

Legal aspects of Tenure Security

1. Property Right as a Fundamental Right

The Universal Declaration of Human Rights, proclaimed by the United Nations General Assembly in Paris on the 10 December 1948¹, representing a common standard of achievements for all peoples and nations and widely recognized as having inspired and paved the way for the adoption of many other treaties, states that *“everyone has the right to own property alone as well as in association with others”*.^{2/3}

The “American Declaration on the Rights and Duties of Man”⁴, recognizing that *every person has a right to own private property* also refers that it *“meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.”* The idea contained in this declaration that *“no one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest”* is similarly expressed in the “African [Banjul] Charter on Human and Peoples’ Rights”⁵ when it holds that *“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 and in accordance with the provisions of appropriate laws.”*

In the wake of the Convention for the Protection of Human Rights and Fundamental Freedoms⁶, approved by the Council of Europe in 1950, that acknowledges a right for natural and legal persons to the *“peaceful enjoyment of his possessions”*⁷, the Charter of Fundamental Rights of the European Union, solemnly proclaimed by the European Parliament, the Council and the Commission in 2000, expressly recognized the property right as a fundamental right – *“everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions.”*⁸

In the words of Prof Francis Cheneval, from Switzerland, the right to private property is a direct consequence of a person’s need and ability to provide for his subsistence.

Property right is, in its basic concept, linked to the body, to the space it takes, the place it needs to be, to the things it uses and the labour it executes. Property rights are naturally linked to housing and land rights.

From a legal perspective, property right is to be acquired by an action, for example through work, purchase, inheritance or other, being, therefore, a special right arising from and founding the theory of distributive justice, that Aristotele wrote about. In this sense, property right is more like a

¹ One of the most miraculous and important documents adopted by humankind and celebrating 75 years in 2023
https://www.ohchr.org/en/get-involved/campaign/udhr-75?gclid=Cj0KCQIA5NSdBhDFARIsALzs2EC8NoNimGgmsZlUY0IG70tMICW7mqZs2GMl4263QtSG0WVYU9qCQ5waAvKsEALw_wcB

² Article 17th

³ Francis Cheneval, Property Rights as Human Rights, https://www.philosophie.uzh.ch/static/SHRB/PDFs/Kap_1.pdf

⁴ Signed in Bogotá, Colombia in 1948

https://www.oas.org/dil/access_to_information_human_right_American_Declaration_of_the_Rights_and_Duties_of_Man.pdf

⁵ <https://electionjudgments.org/en/entity/2hhg07pa3ga?page=3>

⁶ https://www.echr.coe.int/documents/convention_eng.pdf

⁷ Article 1 of Protocol 1, from 1952)

⁸ https://www.europarl.europa.eu/charter/pdf/text_en.pdf - (article 17)

guarantee, assigned to every person, of being a potential property owner, than to effectively own any particular asset or group of assets. Consequently, no one is to be excluded from potentially owning for reasons of gender, race, social status, or others.

The right to property does not guarantee anybody to become an owner; it creates, instead, the opportunity and the capacity for every human person becoming an owner, in freedom, despite all social barriers, thus, making property right a fundamental human right.

Moreover, owning property is part of the autonomy and ethical integrity of the person. Personal property is implied in mutual recognition of personhood and creates a sense of responsibility and dignity. The property right is related to the moral value of human personhood and, ideally, everybody, should have property.

When thinking about the situation of refugees and internally displaced persons, property restitution is considered a crucial human rights issue. There is no honest peace without the institution of private property and without the restitution of arbitrarily expropriated property or, at least, an equivalent compensation for expropriated assets.

Societies should provide fair conditions and legal guarantees of property acquisition and means to compensate it when breached or disrespected.

2. Property right framework and its protection

In another light, we do realise that human beings, as individuals, typically own not only for using purposes but also for transferring to other members of the community, to those in command, or to those who hold a contractual title. The above referred guaranty of property acquisition, or titled property, emerges not only as a means to protect ownership, but also to ensure that individuals receive a benefit from transferring what they have previously acquired, preventing the return to first possession agreements, as well as bosting exchange and investment mechanisms for the society to obtain increasing amounts of resources.⁹

Every organized Nation has the need to establish a system of rights that puts property at the reach of all the people striving to improve their life chances, also having the responsibility to install efficient property rights systems that promote fair access to property.

A property rights system is considered a fundamental condition for achieving individual well-being, peace, poverty reduction, economic development and political justice, and the duty to protect the right to private property is to be held by an impartial authority – the State.

Featuring property right as above, it is also important to recall the property's social function. During the second half of the 20th century the concept of property right, as an absolute right, was enriched with the idea of its rational use for the benefit of the community, both in rural and urban areas.

⁹ Tilman Hartley, from Bristol University, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6372161/>

Rural property should serve not only individual interests, but should be "*productive*" in the interest of the community, being no longer bounded just by the respect towards third parties' properties, but also by restrictions imposed in view of the said common interests: the correct use of agricultural or forest land, and, not less important, the protection of the environment are, now, considered duties of the owner. As regards urban property and sustainable development of cities and industrial areas, relevant limitations have been gradually imposed, for example on sealing and soil contamination or on the scale of construction allowed.

In this sense, property is, now, seen not only as a right, but also as a duty.

As stated in the Spanish Constitution, "*the right to private property and inheritance is recognized. The social function of these rights shall determine the limits of their content in accordance with the law*"¹⁰.

Modern States legal systems have been adding a social aspect to property right, imposing restrictions grounded in balanced distribution of wealth and well-being, promoting a rational exploitation of agricultural and forest land, an organized urban surface use, an intelligent management of public resources, and, last but not least, the protection of the environment.

In addition to other property rights, like, for example, intellectual property, more recently, in a completely new approach, EU has approved the European Declaration on Digital Rights, where property right to digital assets is a concern, as regards its safety in the digital world. It states that everyone should be able to determine their digital legacy, and decide what happens with their personal accounts and information, having Member States committed to ensuring the possibility for individuals to easily move their personal and non-personal data between different digital services, prohibiting unlawful identification as well as unlawful retention of activity records.¹¹

Property right, in its different perceptions or insights, is a fundamental right that needs to be protected and nurtured by the nations, enhancing freedom and democracy.

Whether in the real on in the virtual world, the owners of big fortunes have always had means to protect themselves and their rights; all the others have nothing but the law to protect their belongings, definitely needing a legal shield for the property.

In short, it is possible to say that a legally binding system of property rights, duly protected by the State authority, namely through a registry organization, that acts mainly in the field of preventive justice, will ensure trust and enable citizens to be equally treated. Titled property rights are the means to democratize ownership.

The Rule of Law is necessarily linked to democracy, freedom and equality, but also to the recognition of the right to private property. Property is protected when legal instruments make the rights over it secure; along with Prof. Nicolás Nogueroles, "*no State is modern without a register of property and without the right to dispose of it freely*"¹²

¹⁰ <https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf>

¹¹ https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:JOC_2023_023_R_0001

¹² Nicolás Nogueroles, opening speech at IPRA-CINDER Congress, Santiago, Chile -2014.

3. The role of Land Registries

As regards immovable properties, the way to protect the rights, in our perspective, is through a strong registry system able to ensure that no interference in the right can occur without the intervention, whether voluntary or based on a judicial constraint, of the registered legitimate owner.

In fact, the UN Committee on Economic, Social and Cultural Rights stated that *“notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats”*¹³.

The guidelines issued by FAO - Food and Agriculture Organization, on the Responsible Governance of Property Ownership¹⁴ recommend that countries should recognise the right to property and adopt measures to ensure that transactions are carried out in a fair and transparent manner. To this end, reliable registration systems should be implemented to provide accessible information¹⁵, constituting the basis for the defence of property and for preventing arbitrary eviction.

The European Court of Human Rights¹⁶ has reiterated that any interference by a public authority with the right to peaceful enjoyment of possession and property should be lawful. The principle of lawfulness requires that each infringement upon the right to property must have a basis in domestic law and must be accessible, sufficiently precise and foreseeable, pursuing a legitimate aim.

In the Portuguese democratic system, where a consolidated legal land registry system is in place, the Constitutional Court expressly recognized that *“the complete knowledge and accuracy of the legal status of properties (and other objects) subject to registry is absolutely essential to the reliability and certainty of the real estate legal market, legal certainty which currently underpins the entire legal system based on the rule of law.”*¹⁷

Recognizing that man and the economy need security in order to lead, plan and shape life and businesses with autonomy and responsibility, the Portuguese Constitution, early recognized the principle of legal certainty and the protection of trust as constitutive elements of the rule of law. The general principle of legal certainty in a broad sense (encompassing the idea of the protection of trust) can be understood as the right that assists everyone to be able to trust that his acts, or public decisions affecting any rights, are based on valid legal rules and will have the legal effects foreseen and prescribed in the legal system¹⁸.

The expression *“legal certainty”* has been used in various senses to designate the values of the Law: a) security through the Law - the order arising from the existence of the legal system; b) security of the Law - the situation in which the Law is knowable, stable and predictable, so that everyone can

¹³ Written Contribution to the Draft General Comment on Land and Economic, Social and Cultural Rights, August 2021

¹⁴ In 2012 - <http://www.fao.org/tenure/voluntary-guidelines/en/>.

¹⁵ Thereby reducing the risks and costs of transactions.

¹⁶ As regards article 1 of protocol 1

¹⁷ <https://www.tribunalconstitucional.pt/tc/acordaos/20090345.html>

¹⁸ GOMES CANOTILHO (Direito Constitucional e Teoria da Constituição, 5ª ed., pág. 257)

know what to stick to in the legal order; and c) security before the Law – the safeguard of citizens from the power of the State.¹⁹

When thinking about immovable property rights and Land Registries, it is important to focus both in legal certainty in the sense of security of the law, and in the sense of security before the law. A strong registration system assures everyone, in a stable and predictable way, the possibility of knowing the rights and burdens over immovables and what to stick to in the legal order, essential to protect from arbitrary eviction and for contractual relations.

Property rights rely on the common recognition of a bundle of relations of persons and things. Scholars usually speak about a network of linked interdependent dealings, which are identified as positive and negative relationships. Positive in the sense that one has a relationship with an object recognized by the transferor and negative in the sense that all the other members of the community refrain from interfering with or jeopardising that right over the object.

It is the mutual recognition of property rights, with the guarantee of the State, that makes orderly property secure and transactions possible, thus, contributing to peace and wealth growth.

There are three factors to have under supervision: who is the owner, what preferred liens or burdens may affect the acquirer and whether the description of the property is exact.

Real estate allows the simultaneous concurrence of several *iura in rem* – for example security rights, like the mortgage or the seizure - which often do not imply possession, but even exclude it. This means that possession is not a trustworthy sign of ownership and, therefore, it cannot have the same legitimizing effect when dealing with real estate as in the sphere of movable property.

In the core of a modern societies, whoever acquires a property right needs to fully trust in the information that states that the transferor is the owner, and that he has acquired in a valid previous dealing that will not affect the present acquisition via a court demand on the *ius disponendi*. The successive contracts regarding immovable properties are performed among parties not knowing each other – impersonal transactions – hence having the need of an institution in which they can trust and without which “*whoever acquires a good - be it movable, immovable or a credit – would actually acquire a surprise box*». ²⁰ Following Fernando Mendez, in the context of immovable impersonal transactions, the Registry is the institution of the State for protecting property rights before the collective and for judicial purposes, that defines its content and provides a secure, economic and efficient functioning of the market.

The perfect land registry system aims to ensure that the information on each property is complete and exhaustive. The existence of non-registered charges, also called *overriding interests*²¹,

¹⁹ MÁRIO BIGOTTE CHORÃO, Polis-Enciclopédia Verbo da Sociedade e do Estado, Vol. V, pág. 646

²⁰ Fernando Mendez, former Director of International Relations at Colegio de Registradores de la Propiedad y Mercantiles from Spain, “Impersonal Transactions and Registries of Property Rights” <https://www.elra.eu/impersonal-transactions-and-registries-of-property-rights/>

²¹ In the Anglo-Saxon systems

always implies an imperfection. The less overriding interests on immovable properties, the better the Land Registry System, the more reliable the information on the property right.

Recently, modern registration systems are developing ways to introduce information on the above referred restrictions arising from urban planning and from environmental issues, that, nowadays, *shape* the substantive content of property right which.

However, more than the complete information about the immovable property and the rights and burdens on it, the system aims to assure the most accurate information lined up with strong legal effects. This means that the system to protect property right will be better depending on the effects, and the consequences, that the law recognizes to a title right.

A registered right, previously purged and verified by an independent legal professional, will benefit from a presumption of correctness and accuracy, the so-called *public faith*, that allows to demonstrate its existence before anyone, and, above all, before court and any other authorities. In this sense, it is possible to speak about the unassailability of the published rights²².

The existence of a principle of public faith along with the inviolability of the status of the right is furthermore than a mere presumption of accuracy understood as legitimacy to transmit or encumber; it is the guarantee of the property right and its unbreakability.

Land Registry assures that whoever acquires a right over an immovable, specially by onerous title and with good faith, from the registered owner protected by the State legal authority, enjoys a high level of infallibility regarding his acquired right.

And this is Tenure Security in the legal perspective.

4. Tenure insecurity

Despite all the above referred and the unarguable primacy of the law, of the rule of law, ownership insecurity still affects the majority of the world's population whether in rural or urban areas, being particularly severe in developing countries, where in many cases over 90% of land holding is neither documented, administered or protected²³.

Due to several factors, which differ from country to country, around 1 billion people in the world fear eviction.²⁴

The main reasons for tenure insecurity are:

- War, territorial invasion and destruction, forcing, in some circumstances, the migration of entire communities, require a total legal reconstruction of the ownership structure whether with completely new regulations or making the most of the previous (saved) documented rights.

²² As stated at the IPRA CINDER Congress in 2014 in Chile - <http://ipra-cinder.info/wp-content/uploads/2019/03/Conclusiones-Org-Registros.pdf>

²³ <https://glt.net/glt-phase-3/#>

²⁴ <https://www.prindex.net/data/>

- Climate disasters, like floods, volcanic eruptions, earthquakes, fires or others that vanish buildings or pieces of land are, obviously, cause of insecurity. Climate change and the increasing frequency of natural disasters, demand more information on land use restrictions. Moreover, the proprietors affected by the disasters need to have ways to demonstrate their rights, at least for compensation purposes.
- Gender inequalities that occur in places where women are not allowed to own immovable property. The lack of cultural and legal grounds for women rights, in particular to property, raise instability in single families with no male presence undermining the fundamental right to housing.
- Informal documentation or even lack of documentation that boost discretionary practices by those in command that do not respect possession.

Since possession is not a trustworthy sign of ownership, undocumented rights are necessarily weak and easily encroached. Lack of regulation for conveyancing and registering property rights, obstruct the proof of entitlement, hinders its defence, and make it unable for collateral purposes such as for financial purposes, so necessary to encourage loans and credit (whether macro or micro credit).

On the other hand, excessive regulation, or overregulation, turning procurement too costly or inefficient, lead to transactions that tend to run aside or in breach of the law, thus becoming disregarded.

Undocumented property and housing rights are not duly respected.

Whatever the circumstance may be, it is my belief that titled ownership is fundamental to ensuring that each individual's property rights are respected by the community and the authorities and, for this purpose, a solid regulation and a strong Land Registry system is crucial to protect the rule of law.

Land Registry Systems, guided by its main purpose of legal certainty and its principles, unanimously approved by ELRA Members, are aware of the relevance of property right and its social function and do continue to ponder about their role to enhance tenure security in the different perspectives and how to adapt to the challenges of the XXI century.

“At his best, man is the noblest of all animals; separated from law and justice he can be the worst” - Aristotele.

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