Drooghenbroeck, Sébastien

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The concept of “possessions” within the meaning of Article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms

Sébastien Van Drooghenbroeck

Introduction

If there is one concept of International Convention law whose interpretation confronts its doctrinal or judicial interpreters with significant difficulties, it is certainly the concept of “possessions” as it appears in Article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

The difficulty stems essentially from the many different ways in which the domestic law in each of the member States (now numbering 42) recognise and organise that which will be called, for want of a better term, the “associational bond” between a “person” and an “object” which that person is claiming as “his.” If one were to record the legal diversity of the Convention’s interpretation, then one would be opening up the way, not only to the risk of creating an interpretative Tower of Babel with ambiguity arising from the use of numerous languages which entail differences in treatment between the beneficiaries of the Convention corresponding to the respective domestic legal system to which they are subject, but also to the risk of States “manipulating” their national interpretation in order to circumvent application of the Convention.

Similar “Tower of Babel” pitfalls (which are likewise encountered in relation to other “open” concepts of International Convention law, such as “civil rights and obligations” and the “criminal charge” contained in Article 6) have been circumvented by having public authorities raise the concept of “possessions” to the rank of an “autonomous concept” in the Convention; in order words, one endowed it with a “European” meaning potentially distinct from the one it may have in domestic law (I).

Even if it would help to contain misinterpretation of the concept, the autonomous concept created, nevertheless, appears to be anything but crystal clear and would demonstrate several hazy areas and blind spots likely to entail contradictions and legal uncertainty. In conforming with their interpretative customs, the organs of the Convention have in effect abstained from providing the concept of possessions with a general and abstract definition, in other words, one that can be understood. Nonetheless, from the jurisprudence, several, more or less clearly identifiable guidelines emerge whose interplay and actual scope remain baffling (II.III.IV.V). Ultimately, one cannot avoid observing an analytical method which comes to close to mere hair-splitting enriched more or less with massive doses of speculation. The suggestion is all the more justified in the light of the recent case-law of the European Court of Human Rights (hereinafter, the “ECHR”) which illustrates that the concept of possessions is first and foremost in a constant process of construction and reconstruction.2


2 To this effect see as well van Dijk/van Hoof, Theory and Practice of The European Convention of Human Rights, 3rd ed., London/The Hague/Boston (GB/NL/USA), 1998, at 620.
I. An autonomous meaning

In the Gasus Dosier- und Fördertechnik GmbH v Netherlands case, the issue was the compatibility of Article 1 of Protocol No. 1 with the seizure and sale by the Dutch tax authorities of a concrete mixer. The proceeds from the sale were to be set-off against the company’s liabilities for back taxes, however, the seller had sold the concrete mixer subject to a reservation of title over the mixer in order to secure its claim to payment of the sale price. In reply to the respondent government’s argument that, in relation to the above-cited claim to payment of the sale price, in conformity with Dutch law, the seller could not take advantage of any “entitlements” protected by Article 1 of the Protocol No. 1 (§52), the European Court stated that:

“the notion ‘possessions’ (in French: biens) in Article 1 of 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 as ‘possessions’, for the purposes of this provision. In the present context, it is therefore immaterial whether Gasus’s right to the concrete-mixer is to be considered as a right of ownership or as a security right in rem. In any event, the seizure and sale of the concrete-mixer constituted an ‘interference’ with the applicant company’s right ‘to the peaceful enjoyment’ of a ‘possession’ within the meaning of Article 1 of Protocol No. 1.”

Whatever the essential subject of protection may be, Article 1 of Protocol No. 1 does not limit itself to protection of property in the most classic sense of the term, but extends it to other interests, provided that they demonstrate a certain number of characteristics which have been progressively developed in the jurisprudence. First of all, these interests must be of a “hereditable” or “commercial” nature (III). Secondly, these interests, without necessarily being totally “current” or up to date, must show a sufficient likelihood of being realised and thus represent the “legitimate expectations” of their holder (III). Finally, these legal interests must manifest themselves in a sufficiently identifiable manner (IV).

The distinctive feature of conceptual autonomy, which is imparted to the concept of possessions, is that its particulars are not determined from beginning to end by the domestic law of the Member State concerned. Nonetheless, it becomes clear soon enough that the provisions of domestic law cannot be ignored when it comes to the actual implementation of the three components mentioned above. Thus “hereditable nature” presupposes a legal interest located “in commerce” or, at least, the ability to generate wealth as defined by domestic law. Similarly, it can be recognised that it is the provisions of domestic law which ultimately determine the “legitimacy” of the expectation of realising a future legal interest. Expressed succinctly, it would seem hardly conceivable that there could be a “possession” within the meaning of Article 1 of Protocol No. 1 where no national legislation exists or where it is contrary to the national regulations.

Until very recently, such a conclusion would have seemed evident. This is now no longer the case, since the decision in Beyeler v Italy, which accepted the existence of legal interests outside of and even contrary to the provisions of domestic law on the basis of the “legal appearance” created by the administrative practice of the respondent State. Due to the prospects thus opened up, this decision appears to be sufficiently important to warrant separate treatment (V).

II. Hereditable nature - commercial value

It has never been in dispute that proprietary rights relating to an immovable possession, or a tangible movable possession, can be analysed from the perspective of its holder as a “possession” within the meaning of Article 1 of Protocol No. 1. The same is true of other rights in rem, for instance that of servitudes, of leasehold rights. Nor is any difficulty posed by classifying shares in a company as “possessions” if they relate, for instance, to a share in a joint stock company or in a limited partnership.

The common denominator of the “possessions” listed thus far is their “hereditable nature” or likewise the “commercial value” of the interests which they represent. In contrast, any interest not displaying this characteristic would be precluded from the scope of applicability of Article 1 of Protocol No. 1.

Thus, for instance, the ECtHR, in its decision dated 28 October 1999 against Spain, considered that an inherited...
noble title could not be considered a “possession”, in particular because of lack of any “hereditary nature”.

Likewise, it is the lack of “hereditary nature” of the relevant interest that is conventionally used to justify the lack of protection under Article 1 of Protocol No. 1, relating to the right to occupy in the capacity of a tenant or in relation to a learned profession. Without judging what has so far been said too hastily, the case-law of the ECHR nonetheless accepts that occupation of real property through a rental agreement, may represent the outline of a commercial activity which, in view of its hereditary nature, could be equated with “possessions.” In the Iatridis v Greece case of 25 March 1999, where the applicant operated a cinema within a leased building whose ownership was in dispute, it was held that the applicant was successful in his opposition to the eviction order based on his reliance on Article 1 of Protocol No. 1. The court found (§ 54):

“(that the applicant) had operated the cinema for eleven years under a formally valid lease without any interference by the authorities, as a result of which he had built up a clientele that constituted an asset”.

III. The requirement of “currentness” or, at the least, of a “legitimate expectation of being realised.”

As clarified by the examples, the jurisprudence of the ECHR admits in its most recent findings that the concept of “possessions” contained in Article 1 of Protocol No. 1, could cover both “tangible possessions” as well as financial claims. This would include creditor’s rights, on the basis of which the applicant could claim to have, at the least, a “legitimate expectation” of effectively enjoying the rights associated with ownership.

These are the general principles of application which have enabled organs of the Convention to resolve a series of particular difficulties to varying degrees.

III.1. The right to acquire or recover ownership of a possession

The organs of the Convention have affirmed in their continual case-law that Article 1 of Protocol No. 1 does not as such guarantee the right to acquire ownership of a possession. Such an exclusion immediately entails various consequences in the area of inheritance law. It has in fact been found in the Marckx v Belgium case that the second applicant (daughter of the first applicant), could not rely on any right guaranteed by Article 1 of Protocol No. 1 in relation to possessions contained in the latter’s estate because succession had not at the time of the litigation taken place. The situation was otherwise in the decisions Inze v Austria and Mazurek v France. In both of these cases, the applicants had, according to the relevant provisions of national law, already become the undivided owner of estate possessions, which could thus be considered their “possessions” within the meaning of Article 1 of Protocol No. 1 because the respective testators were already deceased at the relevant time and accordingly succession had already taken place.

Since Article 1 of Protocol No. 1 in principle excludes the right to “acquire” ownership, an applicant who brings an action against the infringement of this article, is required to show prima facie evidence of the existence and validity of his claim to the possession in dispute. Both of these requirements are to be determined according to domestic law. However, such requirements have proved to be a source of difficulties and of potentially illogical and inequitable decisions because a violation of the above-cited article arises precisely from a dispute over the existence and/or validity of the title claimed. In such a case, the Strasbourg case-law has shown itself to be quite flexible in admitting that the applicant must limit himself to establishing the mere “beginnings” of proprietary title which may consist of recognition, even by way of a non-final judicial decision or may even be the result of the attitude of public authorities.

Finally, the right to claim restitution of ownership of a possession which has definitely ceased to belong to the applicant, is no more guaranteed by Article 1 of Protocol No. 1 than the right of acquisition. In this vein the ECHR has affirmed that “the hope of having the survival of a proprietary title, which has long become impossible to properly exercise, recognised, may not be considered a ‘possession’ within the meaning of
Article 1 of Protocol No. 1”. For instance, the decision in *Fu tro v Poland* of 12 December 2000 where the applicant’s action was declared inadmissible on the grounds of the relevant provision of the Convention in question; in this case, public authorities had refused to restore to the applicant property which had been expropriated for reasons of public need which were later held to have lapsed. The barring of the “right to restitution” nonetheless requires some tempering when the legal system in question creates at least the “legitimate expectation” of recovering his possession. The extent of such mitigation is relatively easily illustrated by the decision of 6 April 2000, *Malbous v Czech Republic* which called into question the restitution of land expropriated in 1948 by the authorities. It was understood that the litigation did not concern one of the applicant’s “current possessions” within the meaning of Article 1 of Protocol No. 1. The Court nonetheless agreed to review whether the applicant could at least claim to have a “legitimate expectation” of recovering his possession. On this point, it found that real property law in the Czech Republic effectively authorised reclaiming property expropriated in this manner. Nevertheless, such legal action could only entitle restitution where the possession in dispute had been transmitted to a public law entity and not to a natural person as was indeed the case in the litigation at hand. Therefore it was ultimately not possible to find any “legitimate expectation”.

**III.2. Income from professional work**

According to the Court’s settled case law, “future” income derived from professional work may not be deemed to be a “possession” within the meaning of Article 1 of Protocol No. 1 unless it has already been earned or is the object of an undisputed claim. Accordingly, the fees and expenses which an attorney invoiced in the context of completed or ongoing proceedings and for which he had applied to the competent court for reimbursement at the expense of the unsuccessful party in accordance with the provisions of domestic law, would be subject to the protection provided by this article. Such income is however jeopardised by retroactive annulment of the proceedings in question. On the other hand, any person who had been refused entry into the civil service due to a criminal conviction or is removed from the civil service due to a disciplinary offence, could not legitimately bring an action for infringement of rights guaranteed by this provision. The income jeopardised in this case is, strictly speaking, a future one. Mutatis mutandis, the same solution is applied to the hypothetical situation where an employment contract in private law is rescinded.29

The “strictly future” income in question in the case above, should not be confused with goodwill which the Strasbourg case-law includes in the category of “possessions” protected by the Convention. Thus, the ECHR considered in the *Van Marle* case30 that the refusal of permission for the applicants to bear the professional title of ‘certified accountant’ (even though they had previously de facto exercised that profession) could involve the legal responsibility of the respondent State in relation to Article 1 of Protocol No. 1. In effect (§§ 41-42), “…by dint of their own work, the applicants had built up a clientele; this had in many respects the nature of a private right and constituted an asset and, hence, a possession within the meaning of the first sentence of Article 1. This provision was accordingly applicable in the present case. The refusal to register the applicants as certified accountants radically affected the conditions of their professional activities and the scope of those activities was reduced. Their income fell, as did the value of their clientele and, more generally, their business. Consequently, there was interference with their right to the peaceful enjoyment of their possessions”.

Mutatis mutandis, the same solution prevailed in the cases of a disbarred advocate31, the annulment of appointment as a tax accountant of someone previously exercising that profession32 and, again, refusing a company permission to engage in the work of winding up estates as it had done previously.33 We should likewise remember that in the *Iatridis* case, the ECHR took the view that the clientele of a cinema located on a certain property leased to the applicant could be treated as a “possession” of the latter within the meaning of Article 1 of Protocol No. 1.

However much this decision has been reinforced and could theoretically be affirmed, one would still have to concede that the distinction which the Strasbourg jurisprudence prompts us
to make between “strictly future income” on the one hand, and “goodwill” on the other hand, is rather difficult to apply in practice. Where it has been found that the applicant’s possessions had in fact been interfered with, the lawfulness of the interference must then be judged in terms of balancing the interests of the parties concerned in accordance with principle of proportionality. This balance in turn presupposes an evaluation, even if only approximate, of the value of the possession which has been jeopardised. The question is then, whether the distinction between “future income” and “goodwill” in the context of such an evaluation is not completely blurred. How can one otherwise calculate the value of clientele or goodwill, if it is not precisely the hope of reproducing in future, the previous income which was produced by such clients or goodwill in the past?

The difficulty brought up here is illustrated in the framework of numerous matters initiated under the auspices of Article 1 of Protocol No. 1 by British arms manufacturers subsequent to the adoption in 1997 of a law prohibiting the keeping of hand weapons.31 Each of the companies affected argued in substance, that their gross sales fell as the result of such regulatory provisions. In response to this complaint, the ECHR affirmed, in particular in its decision in Edgar (Liverpool) Ltd v United Kingdom dated 25 January 200032 that:

“[the case-law] has in the past held that goodwill may be an element in the valuation of a professional practice, but that future income itself is only a ‘possession’ once it has been earned, or an enforceable claim to it exists (No. 10438/83, Batelaan and Huiges v the Netherlands, Dec. 3.10.84, D.R. 41, p. 170). The Court considers that the same must apply in the case of a business engaged in commerce. In the present case, the applicant refers to the value of its business based upon the profits generated by the business as ‘goodwill’. The Court considers that the applicant is complaining in substance of loss of future income in addition to loss of goodwill and a diminution in value of the company’s assets. It concludes that the element of the complaint which is based upon the diminution in value of the business assessed by reference to future income, and which amounts in effect to a claim for loss of future income, falls outside the scope of Article 1 of Protocol No. 1.”

III.3. Planning or commercial administrative permits

It is a settled facet of case law that an administrative authorisation can be considered a “possession” protected by Article 1 of Protocol No. 1 where it produces a “legitimate expectation” of achievement of an interest by its holder. This is primarily the case in urban planning.36 It has thus been found in the Pine Valley Development et al v Ireland case,37 that annulment by the Irish Supreme Court of a planning permission authorising the applicants to build on a site which they had bought, interfered with a “possession” protected by Article 1 of Protocol No. 1. In upholding this conclusion, the decision of 29 November 1991 explains (§ 51):

“When Pine Valley purchased the site, it did so in reliance on the permission which had been duly recorded in a public register kept for the purpose and which it was perfectly entitled to assume was valid. (...) That permission amounted to a favourable decision as to the principle of the proposed development, which could not be reopened by the planning authority. (...) In these circumstances it would be unduly formalistic to hold that the Supreme Court’s decision did not constitute an interference. Until it was rendered, the applicants had at least a legitimate expectation of being able to carry out their proposed development and this has to be regarded, for the purposes of Article 1 of Protocol No. 1, as a component part of the property in question. (...)”

Similarly, the granting of an authorisation for commercial activities is apt to constitute a “possession” protected by the Convention. In the Tre Traktörer AB v Sweden case38, for instance, the court held that withdrawal of a licence to serve alcoholic beverages which the applicant company had enjoyed, was actionable under Article 1 of Protocol No. 1. In effect (§ 53), “(...) the maintenance of the licence was one of the principal conditions for the carrying on of the applicant company’s business, and that its withdrawal had adverse effects on the goodwill and value of the restaurant.” Previous case law had clarified that such licences did not constitute “possessions” unless, and as long as, the commercial activity for which they had been applied for, is due to be pursued.39

III.4. The rights to “claims”

As long as the holder of a claim can have a “legitimate expectation” of realising the claim, that is, that the claim is “sufficiently established” to the extent of being executible, then this claim is in principle to be accepted as on a par with “possessions” capable of being protected by Article 1 of Protocol No. 1.40

Although this principle has been accepted, the explanation thereof has proved to be particularly complex and, one must say, subject to judicial subterfuges making it similar to Ariadne’s thread, i.e. a convenient way out of difficult situations.

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33 See to this effect, recently, ECHR, admissibility decision of 12 December 2000, Appl. No. 50924/94 – Bahia Nova S.A. v Spain, not published.
34 ECHR 29 November 1991 – Pine Valley Dlt. Ltd. and Others v United Kingdom, Series A, No. 222.
35 ECHR 7 July 1989 – Tre Traktörer AB v Sweden, Series A, No. 159.
36 See to this effect, ECHR, admissibility decision of 21 September 1999, Appl. No. 35585/97 – Kervoëlen v France, not published.
37 To this effect, see inter alia, ECHR 14 December 1999 – Antonakopoulous v Greece, not reprinted, para. 30.
The case-law leaves no doubt that the loss of a “possession” is not in question when a claim lapses “due to natural causes” subsequent to default on a condition precedent or upon attainment of a condition subsequent which affected its validity ab initio. At the same time, the case law presents some case-specific variations in terms of the scope of the criteria which are required before a “legitimate expectation”, as foreseen by Article 1 of Protocol No. 1, can be found to exist.

In the first category of such cases, the European judge will limit himself to a finding that the applicable positive law acknowledges the existence of the claim without additionally requiring that the claim in question was the object of explicit recognition by public authorities and more particularly, the subject of a judicial decision. This was the case in the matter of Pressos Compania Naviera which raised the question of the compatibility of Article 1 with retroactive legislative suppression of indemnity claims which, subsequent to a turnaround in the jurisprudence of the Court of Cassation, the applicants could bring against the State based on pilot accidents in the river mouth area of the Scheldt River. In response to the respondent government’s argument that such claims could not be considered as possessions as they had not been the subject of judicial decisions entering into force as res iudicata, the decision dated 20 November 1995 stated (§ 31):

“...On the basis of the judgments of the Court of Cassation (...), 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”.

In a second category of cases, the European judge will be more severe, requiring that the claim be at least determined by a judicial decision without, however, requiring that the latter already be in force. This seems to have been the case in the matter of Dimitrios Georgiadis v Greece concerning retroactive annulment by legislation of claims for pension supplements which had been duly recognised by a decision of the Court of Audit. According to the ECHR, such claims can be accepted as possessions. Thus, the fact that the decision of the Court of Audit in questions was, at the time the contested law came into force, still open to appeal without suspensive effect before the full bench of the Court of Audit, had no bearing on the decision (§ 32).

The third category of cases are subject to the strictest requirements; here, the judge demands that the claim advanced as a “possession”, was the subject of a legally effective or even unappealable decision. This was the case in the Greek Refineries Stran & Stratis Andreatis v Greece case, which in particular raised the issue of whether the debt claimed by the applicants against the Greek State, could subsequent to non-fulfilment by the latter of its contractual obligations, be regarded as a “possession”. In these proceedings, the debt had been established by an interlocutory decision and by an arbitration ruling, before being barred by legislation whose compatibility with Article 1 of Protocol No. 1 was challenged in this decision. The Court found first of all that the interlocutory judgment, while apparently recognising the government debt, had however, limited itself to arranging the appearance of witnesses for the purpose of determining the existence and scope of damages sustained by the applicants. “The effect of such a decision”, affirmed the Court (§ 60), “was merely to furnish the applicants with the hope that they would secure recognition of the claim put forward. Whether the resulting debt was enforceable would depend on any review by two superior courts.” Consequently, according to the Court, the “possession” only arose with the arbitration ruling which “recognised the State’s liability up to a maximum of specified amounts in three different currencies (...) was final and binding (...) did not require any further enforcement measure” and was not open to any ordinary or extraordinary appeal (§ 61).

In light of the Court’s vacillation between severity and flexibility, it is difficult for the Strasbourg jurisprudence to attain a systematised approach. The quest for judicial certainty on this point is by no means facilitated, but rather, hindered by the few decisions where the European judge, confronted by the difficulties inherent in characterising claims sub judice as “possessions”, simply abstained from taking any position on the issue and pragmatically affirmed that “even if it...
were found to be applicable to this type of case, the first article of the First Protocol would not be violated."

IV. The requirement of identification. The problem of welfare benefits

Originally, the question of including rights derived from the social security system in the category of “possessions” protected by Article 1 of Protocol No. 1, arose in terms of sufficiently identifying the legal interests at stake.

The case law of the old Commission on this point appears to really presume a distinction between claims arising from “contribution”, that is, those resulting from payment of contributions by their holder in a fund in the nature of an insurance, and claims arising from “non-contribution” which are based more on a system of solidarity. In the first case, the Commission conceded that by reason of the identifying link between the contributions paid, on the one hand, and the benefit accrued, on the other hand, the latter could appear to be a “possessions”. This principle was upheld several times in relation to pensions; however, the Commission, at the same time, made it clear, that Article 1 of Protocol No. 1 did not go to the extent of granting the right to a pension in a specific amount. 49 Since non-contributory benefits do not evidence such an identifying link, they do not, in contrast, fall within the scope of Article 1 of Protocol No. 1. 50

Although it has been disputed by legal academics, the justification of such a dichotomy has neither been confirmed nor rejected by the Court on the – according to our knowledge – sole occasion, it handed down a decision on this question. In the Gaygusuz v Austria case, the Court was called upon to rule on the compatibility of Articles 1 and 14 of Protocol No. 1 (read together) with the unequal treatment of nationals and foreigners in the granting of so-called “emergency” unemployment benefits. The preliminary question was whether this social benefit fell within the ambit of “possessions” protected by Article 1 of Protocol No. 1. This question was decided in the affirmative based on reasons, which in combination were, however, particularly ambiguous. The Court in fact held first of all that a right to the emergency benefit was linked to the payment of contributions to the unemployment insurance fund (§ 39); in this way, it implicitly endorsed the position taken by the Commission until now. However, the ambiguity – an obvious break from the same position – then ensued in that the decision further added (§ 41) that:

“(…) the right to emergency assistance - in so far as provided for in the applicable legislation - is a pecuniary right for the purposes of Article 1 of Protocol No. 1. That provision is therefore applicable without it being necessary to rely solely on the link between entitlement to emergency assistance and the obligation to pay “taxes or other contributions”.” (emphasis added)

To the best of our knowledge, this ambiguity has not been raised by the many decisions on admissibility or non-admissibility previously given on this subject by the ECHR.

In some of those decisions, the court seemed to in fact want to return to the old dichotomy between contributory and non-contributory benefits, 51 in order to establish the applicability of Article 1 of Protocol No. 1. Other decisions suggest, on the contrary, that this dichotomy has lost its relevance. Thus in the decision, Mattheus v United Kingdom 52 the Court has on the basis of Articles 1 and 14 of Protocol No. 1 (read together), ruled to be admissible, a complaint of sexual discrimination brought by the applicant in relation to British legislation concerning the grant of free travel privileges; in doing so, it did not explicitly or implicitly deal with the respondent government’s argument that the social benefit in question did not have a contributory character.

There is no doubt that clarification of the case-law in this area would be highly desirable.

V. Towards the protection of “obvious possessions”?
The Beyeler v Italy decision

By means of the various examples which have been cited up until now in the context of one case or another, it can be seen that consideration of domestic law provisions occurs systematically, albeit to varying degrees, when the European judge rules on the existence of a “possessions” within the meaning of


50 See European Commission of Human Rights, 10 July 1985, Appl. No. 1297/84 – Vos v The Netherlands, D. & R., No. 43, at 192 (regarding a disability pension): “The Commission notes that the social security benefits in question are accorded in accordance with the general law on work disability which is designed as a general insurance programme (volksverzekering) based on the principle of social solidarity. In that programme, there is no direct link between the rate of contributions and the benefits granted. Consequently, no-one ever enjoys a right to an identifiable and enforceable portion of the common fund. Thus the Commission considers that, under such circumstances, the right to benefits could not be qualified as a possession within the meaning of Article 1 of the First Protocol Additional.”

51 See in particular, ECHR, Appl. No. 34462/97, 3 October 2000 – Wessels-Berger Voet v The Netherlands, not published (regarding applicability of Article 1 of Protocol No. 1 to pensions in the Dutch AOW system) “The Court observes that the European Commission of Human Rights has examined this question on several occasions. According to the Commission’s constant case-law, whilst no right to a pension is as such included in the Convention, the making of compulsory contributions to a fund may, in certain circumstances, create a property right in a portion of such fund.” See as well, ECHR, admissibility decision of 27 April 2000, Appl. No. 45851/99 – Shackell v United Kingdom, not published (regarding purported discrimination between married and non-married couples when granting a survivor’s pension to the surviving spouse): “The Court recalls that in the case of Gaygusuz, the applicant’s entitlement to social benefits (...) was linked to the payment of contributions into a national fund and found to be a pecuniary right for the purpose of Article 1 of Protocol 1 (...). In the present case Ian Green paid full contributions as a self-employed earner and the refusal to grant the applicant widow’s benefits was based exclusively on the finding that she had not been married to him. The Court will assume that the right to widow’s benefits may be said to be a pecuniary right for the purposes of Article 1 of Protocol 1 (...).” See again, ECHR, admissibility decision of 23 March 2000 – Appl. No. 33945/96 – J.S. and Others v Poland, not published; ECHR, 16 March 2000 – Appl. No. 29346/99 – K.S. v Finland, not published; ECHR, admissibility decision of 2 March 2000 – Appl. No. 52442/99 – Schwenegel v Germany, not published.

52 ECHR 28 November 2000 – Appl. No. 40302/98 – Mattheus v United Kingdom, not published.
Article 1 of Protocol No. 1. The attitude of executive authorities in tolerating a situation, may eventually reinforce legitimate expectations derived from the normative regulations; on the other hand, however, the ECHR has never appeared to concede that such an attitude could without any legislative basis create such expectations *beyond or even contrary to* these normative regulations.\(^5\) Nevertheless, the Strasbourg jurisprudence seems to have gone through a noticeable evolution in the *Beyeler v Italy* decision dated 5 January 2000. The facts in the case may be summed up as follows.

The applicant, an art dealer, had acquired Vincent van Gogh’s *Le Jardinier* in 1977 through dealings with an intermediary without, however, revealing to the seller that the painting was being purchased on his own behalf. As a consequence, the declaration of sale addressed to the responsible Italian ministry did not mention the name of Mr Beyeler. In 1988, Mr Beyeler resold the painting at a substantial profit. Having, however, learned by 1983 that the applicant had been the real buyer of the painting, the Italian government in November 1988 exercised its right of first refusal against Mr Beyeler to purchase the painting at the price which was paid in 1977.

In this case, the Court held ultimately that Article 1 of Protocol No. 1 had been violated. This conclusion logically presumed that the painting was considered to be a “possession” of Mr Beyeler.

The reasons on which the Court based its answer to the preliminary question in the affirmative, are quite remarkable.

According to the Italian government, the applicant had never actually become the owner of the possession because the sales contract was in fact void in view of the irregularity in the declaration in 1977. By 20 votes to 10, the European Commission of Human Rights shared this conclusion. Not only did it not find any reason to cast doubt on the position of Italian case law according to which the applicant had not acquired any rights in rem to the possession, but it went further in affirming that the same applicant could not claim any “legitimate expectation” to see his claims materialise for the simple reason of the lapse of time and of his repeated contacts with the authorities: the latter had never considered him to be the “owner” and had even expressed some doubts in this regard.

These arguments did not convince the Court. The latter noted in effect that the Italian Council of State had termed the right of first refusal in question as an “act of expropriation” (§ 102). It then observed that during the period before the right of first refusal lapsed, the applicant had remained in “possession” of the painting (§ 104). Finally, it stressed that “at various times the authorities seem to have de facto considered the applicant as having a proprietary interest in the painting and as even being the owner of it” (§ 104). Accordingly, the Italian government in 1988 expressed its intention to acquire the painting to the applicant himself.

According to the Court (§ 105):

“(...) those factors prove that the applicant had a proprietary interest recognised under Italian law – even if it was revocable in certain circumstances – from the time the work was purchased until the right of pre-emption was exercised and he was paid compensation. (...) This interest therefore constituted a ‘possession’ for the purposes of Article 1 of Protocol No. 1.”

It must be noted that this reasoning is determined more by the appearances of the legal situation, than by the actual validity of the legal position in terms of domestic law. In a very significant manner, the Court expressly refused to rule categorically on the validity of the contract of sale and consequently, on the question of whether the right of first refusal of the painting technically constituted an “expropriation” within the meaning of Article 1 of Protocol No. 1 (§ 106).

If this should be confirmed, then there is no doubt that this line of reasoning will open up the generic category of “possessions” even more than before.

**Conclusion**

What are we to conclude? If there is an undeniable tendency in the case-law, it is incontestably a policy of global expansion of the category of “possessions” protected by Article 1 of Protocol No. 1. Such an expansion has been made possible by the flexibility of the interpretative method. More than through any specific definition with clearly set borders, the autonomous concept of “possession” has been made more concrete through the casuist interplay of guidelines, which themselves are based upon particularly open-ended concepts: for instance, the concept of “legitimate expectation.” It does, however, permit the extension of the Convention’s protection, but such “fuzzy logic”, to use Mr Delmas-Marty’s words, is at the cost of a great deal of legal uncertainty. There is no doubt that any rationalisation, albeit still unfinished, would nonetheless be possible and desirable. One has in mind here, more particularly, the case of claims and the uncertainty relating to the necessity (or alternatively, the lack thereof) in having the claims recognised by a judicial decision. One also has in mind, the relatively ambiguous attitude of the Court in regard to the case-law of the old Commission in matters of social security benefits. One finally has in mind, the formidable liberalisation that the *Beyeler case* entails and the protection of apparent possessions which it seems to accept. It would have been more advantageous if this liberalisation were to have been formulated more precisely; otherwise the danger arises of involving the Court in a series of cases in which it would be merely functioning as a trial judge.

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\(^{53}\) See more or less to this effect, ECHR, admissibility decision of 27 April 1999 – Appl. Nos. 40832/98, 40833/98 and 40906/98 – *Bellet, Huertas and Vialatte v France*, not published.