

# **The Right of Property in Conflict with other Protection-meriting Rights or Interests**

Karin Åhman

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## 1 Introduction

In this essay I will discuss how conflicts between right of property and other legislator-recognised rights or interests should be able to be managed and resolved. Which right or interest that prevails/is given the greatest importance affects the extent and which limitations that the right of property is given, as a protection-meriting human right. On one hand it is about how *legislation* should handle these conflicts and on the other hand how one in *practical law* should set about it. Of course it would be ideal if the legislator furnished an understanding of how the law administrator (or another who is subjected to certain legislation) should act in a case of conflict, i.e. that there is already a standpoint and an account of current conflicts of interest. This however is not very common. It is on the contrary not uncommon that legislation disregards conflicts, underestimates them or quite simply does not sufficiently pay attention to the different interests which can arise towards another law, the constitution or international undertakings.<sup>1</sup> At times it is indicated in the preparatory works which has been taken into consideration and observed opposing interests (or rights), but these are not always considered later in the legislation itself. In certain laws it is reminiscent of interest adjustments which shall be made as well as the intervention being proportional.<sup>2</sup> This occurs through provisions which as a rule are fairly general. A better guide to how to handle these situations is often given in case-law.

*Right of property* – protects a company's and an individual person's financial interests. It is guaranteed through the Instrument of Government 2:18 and in the first Protocol to the European Convention on Human Rights (ECHR). The primary aim is to protect a financial right (or lawful expectation of such a right). However there are also other aims which the right safeguards.<sup>3</sup> It also guarantees other than financial values.

The owner has e.g. a right to make decisions on what is owned (right of disposal or right of disposition) which cannot always be provided financial significance, e.g. when the possibility to exercise influence is created through assets. There is a perception that the personal ownership has an intrinsic value, or as the French National Assembly expressed it in 1953 in conjunction with the first protocol to the ECHR being ratified, “la propriété prolonge la personne”.<sup>4</sup> Many, including myself, refer to the fact that this right can affect the actual possibility to exercise other rights, such as freedom of speech and freedom of religion. It therefore does not necessarily need to be the one which is always in glaring contrast to others' rights or interests. It is however the contrast which is the subject of this essay.

I begin the essay by discussing conflicts of interest on a more general level and look at how they can manifest themselves. I then discuss how different

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1 One problem is also that the Instrument of Government 2:18 is limited when it refers to which asset is protected and when it is applicable.

2 See e.g. PBL 1:5, Environmental Code 2:7 and Section 8 of the Police Act (1984:387).

3 Åhman, Karin, *Egendomsskyddet*, IUSTUS förlag, 2000 p. 24 ff.

4 Åhman, op. cit, p. 25.

rights and interests can limit the right of property's contents. On one hand I take up conflicts which arise between different guaranteed *rights* and on the other hand conflicts which can arise between right of property and others from legislator-recognised *interests* not guaranteed as freedoms and rights. I conclude with some summarising reflections.

## 2 Conflicts of Interest in the Legal System

One of the primary purposes of the law is to resolve conflicts between individuals in a peaceful manner.<sup>5</sup> By regulating of how certain types of conflicts shall be resolved in advance the possibility has been considered for the increase of the prevention of violent outcome based on dispute between individuals (or between states) concerning different interests. It often involves a conflict's financial interests. That a conflict thus is given legal frameworks allows certain mechanisms to enter into it and the parties are bound by these mechanisms for the benefit of a peaceful solution. In our modern society quite a few of us tend to overlook this function of the law. Another effect of "judicialising" conflicts is that the argument becomes technically characterised and tied to a professional guild with another language etc. Certain arguments therewith become less significant while others have precedence. There are many other effects which I do not take into account here.

In other words it rests in the essence of the law that there are conflicts which shall (and must) be handled and resolved. Moreover, the entire legal argumentation builds on this idea. In the methodology where the legal sources are treated it also presupposes that conflicts can arise from between law sources. Through the formal doctrine of the sources of law<sup>6</sup> a proposal is furnished on how to resolve such a conflict. Another alternative – than adopting the doctrine of the sources of law – is to allow the argument which appears in respective sources to steer the outcome. What substance does the argument have and which results do different solutions give, seen from the legal system's entirety and its construction? However such a solution can further appear more unpredictable and rest on shaky ground. It presupposes a knowledgeable and well-informed legal profession with proper perception on how the law is constructed and on which values the legal system rests. The purpose of the reasoning is extremely important in such an operation.<sup>7</sup> This latter solution model is preferable in cases

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5 There are of course other important purposes, which are not dealt with in this essay.

6 First and foremost wording of a law shall be used, afterwards the travaux préparatoire and authoritative practice. Lastly you allow the doctrine to furnish the instruction. If the wording of a law e.g. is not allowed to be joined with what is explicitly expressed in the travaux préparatoire, a clear and distinct law must be given precedence. The legislator however presupposes that there will not be any general opposition between the law sources. It may however be said to be wishful thinking and there are several concrete legislation matters which demonstrate it.

7 A clear example of such a management makes up RH 2004:41 which referred to an action on compensation due to an agreement about termination of pregnancy. The agreement was considered invalid and lacked legal consequence due to the fact that it was in conflict with good practice, "pactum turpe". The Court of Appeal dismissed the action. In the decision a

where clear conflicts arise between applicable and obvious law sources themselves or if it is found that a situation which shall be judged in a legal respect is completely unregulated.

Hans-Gunnar Axberger describes the conflict in law that is most fundamental, namely “the one between self-interest and public interest”.<sup>8</sup> He relates the issue about conflicts of interest to the impartial concept or to “a universal value system”.<sup>9</sup> How should we resolve certain conflict situations through rules so that they are regarded as fair? The issue has been previously dealt with in literature and is about how we create a legal system which is perceived as lawful by most of society. John Rawls’ metaphor about the veil of ignorance gives a solution on how to resolve the conflict between self-interest and public interest.<sup>10</sup> Through being ignorant of their future position – everyone is under ignorance’s veil – you can create rules which become universal or fair if so desired. In other words, irrespective of any interest is represented in real life the rules can be viewed as fair (despite conflict with self-interest) and they receive therefore acceptance. Rawls does not actually say so much about how you can manage conflicts of interest. He provides us with a method for creating a societal order that can be perceived as lawful and just by most of us.

If we transfer this perspective on the subject for this essay public interest can be said to be represented by the interest which the legislator (or the law administrator) chooses reward in a separate legislation matter. Thus far public interest is formal in its nature since it is based upon decisions by the Parliament during a given period. In certain situations self-interest is rewarded, but as a rule it occurs under the protection by that the public’s can also benefit from the whole. Many times different public interests therewith come into conflict with each other.

In the legal policy context, conflict between different interests works as a base for discussion. The political parties e.g. represent through their party programme different interests and, more or less, express certain individual group’s (students, families with children, etc.) wishes on how to design future policies. In this way the groups are set against each other. The parties also represent interests that cannot be directly connected to groups of people (environmental interests, social interests, commercial interests, etc.). In the politics these interests are also set against each other in various contexts. When politics becomes law, interests become lawful rights for some and obligations for others. In both legislation context and in practical law situations therefore arise when the conflicts must be handled: Different laws and rules come in conflict with each other. A wording in a law can be interpreted as contrary to a

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line of argument on which the merit as the legal system shall protect and safeguard was conducted.

8 Hans-Gunnar Axberger, *Intresse för intressekonflikter*, i *Intressekonflikter och finansiella marknader*, red. Gunnar Nord & Per Thorell, Stockholm Centre for Commercial Law, 2006, p. 11.

9 Axberger, *ibid.*

10 John Rawls, *En teori om rättvisa*, Daidalos, 2000.

fundamental right in the Instrument of Government Chapter 2 and ECHR. It is in other words not so that the conflicts cease; they are only given other shapes. In a legal system with freedoms and rights, as one of the bases for a democratic society, there are also conflicts which perpetually require solutions. It is more often than not that the rights are set against each other. Subsequently the examples are many. A well-known conflict is the one between civil and political rights on the one hand and economical, social and cultural rights on the other.

### **3 The Right of Property and other Freedoms and Rights**

In the following I will take up the right of property viewed in light of the need of meeting other recognised rights. The other rights which will be discussed are freedom of speech and freedom of information.

*Freedom of speech* is one of the freedoms of opinion which are often emphasised as being a part of the core of democracy. It is regulated in the Instrument of Government 2:1 point 1 and in article 10 of the ECHR. It is a political right and its aim can be said to protect and preserve a democratic social organisation. How can this right – which is so unlike the right of property in its content – come in conflict with an individual's financial interests? I shall attempt to provide an example of this below.

Through freedom of the press, which is regulated in the Freedom of the Press Act a statement in printed publications is given a special position in Swedish law. The entire act is permeated by the statement of the kind protected through the act shall be given a strong position. This is expressed in, among others, 1:4 where it is emphasised that the one who supervises the observance of this ordinance in doubt should be freed rather than sentenced.

The person responsible for the content in a printed publication is its primary publisher. If this person does not have the publisher authority in accordance with 5:3 responsibility can transfer to the publication's owner in accordance with 8:2. The person who owns a publishing firm is responsible as the owner of the business being conducted. With ownership comes the possibility of appointing (and dismissing) a publisher etc. In the system there is an inherent conflict between the person responsible for a publication's contents (its publisher primarily) and the person who owns it. If there is something deficient concerning the publisher, the owner instead becomes responsible for any possible violation of the press act.<sup>11</sup>

Via the Freedom of the Press Act guidance is given on how a conflict between these different interests shall be handled. To a certain degree ownership is subordinated to freedom of speech. In practice, it can however seem different. There can be powerful owners with considerable interests in that which is published. Of course there can also be owners who do not participate at all in the written word but only look to the financial outcome. In a similar

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11 Warnling-Nerep, Wiweka & Bernitz, Hedvig, *En orientering i tryckfrihet & yttrandefrihet*, Stockholm, 2009, p. 41 and 90 ff.

manner a publisher can have different positions and possibilities of influence towards the owner.

Likewise there is an inherent conflict between freedom of speech and right of property when it concerns the state's active participation in media politics. The issue is as is indicated more political than legal but should still be commented here. Through a great variety of ownership within different branches of significance for freedom of speech, a basis is created for both the free word and for distributed media ownership. Owner concentration gives the opposite effect and can imply that freedom of speech does not have full effect – though this happens at the expense of the right of ownership in certain cases.

As the Freedom of the Press Act is drawn up (and also the Freedom of Speech Act) freedom of speech which as mentioned is given precedence before owner interests, above all when it applies to how the rules of responsibility are designed in Chapter 8. If a powerful owner of a media company wishes to increase its influence above and beyond that which is strictly financial it also becomes responsible for what is printed.

The contrast between *freedom of information* (in accordance with article 10 of ECHR, compare the Instrument of Government 2:1) and right of property arose in a recently decided and interesting case from the European Court on Human Rights, in the case of *Khurshid Mustafa and Tarzibachi v. Sweden* from December 2008.<sup>12</sup> The issue concerned if the tenants' right to information had been violated by the landlord attempting to prevent the tenant from setting up a satellite dish from inside the kitchen. As the case went on, it primarily dealt with the interpretation of the tenant agreement seen from Swedish Property Acts rules on the tenant's custodial duties etc. The tenants also pursued the issue as a right to information pursuant to the Instrument of Government and ECHR.

In the Svea Court of Appeal's decision<sup>13</sup> (the court annulled the rent tribunal's decision which decision was to the landlord's disadvantage) it was stated that the installation of a satellite dish – which started from the kitchen (through a window) – was in breach of the rental agreement despite the fact that it does not in the actual case imply any security problem or other risk. The landlord's overall responsibility for and implementation of the security in the building had preference and one could not in every individual case demand an answer whether a special installation was a security risk or not. The court also deemed that even if the individual's freedom of information was important it did not have such a great significance in the individual case.

The tenants – who moved from the apartment in question despite the landlord offering to allow them to still live there if the satellite dish was removed – took the issue to the European Court on Human Rights. This court judged in *their* favour. After having demonstrated that the case not only concerned an issue on the interpretation of the rental agreement, that there was an infringement in the appellants' freedom of information, it occurred in accordance with the law and it

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12 Case of *Khurshid Mustafa and Tarzibachi v. Sweden*, judgment of 18 December 2008. The case can be found on the European Court on Human Rights' web page HUDOC.

13 Decision 20 December 2005.

had a legitimate purpose (to protect others' rights; the right of property) the court reasoned the intervention was necessary in a democratic society (compare paragraph two in article 10).

The Swedish court's grounds for the intervention must in accordance with the European Court on Human Rights be "relevant and sufficient" and the measures must be proportional with consideration for the purposes which leads to the intervention.<sup>14</sup> Freedom of information, the court asserted, was of special importance for the appellants bearing in mind that they wished to receive information from their homeland Iraq. There was no other way to obtain this information. The landlord's responsibility for security was important but the security was not questioned in this case. On the contrary through expertise it was presented that the device was in order. The landlord's responsibility for overall security (compare the Court of Appeals' decision) was not so important that it prevailed over the appellants' interests. Likewise in this case there is not any actual threat against "order and good custom". In conclusion, the court attached importance to the fact that the appellants moved from their apartment in which they had lived for six years. Despite certain margin of appreciation to the state's advantage the intervention was not, all in accordance with the court, necessary wherefore the state was considered to have been in breach of article 10 of the convention.

Property rights interests are a common theme throughout this case but they are not expressly mentioned other than as a reason to be able to intervene in the freedom of information.

#### **4 The Right of Property and other Property Right Claims**

Something which is not often discussed is the conflict which can arise between different *property interests* since resolution is needed in both legislation and concrete cases. One such conflict is that between minority owners and majority owners which may arise in a public company. It primarily concerns the situation when there is the possibility to redeem the minority's shares. Intervention in share ownership is protected in the Instrument of Government 2:18 insofar that dispossession of the shares requires urgent public interest as well as compensation for the loss, in order to be considered as constitutional. On the other hand the constitution does not protect against "right of disposition restrictions of chattels." Article 1 of the first protocol to the ECHR provides broader protection for share ownership both when it deals with dispossession and right of disposition restrictions.

Through their various owner positions the different owner groups represent various interests. The minority as a rule has interests in their shares not being undervalued if an issue of redemption should arise. The minority has of course other interests which deal with their right to influence what the minority considers. Majority interest can exist in allowing the company as an entirety to function as well as possible and to take responsibility for the decisions which are

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14 Item 43 in the judgement.

made at the shareholders' meeting. If it becomes an issue of redemption of minority shares the majority has interests in it being done as profitably and smoothly as possible.

The legislator gives the minority a fairly strong position when it comes to issues of influence through the way certain voting rules are managed. When it is a question of redemption the shares' appraisal is redeemed often being the subject of dispute despite the Company Act regulating the level of compensation.<sup>15</sup> Many questions however receive their answers through case-law. One question not yet answered is to which extent the Constitution's inquiry proposal<sup>16</sup> about full compensation in the event of a dispossession changes this situation.

Another conflict of interest between different owner interests is the one concerning "commercial expropriations". The owner of land (generally a farmer/agriculturalist) has partiality towards a company which has interest in utilising (or purchasing) part of the owner's land with the aim of developing e.g. telecommunication. Through the proposals which are set by the Expropriation compensation inquiry<sup>17</sup> these interests (equivalent in nature) are balanced in a better manner than what has previously been the case. Stipulating e.g. individual value for the landowner if the land is expropriated gives a clear expression that both of the owner interests are similar from the legislator's perspective. It is another matter whether and how this expression will work in practice from an e.g. foreseeable point of view.

## 5 The Right of Property and other Protection-meriting Interests

In many legislation matters and in practical law, the right of property stands up to other strong interests meriting protection. In the following I deal with freedom of competition interests and common right of access interests.

Through EU law the importance of it advising *freedom of competition* for companies has been made clear. This freedom is of fundamental significance for cooperation within the EU. It has a strong and close connection to freedom of trade in the Instrument of Government 2:20 by the provision protecting similar treatment of manufacturers, which is also one of the aims of freedom of competition.<sup>18</sup> This interest acts with force in legislation matters which concern e.g. the telecom trade or abolition of the pharmacy monopoly. In short freedom of competition implies that it shall advise similar conditions (non-discrimination) for companies which are established in the industry. In order to protect competition – which results in the consumer receiving better prices and generally increased access to a product – an individual owner interest (or

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15 It can of course be objected that compensation is not sufficiently regulated.

16 SOU (the Swedish Government Official Reports) 2008:125.

17 SOU 2008:99.

18 See further in Karin Åhman, *Grundlagsperspektiv på näringsfriheten*, i *Våra rättigheter V, Rättighetsperspektiv till minne av Gustaf Petrén*, Rättsfonden (Human Rights in Sweden), 2007, p. 169–181.

several) can sometimes be placed aside for the benefit of another's interest of freedom of competition. In such a context owner interest is not thought to carry much weight.

Such a matter touches upon the realisation of new regulations in the act (2003:389) on electronic communication. The aim was to *increase* the possibilities without discrimination and with transparency for the companies, which do not have the fixed telephone network, to have access to this. The fixed telephone network is owned by TeliaSonera AB. An increased access it was said, would encourage competition between different telecom companies which in the end would promote consumer access to e.g. good-valued telephony.<sup>19</sup>

Through previously implemented regulations which in a large sense develop EU law and certain separate EU directives, obligation had been imposed on TeliaSonera AB which is supported by the same aim as above (i.e. to primarily work for promoting competition). From the act it appears that companies with significant influence can be forced to e.g. give other actors access to networks and appurtenant installations, "admittance obligation". This obligation can be combined with an obligation to apply non-discriminating conditions or cost-orientated prices for access. Through a special decision in 2004 the Swedish Post and Telecom Agency stipulated that TeliaSonera AB was the operator which had significant influence on the Swedish market for access on a wholesale level to conventional managements of metal and partial access networks. Subsequently the agency stipulated which obligations are payable by the company in accordance with the act. After inspection it appeared that TeliaSonera did not sufficiently comply with the decision. All in all the existing competition regulation in question (neither the public nor more sector specific) was not regarded to be enough to manage the company's dominance. Experiences from other European countries were similar.

In this light new rules were implemented with the idea to increase the unowned operators' possibilities to similar access to the fixed telecom network. TeliaSonera AB – the telecom network's owner – have obligations imposed as "functional separation" which means that an operator (TeliaSonera AB) can be obliged to separate the operations and assets which are needed to plan, run, maintain and supply the parts of the net to which the obligation refers.<sup>20</sup> Even though the Instrument of Government 2:18 may not be considered applicable<sup>21</sup> to the implemented regulations it was strongly objected from TeliaSonera AB that the practice would breach the company's protection for the right of ownership. The company's statement of objections did not receive any sympathy and the Government neither followed the statement of objections which the Council on Legislation by way of precaution delivered on awaiting a future EU judicial regulation in question. Ownership of the fixed telecom network is now strongly restricted by the act on electronic communication, which may be chiefly considered an EU judicial product.

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19 See prop. 2002/03:110 which was the basis for the measures which were previously taken through the act on electronic communication.

20 Proposal to the act on electronic communication 4:9 a, PTS report 14 June 2007 to the Government.

21 Which however is the case with ECHR.

The conflict which will be expressed between right of property and *common - right of access to private land* primarily appears in the Instrument of Government 2:18 (last paragraph) where it stated that irrespective of what is stated in the previous paragraph (about protection for the right of property) everyone shall have access to nature in accordance with common right of access to private land.

Common right of access to private land which is based on the practice and not expressly found regulated in detail implies for the individual an authority to a certain extent to utilise another's property, irrespective of whether anyone owns any individual right to it. The fact that legal right of access to private land in principle is unregulated signifies that in many cases the opposite conclusion may be made on what is applicable; that which is not prohibited and punishable can therefore be considered permitted from a legal right of access to private land judicial perspective. However there are examples of expressed rules which directly have the legal right of access to private land's contents in mind. Freedom of movement for everybody applies as long as the landowner is not afflicted any mentionable financial damage or disturbance in home privacy and no significance inconvenience occurs from an environmental protection point of view.

A case can be made that the conflict is only apparent and that will be interpreted in the common right of access to private land in the protection of property, which is to say, that this right may be considered to be included in the right of property. The practice of common right of access to private land presupposes however that someone uses another's land in any way which the legal system acknowledges. Likewise through the practice which has been established and states how common right of access to private land may be exercised, it appears that what is allowed in accordance with common right of access to private land is considered constituting an infringement on the right of property – not an interpretation of it. It is not founded however on an authoritative decision or the like, but on the fact that an individual is permitted to act in a certain manner. Another issue is if the process in question implies a formal infringement in accordance with the provision on the right of property. Of course the constitution's protection does not always apply to the right of disposition's restrictions bearing in mind how the wording is formulated.

What shall be considered an infringement of the right of property can be an important issue when its admissibility (constitutionality) e.g. shall later be examined.<sup>22</sup> If it is an infringement of common right of access to private land it has a dignity which otherwise would not have had, bearing in mind that common right of access to private land is presently anchored in the constitution. It may not however be considered to have the status of a freedom and right.

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22 That is to say if an intervention is in breach of the protection for the right of ownership.

## **6 Concluding Reflections**

In this essay I have emphasised different situations when the right of property comes into conflict with other rights and interests. It is not always the case that owner interest enjoys support in the constitution. On the contrary, the ECHR supplements with protection in most of the cases. If there is no constitutional protection this situation can in itself result in the conflict not being at all treated or emphasised as relevant neither in legislation's context or in practical application. That the constitution e.g. as it is formulated today does not protect against right of disposition intervention in chattels therefore becomes problematic from an owner's point of view.

Another reason for the owner's interests not always being given its proper say may be that these interests occur so often and in so many guises. Although they shall be protected and shall be considered in accordance with the constitution and the convention this is not able to be done.

Another similar problem from an owner's point of view is that the European Court on Human Rights in its examination sometimes does not treat competing rights but only the most prominent right is given scope and examined. This shows above all the case which concerned freedom of information. This case is therefore not unique but the court tends to make such adjustments in several cases. How should you then go about determining how conflicts between rights and interests should be resolved? An important aspect is clarification. Firstly, it deals with an increased degree of clarity stating whether the constitution's protection is applicable or not, as well as stating how the ECHR possibly complements the protection. A constitutionally-protected interest is of course a strong interest due to its status. Secondly, it deals with an increased degree of clarity where rights/interests directly collide with each other. Since legislation in many respects concerns regulating conflicts between interests it may be argued that this would not be difficult.

Besides making certain clauses in the handling of a right or conflict of interest the proportionality principle should be given even greater significance. This has long been found in application of the law, even if it is not clearly constitutionally supported. Proper usage makes this principle work as an adjustment when it comes to handling different conflicts both in legislation's as well as in application's contexts. A not unimportant part in this examination is responding to the issue if there are less radical methods in achieving the same goal. Every now and then this is not sufficiently proven. Less relevant is the issue of whether the aim is lawful. Such an examination can often be taken without judicial problems. Finally how do interests manage against each other in the concrete examinations? Which interests does it deal with and how strong are they? When it concerns protection for the right of property it is not uninteresting if compensation is issued.

If the conflicts are made clearer this could better lead to the arguments becoming stricter in the long run and maybe also more comprehensible for those who shall follow the rules. There is also a developed case-law both from national and from European courts which state how the principle of

proportionality shall be used. This practice ought to be of use more often in legislation matters.