the protection which it affords against action by the State to limit the enjoyment by individuals of their rights under civil law.

We will examine this importance in a more practical way by reference to a number of examples taken from the law of compensation. It is, however,

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19 *Stb.* 1998, no. 245.

20 Lower House of Parliament 1992-1993, 22 969, p. 6 (explanatory notes)

21 Section 358, subsection 1, Bankruptcy Act: 'the claim in respect of which the debt rescheduling arrangement takes effect is, in so far as it has not been met, no longer enforceable, irrespective of whether or not the claim has been proved'.

22 A study of the actual operation of the Act is being made at the E.M. Meijers Institute of Legal Studies in Leiden by Ms. Nadja Jungmann.

worthwhile first examining the application of Article 1 in general. Article 1 can be split into three rules. However in accordance with the established case law of the European Court these rules must be viewed in their entirety. The first sentence of the first paragraph contains the general principle of 'peaceful enjoyment'. The second sentence concerns the conditions under which 'deprivation' can take place. Finally, § 2 recognises the right of a State to 'control the use of property'. In the case of deprivation of possession in the public interest it is provided that the conditions provided for by law must be observed. In ruling on the lawfulness of a measure the European Court will tend to follow the view taken by the national courts.

Regarding the lawfulness of the impugned measures, the Court would recall that its power to review compliance with the domestic law is limited.<sup>23</sup>

It has proved difficult to draw a line between 'deprivation' and 'control of use'.<sup>24</sup> This seems to depend to a great extent on the facts as a whole.<sup>25</sup> 'Deprivation' does not in any event exist if the property has not been completely taken<sup>26</sup>, or if the measure is only provisional.<sup>27</sup>

Finally, we would return to the first sentence of the first paragraph. This is more important than it seems at first sight. If the situation is not covered by 'deprivation' or 'control of use' the assessment will take place by reference to the general principle of the first sentence of Article 1.<sup>28</sup>

A central feature of the criterion in Article 1 is the need for 'a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights'. This runs through the entire Article, no matter which of the three above-mentioned rules is applicable to the case in question. See, for example, the European Court of Human Rights in *James and Others*:

23 ECtHR 21 February 1990 (*Håkansson and Stureson/Sweden*), *Series A* vol. 171-A, § 47.

24 See D. Anderson, 'Compensation for Interference with Property', *European Human Rights Law Review* 1999, p. 553-554.

25 See for example ECtHR 25 October 1986 (*Agosi/UK*), *Series A* vol. 108, § 51.

26 See for example ECtHR 19 December 1989 (*Mellacher and others/Austria*), *Series A* vol. 169, § 44; ECtHR 29 November 1991 (*Pine Vally Developments/UK*), *Series A* vol. 222, § 56 ('title remained vested in Healy Holdings, whose powers to take decisions concerning the property were unaffected (...) the land was not left without any meaningful alternative use'); ECtHR 28 July 1999 (*Immobiliare Saffi/Italia*), Appl. No. 22774/93, § 46 ('the applicant company was at no stage deprived of the right to let or to sell the property'). Deprivation did, however, occur in: ECtHR 28 October 1999 (*Brumarescu/Romania*), Appl. No. 28342/95, § 77 (the applicant 'was no longer able to sell, devise, donate or otherwise dispose of the property').

27 See, for example: ECtHR 7 December 1976 (*Handyside/UK*), *Series A* vol. 24, § 62; ECtHR 22 February 1994 (*Raimondo/Italy*), *Series A* vol. 281-A, § 29; ECtHR 15 November 1996 (*Prötsch/Austria*), *RJ&D* 1996-V, no. 22, p. 1812, § 42.

28 ECtHR 9 December 1994 (*Stran Greek Refineries and Stratis Andreadis/UK*), *Series A* vol. 301-B, § 68.

Not only must a measure depriving a person of his property pursue, on the facts as well as in principle, a legitimate aim 'in the public interest', but there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

A lack of proportionality would, for example, occur in the case of expropriation if a person is deprived of a right without payment of a reasonable sum corresponding to the value thereof. Article 1 does not, however, confer automatic entitlement to full compensation:

(...) the taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which could not be considered justifiable under Article 1. Article 1 does not, however guarantee a right to full compensation in all circumstances. Legitimate objectives of 'public interest', such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value.<sup>29</sup>

This concludes our brief remarks on the rules of Article 1. We will now apply them to three situations.

#### 4.2 Mandatory participation in mass tort settlement funds

In recent years the phenomenon of mass injury has attracted attention. This concerns cases of large-scale injury often affecting a large group of injured parties and sometimes also involving a large group of potentially liable persons. The subject of mass injury gives rise to a problem to which traditional liability law – which is based on one-to-one relationships – seems unable to respond sufficiently.

For example, it may be impossible to recover compensation because the link between the act and the injury is too difficult to prove or because the party who is liable, for example the producer of a harmful medicine, is insolvent or can no longer be traced. Settlement of damage in accordance with the traditional law of liability can take a very long time having regard to the large number of people involved both on the side of the victims and on the side of the perpetrators.

A mass settlement compensation fund is a solution to these problems. Attention is focused in particular on what are known as 'limitation funds'. This description is not entirely accurate. It is not a limitation of liability, but a determination of the amount of compensation to be paid. The victims can claim fixed amounts of compensation from this fund. In this way they can circumvent the difficulties posed by the law of liability.

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29 ECtHR 21 February 1986 (James and others/UK), *Series A* vol. 98, § 54.

One method is that the extent of the compensation is made dependent on the 'hardness' of the claim. For example, when the so-called *Dalkon Shield Claimants Trust* was established to cover the damage suffered by women who had used this contraceptive, provision was made for three levels of compensation: (i) a fixed amount of \$ 725, payable after the claimant had made a declaration 'under penalty of law' that the Dalkon shield had been used and had caused injury; (ii) an amount of between \$ 850 and \$ 5,500 depending on the nature and seriousness of the injury, for which purpose a medical report was necessary; and (iii) a large amount of compensation (on average \$ 45,000) if a causal link could actually be proved between the injury and the use of the Dalkon shield.<sup>30</sup>

The advantage of a compensation fund to the liable parties (such as the employer or the producer) is that they are liberated from further claims in exchange for providing the fund from which the compensation is paid. A compensation fund is also advantageous for victims whose claims are 'problematic' (for example, a claim where the causal link is difficult to prove). They receive a given amount of compensation in cases where they would have otherwise have had virtually no chance under the traditional law of liability. An example is cases involving infection with HIV.

A group who are worse off in the case of a compensation fund are the victims who have a 'hard' claim against a creditworthy defendant in cases where the actual loss or injury exceeds the fixed sum paid by the fund. Does mandatory participation in such fund and the consequent deprivation of the possibility of obtaining full compensation through the courts constitute an impermissible violation of the right of the injured party to 'the peaceful enjoyment of his possessions'? This seems to be a real issue. In the debate on the scope for the establishment of funds, the ECHR is indeed mentioned as a potentially formidable obstacle.

As regards the question of whether the establishment of funds is permissible, much will depend on whether the limitation of the claim to compensation can pass the test of proportionality. What is at issue is whether, in the case of (mandatory) participation in a fund, there is a reasonable balance between the objectives of the public interest and the violation of the rights of the individual victim. What is the result of this test? It would be hard to deny that the establishment of a fund serves the public interest in so far as victims can have their damage determined in a speedy and not exceptionally complicated manner and have the prospect of compensation of this damage. A feature of cases of mass injury is the generally large number of victims who find themselves in a comparable

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30 Source: L. Dommering-Van Rongen, *Schade vergoeden door Fondsvorming*, Deventer: Kluwer 1996.

position, the comparatively small number of persons or institutions to be held liable and the many intractable questions concerning liability and causation. In addition, the type of injury often means that victims have an extra interest in obtaining a quick and overall settlement since they might not survive a protracted legal action. Personal injury as a result of working with asbestos is a good example. Although the counterargument might be that participation in the fund could also be arranged on a voluntary basis (i.e. without the mandatory participation described above), this would entail a problem for the liable parties in that the 'hard' cases could recover their damage under the ordinary law of liability and that the fund would serve, above all, the interests of those who have a weaker case under private law. The establishment of a fund on the basis of voluntary participation will therefore prove difficult if only for practical reasons.

In summary, the mandatory establishment of a compensation fund may be seen as a legal structure conducive to the public interest. As against this, a victim who is obliged to resort to a fund will often obtain *less* compensation than he would if he were to pursue his rights before the civil courts. What is the result of the test? We would merely state that mandatory participation in a compensation fund, in any event in situations of mass injury, need not conflict with Article 1 Protocol No. 1. Whether the institution of a mandatory compensation fund is acceptable in a specific case will depend on the conditions controlling which victims can participate and the amount of compensation which they can hope to obtain, as weighed against the interest of a relatively speedy settlement of the case; the greater the restrictions on access to the fund, the more likely it is that this will constitute a violation of the Protocol. In America courts play an important role in devising procedures and remedies to preserve the essence of equal access to the court system and to provide effective remedies for the injured of mass tort. The inclusion of an opt-out clause can easily preclude uncertainties about whether or not the ECHR-test is passed.<sup>31</sup>

The issue of accessibility in connection with the settlement of claims by means of the establishment of compensation funds has recently become of particular importance in the Netherlands: both in the case of the claims by 'DES' daughters and in the case of haemophiliacs infected by HIV far-reaching agreements for collective settlement have been concluded by the representatives of the liable parties (pharmaceutical companies and blood banks respectively) and representatives of the victims. However, the details are not yet known.

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31 See J.B. Weinstein, *Individual Justice in Mass Tort Litigation – The effect of Class Actions, Consolidation and other Multiparty Devices*, Evanston Illinois: North Western University Press 1995.

Article 6 ECHR also plays a role in this connection. The cases of *Bellet* and *F.E.* are a warning to proceed cautiously. Both cases concerned the French fund established to compensate victims infected with the HIV virus after a blood transfusion. The establishment of the fund was not intended completely to exclude access to the courts. However, access to the courts was limited in the sense that only those persons who rejected the offer of the fund, which was intended as full compensation for the damage suffered, could take proceedings. A special appeal procedure to the Court of Appeal in Paris was instituted for this purpose.

*Bellet* obtained compensation from the fund and then applied to the French Court of Appeal in order to obtain compensation in addition to the sum received from the fund. However, his claim was held to be inadmissible. He then appealed to the European Court in Strasbourg, which proved amenable to his claim. According to the European Court, *Bellet* was entitled to assume, on the basis of the parliamentary history of the legislation, that even after the award of an amount from the fund there would still be the possibility of obtaining an additional sum – in so far as the amount awarded by the compensation fund did not cover his damage – by taking proceedings before the Paris Court of Appeal.<sup>32</sup>

*F.E.* had bet on two horses. After obtaining compensation from the compensation fund he continued his legal action before the courts. The *Cour de Cassation* held, however, that the law did not permit a person to obtain additional compensation through the ordinary courts after accepting the offer of the fund. According to the European Court, this too constituted a violation of Article 6 ECHR. At the moment when *F.E.* continued his action before the normal courts he was entitled to rely on the fact that the law permitted this. The fact that the Paris Court of Appeal had evidently interpreted the Act more narrowly in the *Bellet* case was of no concern to *F.E.*

Like Mr. *Bellet*, *F.E.* could therefore reasonably believe that it was possible to pursue an action in the civil courts concurrently with his compensation claim to the Fund, even after he had accepted the Fund's offer. In view of the applicant's situation at that time, he cannot be criticised for not refusing a solution which met his most urgent needs, since he was entitled to think that it had not been intended that, in the event of an offer being accepted, the Act should deprive victims of the right to bring proceedings against any liable party.<sup>33</sup>

In view of this case law we consider that caution is needed in respect of a limitation fund. The greater the discrepancy between the amount to which the victim believes – with a certain degree of justification – he is entitled and the amount which he can count on receiving through the fund, the greater the need for the inclusion of an opt-out clause. Again, if a compensation

32 ECtHR 4 December 1995 (*Bellet/France*), *Series A* vol. 333-B, § 37.

33 ECtHR 30 October 1998 (*F.E./France*), *RJ&D* 1998-VIII, no. 92, p. 3332, § 47.

fund is to be *certain* of passing the test of the ECHR an opt-out clause is essential.

We would point out that other fundamental rights too may play a role in relation to the establishment of a fund. For example, the making of a distinction between different victims or groups of victims without any proper ground for such a distinction may be in breach of the principle of equality in Article 14 ECHR and of Article 26 of the International Covenant on Civil and Political Rights. In addition, the way in which compensation is fixed may in itself be in breach of the requirement of a fair hearing under Article 6 ECHR. The Dutch author Dommering-van Rongen writes:

It would be advisable when instituting a fund to incorporate a procedure for testing in advance whether the limitations are reasonable and based on sound grounds. In the case of mandatory funds this could make it possible to determine the equality of the claim (i.e. the *quid pro quo*). In the case of a fund with an opt-out clause the purpose of such a test would be to ensure that the fund is widely accepted.<sup>34</sup>

She refers to the American practice of holding hearings at which all interested parties or their representatives or organisations can make known their position. The exercise of due care in the establishment of the scheme is therefore of great importance. But doubts may always continue to exist, for example about how and to what extent the designers of a fund should take account of *future* claims of *future* victims.

#### 4.3 Limitation of liability and prescription

Forms of statutory limitation of the duty of a liable party to pay compensation also constitute a violation of the principle of full compensation. Limitation of liability does not in itself appear to pose a problem. Limitation serves the public interest in so far as it means that certain activities of use to society, such as transport and energy generation, are insurable and hence practicable. The limitations on liability are imposed in numerous sectors of social life. Limitation is generally regarded as necessary, for example in transport and also in the event of large-scale disasters such as an accident in a nuclear power station. However, the legislature must always make clear why a limitation is necessary in a given case and why an exception to the principle of full compensation is made in respect of a given group of victims. Furthermore, the amount of the limit must be supported by good arguments.

The same applies to the imposition of statutes of limitations. The public interest is in this case that in a modern society law must adapt to the actual

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<sup>34</sup> Dommering-van Rongen 1996, *supra* note 31, p. 30.

situation after the passage of time. Anyone who remains inactive for too long loses his right. This is in the interests of legal certainty. In the case of a test by reference to the ECHR, much naturally depends on the circumstances of the case: is a specific period of prescription not too short or too strictly formulated? For the application of a test of this kind in the context of Article 6 ECHR see *Stubbings and Others*.<sup>35</sup>

Special attention should be paid to the situation in which, for example, the conditions for the commencement of a period of prescription change or in which the length of the periods is reduced. The Dutch legislature considered this issue when a completely new Civil Code was introduced in 1992, at which point the periods of prescription were reduced. In certain cases by no less than 25 years (from 30 to 5 years)! A transitional rule was introduced in order to prevent victims from losing their claims in an unduly brusque manner. Section 73 of the New Civil Code *Overgangswet* [Transitional Act] stipulated that if the new Civil Code provides for a period of prescription of one year or longer and the period of prescription started to run before the introduction of the new law on 1 January 1992 the rules of the 1992 Civil Code concerning the commencement, duration and nature of the period do not apply for one year after the introduction of the new law. The prescription is also deemed not to have been completed before the end of that year.

This means in concrete terms that the old periods of prescription remained applicable until 1 January 1993. After this 'postponement' year the new shorter period took effect without exception. The consequences can be far-reaching. Suppose that A is entitled to compensation from B for tort. The period of prescription started to run before 1 January 1988. At that time the claim would be barred by prescription only after 30 years. As a consequence of the introduction of the 1992 Civil Code the period has been reduced to five years. During the 1992 transitional year the creditor had to interrupt the prescription by instituting a legal action. If A did not do so, he saw his right go up in smoke on 1 January 1993 as a result of the completion of the new period.

The question is therefore whether the transitional scheme was sufficient. Was the transitional period of one year not too short? Was one entitled to expect the State to mount a large-scale information campaign? As it turned

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35 ECtHR 22 October 1996 (*Stubbings and others/UK*), *RJ&D* 1996-IV, no. 17, p. 1487, § 50-57. This case concerned a number of women who had been sexually abused in their childhood. Under the prevailing rules their claim to compensation was barred six years after their 18th birthday. The applicants submitted that it was only at a later age that they discovered the connection between certain complaints and the events in their childhood. The European Court held that the periods of prescription were not contrary to Article 6 ECHR.

out, the information was provided mainly by associations of patients acting on their own initiative.

We are critical of another matter in particular. There is a debate in the Netherlands as to whether, say, an asbestosis victim can lose his claim to compensation without becoming aware of his disorder. The incubation time of asbestosis is between 20 and 40 years. The applicable period of prescription was 20 years (it is now been extended to 30 years). In this way, a right to compensation may be barred without the person entitled ever being aware of the damage. Is this right? The views on this are divided. Various ways are suggested in the literature of avoiding this rather unsatisfactory result.<sup>36</sup>

In our view this debate can very well be placed in a human rights perspective: is a situation in which a personal injury victim is unable to institute his claim because it is barred before he becomes aware of the damage (and perhaps comparable cases of victims in general) compatible with the Protocol? And is the national legislature not subject to an obligation to make statutory provision for compensation for these victims? In our view, this is the case. It should, incidentally, be noted that in 1998 the courts took an important step towards helping the victims. The case involved sexual abuse in which the victim was so badly affected that she was unable to institute a claim for compensation before the expiry of the period of prescription. The Supreme Court of the Netherlands held that in so far as application of the law could result in the barring of a claim which the victim was unable to enforce this is hard to accept in terms of individual justice. This applies in particular if the inability to enforce the claim results from circumstances attributable to the perpetrator. According to the Supreme Court, the period of prescription starts to run in such a case only when these circumstances no longer prevent the institution of the claim.<sup>37</sup>

The Dutch *legislature* also now seems to be aware of the problems of victims who unwittingly lose their right of action. The State Secretary for Social Affairs and Employment has introduced an amendment to the legislation in connection with the problems faced by the victims of asbestosis. The amendment is intended to cover situations in which an injury remains concealed for so long that the right of action has already been barred by prescription before it comes to light. Under the new prescription rules a claim for compensation for personal injury will not be barred by prescription as long as the injured party is unaware of his injury and

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36 See for example J. Spier, *Schade en loss occurrence verzekeringen*, Deventer: Kluwer 1998, chapter 5.

37 HR 23 October 1998, *NJ* 2000, 15 (M/B) and HR 25 June 1999, *NJ* 2000, 16 (B/B).

unaware of who is responsible for it. From the moment at which he becomes aware or could reasonably be expected to have been aware of these facts he has a period of five years in which to institute a claim. If he allows this period to expire, the claim is barred after all. Under the Bill the law in respect of damage other than personal injury will remain unchanged; the new rules will also apply only to events that cause damage in the future.<sup>38</sup>

## 5 CONCLUSION

The protection of possessions under human rights law is not confined to the technical concept of ownership under national law. It extends to the entire area covered by private law entitlement ('property' within the meaning of Section 6 Book 3 of the Dutch Civil Code).

Despite this wide scope, we believe that Article 1 Protocol No. 1 ECHR will continue to play a relatively limited role in civil law in the future. Where cases involve the determination of rights between individuals Article 1 provides no criterion whatever. However, the Article does play a role in its classical function: provision of protection against a State which passes legislation either depriving him of claims under private law against other citizens or the State itself or limiting him in the exercise of these rights.

In this connection we have examined the law of compensation, and in particular the mandatory participation in compensation funds, statutory limitation of liability, and prescription. In our view, these three examples can in principle pass the test of the Protocol. We say 'in principle' because although the European Court allows the national courts and legislature a substantial margin of appreciation there are certainly limits.

The legislature should be aware of these limits. For example, the inclusion of an opt-out clause for injured parties seems necessary when establishing a compensation fund. Did the authorities take adequate action when the periods of prescription were shortened by the introduction of the new Civil Code in 1992? Although the year's 'postponement' provided by the transitional rules smoothed away the sharp edges of the reduction of the periods of prescription, one may well wonder whether this was sufficient for all cases. And did not the authorities have the duty to provide information on this point in order to draw the attention of individuals to the disappearance of their rights, thereby enabling them to take action in good time to interrupt the prescription? Allowing a situation to exist or continue to exist in which the right to compensation may be barred by prescription before the victim has even realised he has such a right seems to us suspect.

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38 Letter to the Lower House of Parliament, *Kamerstukken II*, 1998-1999, 25834, no. 7.

Provision to cover this appears to have been made in the Netherlands both by the courts and by the legislature. Whether this is sufficient remains to be seen: the new legislation mentioned in this Article applies only to future victims.

Taking everything into account the proportionality requirement which underlies Article 1 as a whole is of great importance. This brings us to what we consider to be the most important conclusion which we can draw for our area of law. Even where cases involve rights arising from relationships under civil law and where one might initially consider that the role of human rights is limited (or even entirely absent) the national legislature must constantly consider whether a given measure is consistent with Article 1 Protocol No. 1. It will in particular have to consider whether the requirement of 'proportionality between the means employed and the aim sought to be realised' has been satisfied. Evasion of this issue is unwise and will inevitably lead to endless debate, with the attendant risk that this debate can only be resolved in Strasbourg.

#### POSTSCRIPT

Shortly after the completion of this contribution the Dutch Supreme Court delivered an important judgment. It concerned a case of asbestos. An employee of a shipyard where asbestos had been used in the 1950s and 1960s learned over 30 years after his exposure to the substance that he was suffering from the fatal illness mesothelioma. The Court of Appeal had held on appeal that the right of action had been barred by prescription for this reason. The problem was described above in section 4.3.

The Supreme Court was more favourably disposed towards the victim than the Court of Appeal. The Supreme Court held first and foremost that a period of prescription of 30 years should in principle be strictly applied in the case of injury caused by asbestos. Nonetheless, it directed that in "exceptional cases" an exception could be made to this rule. This would apply in particular to cases where the victim had been completely unable to lodge a claim for compensation: before the expiry of the period of prescription because no damage yet existed or was yet known and after the expiry of the period because the right of action was barred by prescription. According to the Supreme Court, this would mean in fact the statutory prescription arrangement would not so much nullify an existing right of action but prevent even the *creation* of a right of action.

The Supreme Court managed to base this exception, which is not in fact provided for in the Civil Code (the period of 30 years is a hard-and-fast period), on a different general provision in the Code in which it is stated that

a binding rule does not apply between a creditor (victim) and debtor (tortfeasor) to the extent that, in the given circumstances, this would be "unacceptable according to criteria of reasonableness and equity" (Section 6:2 Civil Code).

In explaining the reasonableness of this exception, the Supreme Court referred to Article 6 of the European Convention on Human Rights. The Court held that in the *Stubbings* case the premise had been that a right of action is not absolute but may be subject to limitations. To this extent the Contracting States have a margin of appreciation, as long as the limitations do not go so far as to impair 'the very essence of the right'. In the case before it, the Supreme Court stated that given the length of the period (30 years is very long by present standards) and the aim of legal certainty which prescription is intended to serve, it could *not* be said that this limitation of access to the courts fell outside the margin of appreciation. Nonetheless, it held that the exception formulated above to the hard-and-fast period of 30 years, based on the dictates of reasonableness and equity, was in keeping with the right of access to the courts as laid down in Article 6 of the European Convention on Human Rights (Supreme Court, 28 April 2000).

In his opinion to the Supreme Court, Advocate General Spier pointed out that mesothelioma victims would be affected in the very essence of their right if the period of prescription were to have expired before the sickness came to light.

If one compares this judgment (which, by its very nature, also has retroactive effect) with section 4.3 of the article in the Bill (which applies only to future cases), one is bound to conclude that the human rights problem involved in prescription has to a large extent been resolved in Dutch law.