Property rights, human rights and surveyors

Paul van der MOLEN
FIG Sofia 2015

Political views: pro property

John Locke (1632-1704) in Book II of Two Treatise (1690): ‘Governments have no other end but the preservation of property’
Political views: anti property

Pierre Joseph Proudhon (1809-1865) in ‘What is property’ (1841).

Property and wealth distribution

Why to protect the happy few?
But: why to exclude people from an universal right to property and from protection against infringements of an unlawful state?
Property a civil or social right.

Civil and Political human right: state *must* protect property.
Economic, Social or Cultural human right: states should have a policy to realise such right progressively.

Positive or negative obligations.
Linked to the right to housing and the right to food.

Property and plurality

- Other property concepts than western ones
- No adoption of property in domestic law
- Customary authority and customary justice
- Customs in conflict with civil human rights law
Property and state control

Whether and how the state can control the use of landed property, limits its use, or even take it.
The human right to property should not exclude the power of the state to make land use plans, town development plans and expropriation plans. Although: qualified (see European Court).

UN Commission on Human Rights

Eleanor Roosevelt with the UNDHR 1948
International: UNDHR 1948

Universal Declaration of Human Rights
Adopted by Resolution 217 A III 10-12-1948 Paris, Article 17:
‘Everyone has the right to own property alone as well in association with others’
‘No one shall arbitrarily deprived of his property’

Elaboration UNDHR in 2 covenants

No agreement on property and its protection (1951 - 1954)
American Convention Human Rights, signed 22 November 1969 San Jose, article 21:

‘Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society; no one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest.’


Protocol Signed 20 March 1952, article 1:

‘Every natural or legal person is entitled to the peaceful enjoyment of his possession. No one shall be deprived of his possession except in the public interest and subject to the conditions provided for by law and by general principles of international law’
Regional: ACHPR 1981

African Charter on Human Rights and People’s Rights, 27 June 1981 article 21:
‘The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community as in accordance with the provisions of appropriate laws’

What about Asea?

Art 17: ‘..every person has the right to own, use, dispose of, and give that person’s lawfully acquired possession …..’
Specific: for example ILO 1989

ILO Convention no 169 Concerning Indigenous and Tribal Peoples in Independent Countries 27 June 1989, article 14:

‘The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised.’

Who supervises these Conventions

UN Human Rights Council New York USA, no court but complaint procedures for individuals, groups, NGO’s, states (Resolution 5/1, d.d. 18/6/2007)
ILO: Committee of Experts (CEACR)

Art 22 ILO Constitution: system of supervision leading to ‘observations’ and ‘requests’
Art 24 ILO Constitution: complaint procedure

Inter-American Court of Human Rights
San José, Costa Rica

Priority to indigenous people’s communal and ancestral land and their cultural identity against unlawful infringement of States. Peoples living in voluntary isolation should be respected, also their property.
**African Court on Human and People’s Rights, Arusha Tanzania**

African Commission confirmed that the right of traditional communities in their traditional lands constitute ‘property’ under art 14 African Charter. Only 1 case on property: pending. (*Ogiek vs Kenya*)

---

**European Court of Human Rights Strasbourg, France.**

Easy access by individuals after all domestic remedies have been exhausted (art 34 Convention). Since start in 1959, on 2215 property cases decided (2010)
Case Law European Court Human Rights

The three rules:

• Peaceful enjoyment
• Deprevation subjected to conditions
• States are entitled to control use of property inaccordance with general interests

Consistent argument: is there an acceptable justification for interference, related to these three rules?

Criteria: Lawfulness, Public Interest, Proportionality

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

The 6 relevant questions

• Is there a property right within P1-1?
• Has there been an interference in that possession?
• Under which of the three rules of Art 1 does the interference fall?
• Does the interference serve a legitimate objective in the public or general interest?
• Is the interference proportionate, and does it strike a fair balance between the demands of the general interest and the protection of the individual’s fundamental rights?
• Does the interference comply with the principles of legal certainty or legality?
Interfaces with the profession

(A) Assessment of human rights in domestic land issues:
- taking cognizance of how right to property is embedded in human rights law (international and regional)
- understanding property resp. house as a broad concept
- indigenous land rights, specific groups
- understanding of domestic society and its regulations
- understand relation property, housing, and food
- extra attention for domestic human right conflict resolution, also within customary justice systems and the international options when domestic remedy is missing or exhausted

Interfaces with the profession

(B) Contribute to the inclusion of human right to property in domestic law.
- Land policy that pays respect to the broad concepts of property and housing
- Take care of inclusion of protection measures for both people and states, to avoid states violating human rights
- Take steps to realise right to property progressively
- Translate respect and protection or property into negative and positive obligations
- Apply the human rights based approach (land governance): transparent procedures, accountable officials, combat discrimination, respect the rule of law (see LGAF, VGRG,...)
**Interfaces with the profession**

(C) Take care of human rights when implementing domestic policy

- Through a system of land administration recognizing the broad spectrum of different tenures, uses and functions: secure land tenure, fair land markets, and socially desirable land use
- Realising the role of land tenure and land use for climate change, rapid urbanisation and slum upgrading, food security, and economic growth (informality, formality).
- Meet the quest for cheap and fast systems, which serve their assigned purposes.

---

I urge for an activist attitude

THANK YOU