

Property rights, human rights and surveyors

Paul van der MOLEN
FIG Sofia 2015

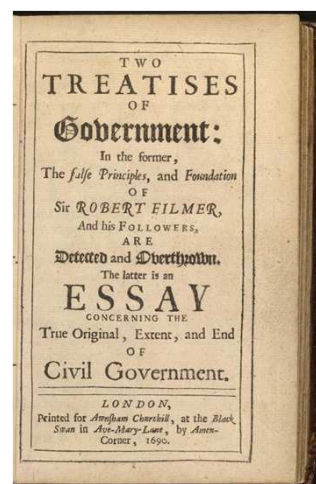


INTERNATIONAL INSTITUTE FOR GEO-INFORMATION SCIENCE AND EARTH OBSERVATION

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).

QU'EST-CE QUE
LA PROPRIÉTÉ?
OU
RECHERCHES SUR LE PRINCIPE
DU DROIT ET DU GOUVERNEMENT,
PAR
P.-J. PROUDHON.
*Adversus hanc aeternam auctoritatem esto.
Contre l'ennemi, la revendication est éternelle.
101 DES DOUZE TABLES.*
—
PREMIER MÉMOIRE.
—
PARIS,
A LA LIBRAIRIE DE PRÉVOT,
RUE BOURBON-VILLENEUVE, 61.
—
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.



Property as central concept to freedom (picture Virginia 1850?)



Property instrument of abuse (picture Ireland 1753)

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).



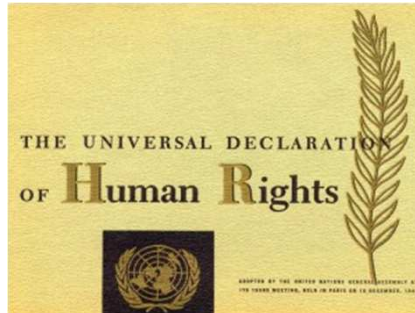
UN Commission on Human Rights



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)



Regional: ACHR 1948/1969

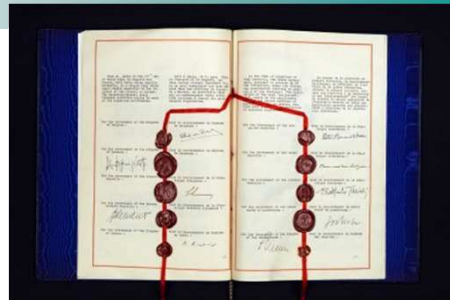


American Convention Human Rights, signed 22 November 1969 San Jose, article 21:

'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 expect upon payment of just compensation, for reasons of public utility or social interest.'



Regional: ECHR 1952



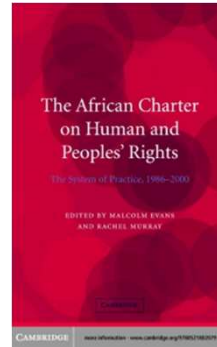
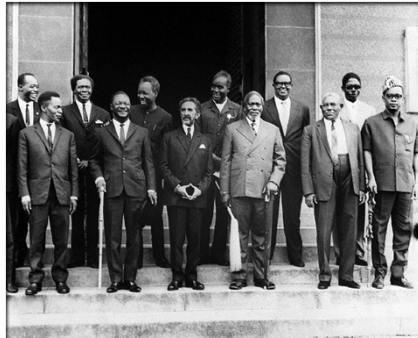
European Convention Protection Human Rights and Fundamental Freedoms: no property, but in the Protocol.

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

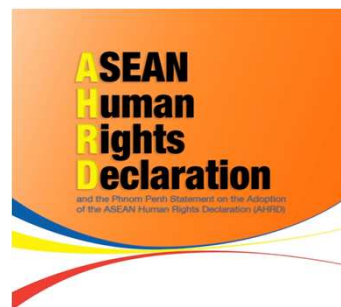


African Charter on Human Rights and People's Rights, 27 June 1981
article 21:

'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
- Deprivation subjected to conditions
- States are entitled to control use of property in accordance 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 of 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

