

Informal Settlements and Fundamental Rights

Hendrik PLOEGER and Daniëlle GROETELAERS, the Netherlands

Key words: Informal settlements, fundamental rights, ECHR, property, possessions

SUMMARY

The European Convention on Human Rights (ECHR) protects several fundamental rights that can be associated with the use of land. More specific: the fundamental right to property and the right to respect for one's private and family life and one's home.

Informal settlements (also known as squatter settlements, illegal settlements or encroachments) are characterized by a dense expansion of small, more or less provisional shelters built from diverse materials. These settlements are developed on private or public land by people who occupy the land without holding any title. The urgent need for this kind of shelter for the poor gains the upper hand in countries where planning and housing systems - in that respect - are not functioning properly.

Although these settlements are 'informal' or 'illegal', the occupants can claim under the European convention protection against arbitrary acts of the government interfering with their fundamental rights. One of the basis of those claims can be article 1 Protocol No. 1 ECHR, that guarantees the 'peaceful enjoyment' of one's possessions.

On the aspect of illegal occupied land, the European Court of Human rights in Strasbourg holds a wide interpretation of 'possessions'. The Court accepts that occupants of land can claim a proprietary interests, although they don't have any (formal) right in the occupied land. On the other hand, the Court recently found that the right to property of the landowner itself was infringed by the rule of adverse possession under English law.

The paper gives a general survey of the interpretation and application of Article 1 in respect to informal settlements, based on case law of the European Court.

Informal Settlements and Fundamental Rights

Hendrik PLOEGER and Daniëlle GROETELAERS, The Netherlands

1. INTRODUCTION TO THE EUROPEAN CONVENTION OF HUMAN RIGHTS

On 4 November 1950 the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) was signed in Rome. The Convention is the product of the Council of Europe, a body founded to promote and protect the fundamental rights in post-war Europe. Now, 55 years later, the ECHR has been ratified by all 46 member states of the Council of Europe. This includes all member states of the European Union (inclusive those that joined the EU on 1 May 2004) and all applicant countries.

The Contracting States are bound to secure to everyone within their jurisdiction the rights and freedoms laid down in the Convention. Everyone whose rights are violated will have an effective remedy before national authorities (Article 13 ECHR). The European Court of Human Rights, seated in Strasbourg, has the supervision over the observance by the Contracting States of their engagements arising from the Convention. In the vision of the Court the ECHR is “a constitutional instrument of European public order”, which creates, “over and above a network of mutual, bilateral undertakings, objective obligations” so setting standards for human rights within Europe. See *Loizidou v. Turkey* (23 March 1995), §70 and 75.

The Court sits in Chambers of seven judges. After the judgment of the Chamber dealing with the specific case, any party request that the case be referred to the Grand Chamber. This request will only be accepted in exceptional cases: i.e. if the case raises a serious question affecting the interpretation or application of the Convention, or a serious issue of general importance. If the request has been accepted, the Grand Chamber of 17 judges shall decide the case again. The judgment of the Grand Chamber is final.

On the aspect of the European Union, Article 6 of the Treaty on European Union affirms the Union’s foundation on the principles of human rights. It explicitly states that the Union shall respect fundamental rights, as guaranteed by the ECHR. This means that those rights do form part of Communal law. Next to the ECHR, in 2000 the European Union Charter of Fundamental Rights was proclaimed in Nice. This Charter is not binding, but its fundamental rights will be incorporated in the future European Constitution.

2. FUNDAMENTAL RIGHTS AND PLANNING

Planning involves spatial changes, which will always have effects on property and therefore Article 1 Protocol No. 1 ECHR comes in play. Article 1 Protocol No. 1 European Convention on Human Rights guarantees:

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.

However in the field of planning more fundamental rights as protected by the ECHR are relevant. Those are the right to a fair trial (Article 6), the right to protection of one's private and family life, and one's home (Article 8) and the prohibition of discrimination (Article 14). Article 6 relates entirely to guarantees of procedure. In essence it states that everyone is entitled to "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". It applies wherever there is a determination of a person's "civil rights and obligations". So in case property is involved, Article 6 imposes on the National Authorities a duty to provide adequate remedies. Therefore this article is also of significance to the planning process. It enables parties concerned, whether it is an owner, user or developer, to argue that he has not had a fair hearing during the planning process. In *Ortenberg v. Austria* (25 November 1994) the European Court found that also neighbours are protected by Article 6, where the grant of planning permission for an adjacent plot might adversely affect the value of their property.

The importance of Article 8 ("Everyone has the right to respect for his private and family life, his home and his correspondence") in the field of planning is best illustrated by the case of *Connors v. the United Kingdom* (27 May 2004). In this case a Gypsy family was evicted from the site where they had lived for about fifteen years. The Court found that the eviction was not attended by sufficient procedural safeguards, namely a proper justification for the serious interference with applicants' rights. Therefore the interference was not proportionate to the legitimate aim being pursued, and a violation of Article 8 was found.

The non-discrimination clause of Article 14 offers a guarantee against arbitrariness, but it has no independent existence. It relates to other rights and freedoms in the European Convention in the sense that it requires that any of those rights have been infringed before the non-discrimination clause can play a role. A good example of its working is the case of *Pine Valley Developments Ltd and Others v. Ireland* (29 November 1991). The case of Pine Valley deals with the purchase of land for possible development purposes in the County of Dublin. Whether the land can or cannot be developed may make it more or less valuable in the hands of its purchasers. In November 1978 private developer Pine Valley purchased 21,5 acres of land relying on the outline planning permission for industrial and office development that was granted by the Minister for Local Government in 1977. However, in development plans of the Dublin County Council the site was located in an area zoned for agricultural and green purposes. Therefore the planning permission was invalid, which reduced the value of the property. Pine Valley claimed to the European Court they had been victims of a breach of Article 1 of Protocol No. 1 to the Convention.

In this case the European Court ruled that there was at least a 'legitimate expectation' of being able to develop the land. Therefore Article 1 is applicable. But the Court concluded there was a fair balance and there has been no violation of Article 1. The motivation was that the interference was in accordance with planning legislation that was designed to protect the environment.

The applicants also claimed that they had been victims of discrimination, because the 1982 Act that was enacted with a view to validating planning permissions and approvals did benefit other holders of permissions in the same category. With regard to this alleged violation of Article 14 of the Convention, taken together with Article 1, the Court found there has been a breach of the right to non-discrimination. According to the Court it couldn't be claimed that the outline planning permission was retrospectively validated (as were other permissions) and the government did not advance any justification for this difference of treatment.

3. INFORMAL SETTLEMENTS

This paper focuses on the rights of occupants of informal settlements. The preceding paragraph shortly addressed some of the articles of the ENHR that come in play when the authorities use planning instruments. This also applies to instruments that are used to intervene in informal settlements.

In order to go into the details, we first have to define the concept "informal settlements". There are many concepts and expressions, which are used for the same or comparable concepts, like squatter settlements, illegal settlements, slum quarters, shantytowns or encroachments.

Informal settlements can be characterized by a dense expansion of small, more or less provisional shelters built from diverse materials. People who do not hold any formal title to the land develop these settlements on private or public land. The urgent need for this kind of shelter for the poor gains the upper hand in countries where planning and housing systems – in that respect – are not functioning properly.

Potsiou and Ioannidis (2006) give a list of the most common forms of informal settlements:

- "Squatting" on state-owned land and shanty construction, which is the case in many countries of Africa, Latin America, and Asia. This type of housing is extralegal from the beginning and is constructed in violation of a variety of laws. It creates slums and frequently the state authorities are in conflict with the occupiers whenever they attempt to establish controls.
- Purchase of agricultural land, subdivision of it into smaller parcels, and illegal conversion of the land use from agricultural into housing or industrial settlements or conversion from industrial into housing, which is the case e.g. in Manila. In some countries the subdivision could be legal, as it was the case in Greece until 1992, in some others not. The latter results in invalid land titles; as was also the case in many Latin America countries (de Sotto, 2000).
- Construction without permission on legally owned land parcels; making "semi-legal" or illegal transactions mostly without a formal registration (especially those related to inheritance) at the cadastre or the land registry.
- Constructing illegal building extensions, such as to add more stories on a legal one-storey building, which is common, for example, in Egypt due to the high taxation and bureaucracy.
- Illegally subdividing apartments and renting or leasing them at high market prices, which may be the case in some countries in transition, but also occurs in major cities in

developed countries where the illegally subdivided apartments are rented to immigrants.

In this paper we will focus on occupiers of land who lack any title to the land.

3.1 South African approach to informal settlements

A country that is familiar with problem of informal settlements is South Africa. Due to – amongst others – the apartheid regime in South Africa the unemployment rate is still very high and many people are living in informal settlements. In 1994 an estimated 1.06 million households (7.7 million people) lived in informal settlements (Muzondo a.o., 2004).

A workable definition of informal settlements can be found in the Informal Settlements Handbook of the Western Cape Department of Housing and the City of Cape Town. The Cape Town authorities are dealing with all kind of problems concerning these settlements. They published The Informal Settlements Handbook, which helps to understand and to address issues relating to the management and the upgrading of Informal Settlements. In this handbook they define informal settlements as: “[...] residential areas that do not comply with local authority requirements for conventional (formal) townships. They are, typically, unauthorised and are invariably located upon land that has not been proclaimed for residential use. They exist because urbanisation has grown faster than the ability of government to provide land, infrastructure and homes.”

According to the handbook informal settlements tend to be characterised by:

- Infrastructure that is inadequate
- Environments that are unsuitable
- Population densities that are uncontrolled and unhealthily high
- Dwellings that are inadequate
- Poor access to health & education facilities and employment opportunities
- Lack of effective government and management.
- They are consequently areas of increasingly high risk with regard to health, fire and crime.

But the handbook also mentions positive characteristics of informal settlements, such as:

- Significant personal investment in dwellings
- Strong social infrastructure
- Effective community leadership
- Strong linkages with the more formally housed community

These positive factors combined with the fact that there still is insufficient land and finance to “just solve the housing problem” make that informal settlements are not merely regarded as unwanted settlements. They are also regarded as “places of vitality and opportunity”. On the other hand it seems to be difficult to upgrade or regularise these settlements. Cadastral and Land Information Systems are often inadequate for informal settlement upgrading (Fourie, 2001). But also a major problem is the fact that only few households can afford the costs of a site with a title and the informal transfer of land is a firmly rooted practice. Does this mean that occupiers of informal settlements have no rights to their property?

4. INFORMAL SETTLEMENTS AND THE RIGHT TO PROPERTY

Recent case law of the European Court has shown that occupiers can gain rights from their possessions, although they are illegally occupying the land.

4.1 Öneriyildiz v. Turkey

The case of *Öneriyildiz v. Turkey* (30 November 2004) deals with the rights of a slum quarter inhabitant to his dwelling. The slum quarter concerned was sited next to a large rubbish dump. When the rubbish dump started to be used, the closest built-up area was 3,5 km away, but since then more and more illegal dwellings were built in the surrounding areas. The applicant's house was built on a piece of land adjacent to the rubbish dump.

In 1989 the Ümraniye district council wanted to redevelop the site of the rubbish dump, but the decision makers refused to adopt the urban-development plan. Nevertheless the council started dumping earth around the slum area, in order to redevelop the rubbish tip site. Two inhabitants of the slum area then brought proceedings against the council to establish title to land (in order to stop the redevelopment). They complained of damage to their plantations and they claimed that for years they had been treated like they had a legal title to the land. They paid taxes since 1977 and filled in forms to regularize their title. They even had water and electricity installed in their houses at the request of the city council. The district council based its defence on the fact that the residence was contrary to the health regulations. In first instance the District Court ruled in favour of the applicants, but the Court of Cassation set aside the judgment, which was followed by the District Court. But the rubbish dump was still there and unwished-for by the district council.

Two years later the district council applied for experts to be appointed to give their opinion about the rubbish tip. According to the experts the rubbish dump did not conform to the technical requirements, such as safely collecting and burning waste gases. The tip therefore "exposed humans, animals and the environment to all kinds of risks". The report was brought to the attention of the other concerning district councils, but they applied to have the report set aside. However the Environment Office (Ministry of Health) recommended the Ümraniye district council to handle the problems with the waste dump. The mayor of Ümraniye then applied to the District Court for the implementation of temporary measures to prevent the city council and the other district councils from using the rubbish tip site. He requested that no further waste was dumped and that the tip was closed. While this case was still pending on 28 April 1993 a methane explosion occurred at the site. The explosion caused a landslide and about ten slum dwellings were buried under a mountain of waste and thirty-nine people died.

One of the destroyed dwellings was the applicant's dwelling. On 3 September 1993 he applied to the district council, the city council and the Ministries of the Interior and the Environment seeking compensation for his losses. He claimed compensation for pecuniary and non-pecuniary damage:

- for the loss of his dwelling and household goods (TRL 150.000.000)
- for the loss of financial support incurred by himself and his three surviving sons (TRL 2.550.000.000, TRL 10.000.000, TRL 15.000.000, TRL 20.000.000)

- for the non-pecuniary damage resulting from the deaths of their relatives for him and his three sons (TRL 900.000.000, TRL 300.000.000, TRL 300.000.000, TRL 300.000.000)

The district council and the Ministry of the Environment dismissed his claims, the others did not reply. The applicant therefore sued them, complaining that their negligence led to the death of his relatives and the destruction of his house and household goods.

In 1995 the Istanbul Administrative Court found a direct causal link between the accident and the negligence of the authorities, based on the reports of the experts that were made up in 1991. The Court ordered the authorities to pay the applicant and his children TRL 100.000.000 (approximately EUR 2077) and TRL 10.000.000 (approximately EUR 208) for non-pecuniary and pecuniary damage.

For the pecuniary damage the Court only took into account the destruction of the household goods. The applicant could not claim compensation for the loss of his dwelling because he had been allocated a subsidized flat. The claim for the loss of financial support was dismissed because the applicant was partly responsible for the damage and the victims had been his wife and young children who had not been in paid employment. The compensation had still not been paid when the case was reviewed by the European Court.

4.1.1 Alleged Violation of Article 1 Protocol 1

On the aspect of illegal occupied land, the European Court seems to accept a wide interpretation of ‘possessions’ in *Öneryıldız v. Turkey*. It was undisputed that the dwelling had been erected in breach of town-planning regulations and that the land belonged to the State. The Court rejected the claim that Öneryıldız could acquire ownership of the occupied land as being speculative. But in respect of the dwelling itself, the Court concluded that the authorities let the applicant and his family live undisturbed in his house for five year, connected him to the water supply, and even levied council tax. Therefore the conclusion was made “that the authorities also acknowledged de facto that the applicant and his close relatives had a proprietary interest in their dwelling and movable goods” (§127).

Opens this the way for all builders of illegal dwellings to argue that they have a possession protected by the ECHR if the authorities have tolerated their illegal use of land? Judges Mularoni and Türmen express this fear in their dissenting opinions. According to Mularoni the conclusion that Article 1 is applicable might have paradoxical effects. She sketches the image of “splendid villas and hotels built illegally on the coast or elsewhere which, under national legislation, cannot be acquired by adverse possession”, but where those who built them “in flagrant breach of the law” have a claim under Article 1 because the authorities have tolerated them.

5. SQUATTERS AND ADVERSE POSSESSION

In many jurisdictions the rule is known that title to land can be obtained by adverse possession. This means that if a squatter remains in possession of land for a certain period of time then he will acquire ownership of the land. This would mean that inhabitants of an

informal settlements can acquire ownership of the land they occupy. On the other hand this rule interferes with the fundamental right to property of the original landowner.

Recently, in the case of *Pye (Oxford) Ltd v. The United Kingdom* (15 November 2005), the Court has ruled that the rule of adverse possession in England and Wales indeed violates the landowner's right to peaceful enjoyment of his possessions. This seems an important issue in the possibility to acquire the rights to the land occupied by squatters, such as people living in informal settlements.

It should be noted that the case has been referred to the Grand Chamber of the Court.

5.1 Pye v The United Kingdom

In 1977 Pye Ltd, a developer, bought in 23 hectares of farmland in Berkshire with the intention to develop it into residential housing. Awaiting the development a grazing license was granted to the neighbouring farmer, Graham. The license expired in 1984. Pye refused a request for a new grazing agreement because the company anticipated seeking planning permission for the development of all or part of the land. However Graham continued to use the land. Pye didn't act. No request to vacate the land or to pay for the grazing was made.

In 1998 Graham registered a caution claiming adverse possession under the Limitation Act 1980 and the Land Registration Act 1925. Pye went to court to remove him. The claim failed as the Grahams had enjoyed 14 clear years of unimpeded exclusive use. Pye therefore had lost his ownership to the squatter.

Limitation periods as such are not incompatible with the ECHR. As the European Court stated in *Stubbings and Others v. the United Kingdom* (22 October 1996), §51:

They serve several important purposes, namely to ensure legal certainty and finality, protect potential defendants from stale claims which might be difficult to counter and prevent the injustice which might arise if courts were required to decide upon events which took place in the distant past on the basis of evidence which might have become unreliable and incomplete because of the passage of time.

But in this case adverse possession not only bars the claim to recover possession of the land but transfers title in the land itself. Such a result can, according to the Court, only be justified by factors over and above those which explain the law on limitation.

The UK Government argued that the provisions governing the adverse possession of land serve two (public) interests.

- they prevent uncertainty and injustice arising from stale claims;
- they ensure that unopposed occupation of land and its legal ownership coincide.

The Court explicitly accepts the relevance and importance of these aims in the case of unregistered land, but considers their importance in the case of registered land, like in the case of Pye, questionable. The uncertainties, which can arise in relation to the ownership of land, are very unlikely in a system of registration of land ownership: the owner of the land is identifiable from the Land Register.

The Court considers that the applicants were "deprived of their possessions" by the application of the rule of adverse possession. The taking of property without a reasonable compensation will normally constitute a disproportionate interference, and therefore a violation of Article 1 of Protocol No. 1. The lack of compensation is viewed by the Court in

the light of the lack of adequate procedural protection for the right of property within the applicable legal system. During the period of twelve year that the land has been adversely possessed by Graham no form of notification whatever was required to be given to owner Pye, which might have alerted him to the risk of losing his title.

The Court observes in this respect that the UK Parliament itself recognised the shortcomings in the (procedural) protection of landowners. A new procedure in relation to adverse possession of registered land came into effect in 2003. Under the Land Registration Act 2002 a squatter wishing to register land in his name must apply to the Land Registry. The Land Registry will give notice of that application on the registered owner. If the registered owner objects, the burden of proof is then on the squatter to show why title to the land should be registered in his name rather than remain in the name of the registered owner. In judging the proportionality of the system as applied in the case of Pye, the Court attaches particular weight to these changes made in the system, and the lack of cogent reasons to justify the system of adverse possession as it applied in the case of registered land.

The Court concludes that the deprivation of the title to the registered land imposed on Pye an individual and excessive burden and upset the fair balance between the demands of the public interest and the right of the applicant to the peaceful enjoyment of his possessions. Therefore Article 1 of Protocol No. 1 had been violated.

6. CONCLUSIONS

The concept of possessions in the ECHR is a wide one. The case law of the European Court indicates that it considers economic interests more than national, dogmatic legal concepts. In general any involvement with the use of land will constitute interference in the sense of Article 1. From the case of Öneriyildiz we can see that rights to the land can be separated from the rights to buildings erected on it. This seems favorable towards those living in informal settlements. However, it will be too much to conclude that all occupants of informal settlements can expect this outcome. In the case of Öneriyildiz it was obvious that the applicant was tolerated as an inhabitant because he was connected to electricity and water and he even paid taxes. Although there was no legal title to the land, his building was tolerated. Nevertheless, this case opens the door for other occupants of illegal settlements that are evicted from their land without proper foundations and procedural safeguards.

Pye, on the other hand, seems to put obstacles to inhabitants of informal settlements to acquire title to land by adverse possession in case of registered land.

When concerning the rights of occupants of informal settlements we see a task for the surveyor. Osskó claims that to create land administration in informal environments is essential to formalise informal land tenure and registering customary tenure in land register and cadastre. The question that is raised during this research is: When rights are not related to land itself, but they are respected as possessions, is this something that should be registered?

REFERENCES

Fourie, C. (2001), 'The use of new forms of spatial information, not the cadastre, to provide tenure security in informal settlements', International Conference on Spatial Information for Sustainable Development, Nairobi, Kenya.

Human Settlement Development - Department of Local Government and Housing, Provincial Government of the Western Cape (2003), *Informal Settlements Handbook*, www.westerncape.gov.za.

Muzondo, I.F., M. Barry, D. Dewar and J. Whittal (2004), 'Land Conflicts in Informal Settlements: Wallacedene in Cape Town, South Africa', FIG Working Week 2004, Athens, Greece.

Osskó, A. (2004), 'Creation Land Administration in Formal and Informal Environment', third FIG Regional Conference, Jakarta, Indonesia.

Potsiou, C.A. and C. Ioannidis (2006), 'Informal Settlements in Greece: The Mystery of Missing Information and the Difficulty of Their Integration into a Legal Framework', fifth FIG Regional Conference, Accra, Ghana.

Case law of the European Court of Human Rights (www.echr.coe.int):

Connors v. the United Kingdom, 27 May 2004;

Öneryildiz v. Turkey, 30 November 2004;

Ortenberg v. Austria 25 November 1994;

Pine Valley Developments Ltd and Others v. Ireland, 29 November 1991;

Pye (Oxford) Ltd v. The United Kingdom, 15 November 2005;

Loizidou v. Turkey, 23 March 1995;

Stubbings and Others v. the United Kingdom, 22 October 1996.

BIOGRAPHICAL NOTES

Hendrik Ploeger

Academic degrees: 1988 Master degree in Dutch law, Leyden University;

1997 Master degree in Notarial and Civil law, Free University of Amsterdam;

1997 PhD, Leyden University.

Experience: 1991-2001 Faculty of law, Leyden University;

2001-2004 Department of Geodesy, Delft University of Technology;
Since 2004 OTB Research Institute for Housing, Urban and Mobility Studies, Delft University of Technology.

Activities: Scientific research, contract research and teaching in the field of land law, land administration and urban land development.

Daniëlle Groetelaers

Academic degrees: 1997 MSc, Geodetic Engineering, Delft University of Technology;

2004 PhD in Urban Land Development, Delft University of Technology.

Experience: 1997-2003 Department of Geodesy, Delft University of Technology;
Since 2003 OTB Research Institute for Housing, Urban and Mobility Studies, Delft University of Technology.

Activities: Scientific research, contract research and some teaching in the field of urban land development, property rights and land economics.

CONTACTS

Dr. Hendrik Ploeger
OTB Research Institute for Housing,
Urban and Mobility Studies
PO Box 5030
2600 GA Delft
THE NETHERLANDS
Tel. +31 15 27 882557
Fax + 31 15 27 82745
Email: h.d.ploeger@tudelft.nl
Web site: www.otb.tudelft.nl

Dr. Ir. Daniëlle Groetelaers
Tel. +31 15 27 81158
Email: d.a.groetelaers@tudelft.nl