



PROPERTY AS A HUMAN RIGHT: AN ANALYSIS IN THE LIGHT OF THE AMERICAN CONVENTION ON HUMAN RIGHTS



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Rodrygo Kanevassi Murakami

ABSTRACT

The article analyzes the right to property as a human right, as recognized by the Universal Declaration of Human Rights and the American Convention on Human Rights. It highlights the historical evolution of property and its social function in the Brazilian legal system, including the legal and voluntary limitations and restrictions imposed on the owner.

Keywords: Property. Social Function.



INTRODUCTION

This article aims to analyze the right to property (recognized as a Human Right by the Universal Declaration of Human Rights of 1948 and also provided for in the American Convention on Human Rights – Pact of San José, Costa Rica) and its social function within the Brazilian legal system.

Initially, an analysis of the positivization and recognition of property as a human right will be made, and then brief considerations will be made about its structure, contours, characteristics and, above all, its social function. The functionalization of private law institutes meets the need of private law to adapt to social reality, abandoning the individual character.

The transition from the Liberal State of the nineteenth century to the Welfare State of the early twentieth century marked the beginning of the individualistic and selfish conception of the right to property.

THE RIGHT TO PROPERTY AS A HUMAN RIGHT

The Universal Declaration of Human Rights, adopted and proclaimed by the United Nations General Assembly on December 10, 1948, establishes, in its article 17, that "1. Every human being has the right to property, alone or in partnership with others. 2. No one shall be arbitrarily deprived of his property."

In the same vein, the Charter of Fundamental Rights of the European Union prescribes, also in Article 17, that:

1. Everyone has the right to own, use, dispose of and pass on his or her lawfully acquired property in life or death. No one may be deprived of his property, except for reasons of public utility, in the cases and under the conditions provided for by law and subject to fair compensation for the loss of property, in good time. The use of property may be regulated by law to the extent necessary in the general interest. 2. Intellectual property is protected.

The American Convention on Human Rights, known as the Pact of San José, Costa Rica (Decree No. 678, of November 6, 1992), determines, in its article 21, the right to private property:

ARTICLE 21

Right to Private Property

1. Everyone has the right to the use and enjoyment of his or her property. The law can subordinate this use and enjoyment to the social interest.
2. No person may be deprived of his or her property, except upon payment of fair compensation, for reasons of public utility or social interest, and in the cases and in the manner established by law.
3. Both usury and any other form of exploitation of man by man must be suppressed by law.

Human beings, throughout their evolution, have always been encouraged to accumulate wealth. The appropriation of goods, the conquest of land, the expansion of territory have always been stimulated in the course of history, from Classical Antiquity to the present day. "Having" has acquired contours not only of *social status*, but above all of the survival of man himself and his family.

In the same vein, Anderson Santos observes¹:

In a world of dispute for economic space, where man struggles to maintain himself and his family through the accumulation of goods and pecuniary resources, private property emerges as one of the main reasons for this "race", configuring itself in the very exteriorization of the capitalist concept. Property, from the perspective of natural law, was created for the satisfaction of man and his desires, presupposing his freedom [...].

The Federal Constitution of 1988 establishes that property is a fundamental right, in the following terms: "Everyone is equal before the law, without distinction of any kind, guaranteeing to Brazilians and foreigners residing in the country the inviolability of the right to life, liberty, equality, security and *property* [...]", emphasis added (article 5, *caput*) and "the right to property is guaranteed" (article 5, item XXII).

In addition to being a fundamental right, property is the main real right of the legal system, from which all other real rights derive (article 1,225² of the Civil Code). From the dismemberment of the powers inherent to the domain, the attributes granted by the owner are expanded or restricted (elasticity). In the classic doctrinal example, the real right of usufruct results from the attribution of the owner of the legal faculties of use and enjoyment to the usufructuary, reserving for himself the powers to dispose of and claim (bare property).

Property is legally defined as the real right that gives its holder the powers to use, enjoy, dispose of and recover the thing from those who unjustly possess or hold it (article 1,228 of the Civil Code), provided that the social function is fulfilled.

The aforementioned article 1,228 of the Civil Code establishes the attributes (or powers or structure) of property, which are: a) the ability to use (*jus utendi*), consisting of the economic or legal destination of the thing, in order to meet the interests of the owner of the domain; b) the ability to enjoy (*jus fruendi*), that is, the right to extract the fruits that the thing can produce, such as, for example, the rents of a leased property (civil fruits); c) the ability to dispose of it (*jus disponendi*), that is, to alter the substance of the thing, which

¹ SANTOS, Anderson. Social Function of Urban Property – Land Regularization. Dissertation (Master's Degree in Political and Economic Law) – Mackenzie Presbyterian University, São Paulo, 2008, p. 53.

² CC, art. 1.225. The following are real rights: I - property; II - the surface; III - easements; IV - usufruct; V - use; VI – housing; VII – the right of the promising buyer of the property; VIII – the pledge; IX – the mortgage; X - the antichresis. XI – the concession of special use for housing purposes; XII – the concession of the real right of use and XIII – the slab.

encompasses the material disposition (such as the destruction of the asset and abandonment, as forms of loss of property) and legal (alienation and encumbrance)³ and d) the right to recover the thing from the power of whoever unjustly possesses or holds it (exercise of the right of sequela characteristic of real rights).

It is important to highlight that these attributes, today, must be exercised in accordance with the social function of property, under penalty of illegitimate action by the owner. Just to exemplify, the Brazilian legal system no longer holds the maxim according to which property is an absolute right and its holder can do whatever he wants with the thing, including destroying it.

To the faculty of use we must add the ingredient of the social function, so that it is correct to state that "currently the lack of use of the thing will deprive someone of the right to property, when it proves to be antisocial [...]. In other words, many times the faculty of use loses the characteristic of a power and becomes a legal duty for the owner".⁴

The exercise of the right to property is subject to limitations, whether legal, administrative or voluntary, as highlighted in the Charter of Fundamental Rights of the European Union ("The use of property may be regulated by law to the extent necessary for the general interest") and in the American Convention on Human Rights ("The law may subordinate such use and enjoyment to the social interest").

Legal restrictions derive from the legal system, configuring the contour given by the legislator to the right to property. As society progresses, these limitations increase, since social life becomes more complex, requiring greater attention from the law to certain points, breaking with the individualistic aspect of private property.

As an example, the Federal Constitution itself, the Forest Code, the City Statute and even the Civil Code bring legal restrictions on property. Article 1,229 of the civil law provides that the ownership of the land covers that of the corresponding airspace and subsoil, in height and depth useful for its exercise, and the owner may not oppose the activities that are carried out by a third party at such a height or depth that he does not have a legitimate interest in preventing them. The criterion of utility was adopted, and the phrase that "he who owns the soil is also the owner up to heaven and even hell" does not prevail among us.

Voluntary restrictions are those imposed on free legal transactions (donations and wills) between the contracting parties, such as, for example, the clauses of inalienability,

³ FARIAS, Cristiano Chaves; ROSENVALD, Nelson. Civil Law Course. Vol. 5, 12th ed. Salvador: Editora JusPodivm, 2016, p. 291-2.

⁴ *Ibid.*, p. 290.



unseizability, and incommunicability. As a rule, no reason is required for the clause, unless it falls on assets of the heirs' reserved portion, whether in the will⁵ or in the donation⁶.

The right to property has particular characteristics (legal nature) in relation to other rights.

To begin with, it is an absolute right in the sense of *erga omnes enforceability*, that is, everyone in the community must respect the holder of the right in rem, refraining from the practice of acts that may harass him (universal passive subjection). In the same vein, property is an exclusive right, so that it is not possible for two or more people to exercise ownership simultaneously. Article 1,231 of the Civil Code establishes that ownership is presumed to be full and exclusive, until proven otherwise. The only exception concerns the figure of the condominium, in which each condominium owner is the exclusive owner of his or her ideal share.

Perpetuity is present to the extent that property is not lost by non-use. In other words, the owner will only be deprived of his fundamental right if he performs acts of alienation or by the incidence of some legal hypothesis (adverse possession, expropriation, among others). The exception relates to resolvable property, in which the holder has a right under a resolutive condition, that is, if the future and uncertain event occurs, the holder will see his right resolved (transitoriness).

It has been said elsewhere that property is elastic to the extent that powers can be increased or decreased according to the will of the owner of the domain. When all powers are gathered in a single person, property is said to be full (maximum degree of elasticity).⁷ Otherwise, the property will be restricted/limited or allodial, in which case a real encumbrance will fall on it.

Finally, property is a fundamental right supported by the Constitution of the Federative Republic of Brazil of 1988 (article 5, *caput*). At this point, it should be noted that its protection and social function are immediately applied in relations between individuals (Article 5, § 1, of the 1988 Constitution: "The norms defining fundamental rights and guarantees have immediate application"). The horizontal effectiveness of fundamental rights is enshrined.

⁵ CC, art. 1.848: Unless there is just cause, declared in the will, the testator cannot establish a clause of inalienability, unseizability, and incommunicability, on the assets of the reserved portion.

⁶ According to Ademar Fioranelli, cited in Civil Appeal 0008818-68.2012.8.26.0438 of the Distinguished Superior Council of the Judiciary of the Court of Justice of the State of São Paulo, "respecting divergent opinions, the truth is that the new code expressly authorizes the imposition of restrictive clauses to the reserved portion, by will or donation (as an anticipation of reserved portion), requiring that the title contain the testator's reasons for imposing them (the just cause). The testator's unconditional will no longer prevails, but the legal need to declare the just cause to make the imposition valid and effective".

⁷ TARTUCE, Flávio. Manual de Direito Civil. 5th ed. São Paulo: Método, 2015, p. 896

THE SOCIAL FUNCTION OF PROPERTY

The study of the social function of property is relevant to modern urban law.

Regarding the social function of urban property, José Afonso da Silva points out⁸:

Urban property is formed and conditioned by urban law in order to fulfill its specific social function: to perform the so-called urban functions of providing housing (housing), adequate working conditions, recreation and human circulation; to carry out, in short, the social functions of the city.

The 1988 Political Charter, while affirming the right to property as a fundamental right and guarantee (article 5, *caput* and item XXII), requires that its holder fulfill the social function⁹. The history of the social function of property in Brazilian Constitutions is well remembered by Ronan Cardoso Naves Neto¹⁰:

In Brazil, the first Constitution to mention the social function was the 1967 Charter, as a principle of the economic order (art. 157, III), and it is true that Constitutional Amendment 1/1969 mentioned the subject along the lines of the 1967 text (art. 160, III). The Constitution of the Republic of 1988, in turn, gave greater prominence to the issue and determined that both property and its social function are fundamental rights (art. 5, XXII and XXIII). In view of the current forecast, the social function cannot be seen as something external to property, but rather as an integral part of its own structure.

[...]

In fact, it was Leon Diguez who deconstructed the individualistic and selfish context of property. In 1912, the aforementioned author elaborated a thesis that questioned the condition of the owner as the holder of a subjective right. In his conception, the owner would be a mere holder of wealth, since property is itself a social function. In Diguez's view, still defended today by various banners of social struggles, property, more than a right, is a function. While the owner fulfills the social function, he holds wealth. If it does not comply, it is subject to state intervention, for some without any right to compensation. The holder of the property right has the duty to give property a function that benefits himself and also the collectivity.

In the same sense, the Civil Code of 2002 provides in article 1,228, paragraph 1 that the right to property must be exercised in accordance with its economic and social purposes and in such a way that flora, fauna, natural beauty, ecological balance and historical and artistic heritage are preserved, in accordance with the provisions of a special law. as well as avoiding air and water pollution.

In other words, it is required that the owner give a positive destination to the property, in order to meet the economic, social and environmental preservation interests. Ownership and the exercise of dominion must be guided by interests that overflow selfish individuality, harmonizing with the desires of the sociality of law and the well-being of all human beings.

⁸ SILVA, José Afonso. Brazilian urban law. 8. ed. São Paulo: Malheiros, 2018, p. 74

⁹ FC, art. 5: [...] XXIII - the property shall serve its social function.

¹⁰ NETO, Ronan Cardoso Naves. The Social and Fundamental Right to Housing and Land Regularization of Law 13.465/2017 (Master's Degree in Collective Rights and Citizenship) – University of Ribeirão Preto, Ribeirão Preto, 2019, p. 28.



Property, traditionally in the liberal conception, has as a characteristic individuality, reigning during the Civil Code of 1916. That is, the Bevilacqua Code was edited at a time when society was extremely patriarchal, patrimonialist and selfish. He thought only of his own well-being, without any concern for the collectivity. The *jus utendi, fruendi* and *abutendi* were in force, so that the owner could do whatever he wanted with the property he owned, including destroying it at his pleasure.

Today, with the advent of the 1988 Constitution already mentioned and the New Civil Code of 2002, the situation changes. There is talk of property rights that must serve a social function, benefiting everyone in society.

Property is the exercise of certain rights and duties in relation to the thing, marked by positive law with observance of the social context in which it is located. Using, enjoying, disposing and claiming require the appeal of human sharing, otherwise it is configured as an abuse of exercise.

Today, every right must be aimed at guaranteeing the dignity of the human person as a greater value and not only at the service of the satisfaction of individual and selfish interests. When the Magna Carta of 1988 prescribed that the Federative Republic of Brazil constitutes a Democratic State of Law, the values provided for therein go beyond the ideals of liberalism to benefit the entire community.

It is noteworthy that the Civil Law of 2002 enshrined as structuring principles the principles of ethics, sociability and operationality. Using the first two, by ethics we mean the valorization of the ethical and moral performance of both the law enforcer and the individual. The typical example is objective good faith (Article 422 of the Civil Code). A standard of behavior is imposed on individuals, so as not to violate the legitimate expectations of the contracting parties, always observing the attached duties created by it.

On the other hand, the principle of sociability emerges, in the words of Pablo Stolze Gagliano and Rodolfo Pamplona Filho¹¹, "in opposition to the individualist and patrimonialist ideology of the 1916 system. Through it, one seeks to preserve the sense of collectivity, often to the detriment of individual interests."

The social function of property has a double purpose, namely, a) to serve as a guide for the exercise of dominion and b) to limit the holder of the real right against the abuses previously practiced¹².

As Santos observes¹³,

¹¹ GAGLIANO, Pablo Stolze; FILHO, Rodolfo Pamplona. *New Civil Law Course – General Part*. 14th ed. São Paulo: Saraiva, 2012, p. 96.

¹² TARTUCE, Flávio. *Op. cit.*, p. 898.

¹³ SANTOS, Anderson. *Op. cit.*, p. 70.



The social function is characterized by being a limitation to the right to property, since it is duly affirmed in constitutional, civil and ordinary laws, but it goes further, and its existence is viscerally linked to property in an intrinsic way. It does not refer to a limitation to the right only, it is more than that. In this sense, our society cannot accept an absolute right that has as its sole objective the maintenance of the status quo of dominant classes. The law must lend itself to social transformation, the improvement of society and the equitable distribution of opportunities.

The absolute character of property reaches the *erga omnes* enforceability of its holder, in the sense that everyone in the community must respect the right in rem. However, it does not mean that the owner can do everything he wants.

In the same vein, the functionalization of property became part of its legal definition, so that those who do not exercise the social function will not be considered the owner and, therefore, in need of the action in any claim¹⁴

According to Cristiano Chaves de Farias and Nelson Rosenvald, the social function is a principle that limits all subjective rights and, as the right to property is the main subjective right of the legal system, it only deserves protection when it is compatible with social desires. In his words, "in a solidary society, each and every subjective right is functionalized to meet the greater objectives of the order".¹⁵

With support in Bodnar¹⁶,

The owner can no longer be an absolute monarch of his "sacred" right with parasitic attitudes of self-indulgence, because he has an important social mortgage that encumbers and encumbers his property, which cannot be an instrument used only to satisfy selfish and excessively personalistic interests, but a right with a deep social spirit.

The fulfillment of the social function legitimizes the right to property to the extent that it is respected and accepted by the collectivity. The interests of the community and the owner complement and compensate each other mutually and reciprocally in the exercise of the right to property.

According to the Magna Carta of 1988, an urban property fulfills its social function when it meets the fundamental requirements of the city's ordinance expressed in the master plan (article 182, § 2).

¹⁴ Case of the *Pullman* favela, judged by the Superior Court of Justice in 2005, through REsp 75.659-SP. *Newsletter 252: CLAIM. LOTS. ABANDONMENT. SLUM. PEREACH. RIGHT.* The appellants seek, in a claim action, the recognition of their ownership and possession over some lots. It turns out that the subdivision dates back to 1955 and was never implemented, as it remained, for years on end, in complete abandonment. However, over time, the occupation took place in the form of a favela, consolidated by a new urban structure, different from the original plan, already recognized by the Government, which provided it with electricity, water and other infrastructure. Thus, the perishing of the right to property remains, as decided by the ordinary courts (articles 589, III, 77, and 78, I and III, of the CC/1916). Special Appeal No. 75.659-SP, Judge Aldir Passarinho Junior, judged on 6/21/2005.

¹⁵ FARIAS, Cristiano Chaves; ROSENVALD, Nelson. *Op. cit.*, p. 304.

¹⁶ BODNAR, Zenildo. *Real Estate Registry Regularization in the Realization of Fundamental Rights in the Sustainable City. Dissertation (Post-Graduation in Urbanism, History and Architecture of the City) – Federal University of Santa Catarina, Florianópolis, 2015, p. 91.*

The master plan, whose preparation is mandatory for the hypotheses of article 41 of Law No. 10,257/01 (City Statute),¹⁷ is an ordinary municipal law that constitutes the basic instrument of development and urban expansion as a way of implementing the municipal urban policy.

With regard to rural properties, they fulfill the social function to the extent that they meet the criteria set forth in Article 186 of the Fundamental Law, namely: a) rational and adequate use; b) adequate use of available natural resources and preservation of the environment; c) compliance with the provisions that regulate labor relations and d) exploitation that favors the well-being of owners and workers.

If the owner fails to fulfill the social function, he will be punished with the institute of expropriation-sanction, since he will not receive prior compensation and in cash¹⁸, but in public debt securities previously approved by the Federal Senate, with a redemption term of up to ten years, in annual, equal and successive installments. assured the real value of the indemnity and the legal interest (article 182, § 4, item III, of the 1988 Constitution, for urban real estate) and in agrarian debt securities, with a clause for the preservation of the real value, redeemable within a period of up to twenty years, from the second year of their issuance, and whose use will be defined by law (article 184, *caput*, of the Constitutional Text of 1988, for rural properties).

Another important point to be analyzed in this article concerns the concept of collective property given by the Inter-American Court of Human Rights in the judgment of the case of the Xucuru indigenous people and their members v. Brazil, judged on February 5, 2018. In summary, the Court condemned the Brazilian State for having taken 16 years, between 1989 and 2005, to recognize, title and demarcate the lands, which constituted a violation of the indigenous people's right to collective property in the territory of their ancestors. It was also slow to remove non-indigenous populations from the lands, which "affected the legal security of the Xucuru people's right to property."

The Court ordered the Brazilian State to guarantee "immediately and effectively" the property rights of the Xucuru people, complete the removal of non-indigenous individuals from the lands upon payment of outstanding compensation, and pay compensation for

¹⁷ Article 41. The master plan is mandatory for cities: I – with more than twenty thousand inhabitants; II – members of metropolitan regions and urban agglomerations; III – where the municipal Government intends to use the instruments provided for in paragraph 4 of article 182 of the Federal Constitution; IV – members of areas of special tourist interest; V – inserted in the area of influence of enterprises or activities with significant environmental impact at regional or national level; VI – included in the national register of Municipalities with areas susceptible to the occurrence of landslides of great impact, sudden floods or related geological or hydrological processes.

¹⁸ FC, art. 5: [...] XXIV – the law shall establish the procedure for expropriation for public necessity or utility, or for social interest, by means of *fair and prior compensation in money*, except in the cases provided for in this Constitution (*emphasis added*).



damages caused by the delay in demarcating lands. The Court pointed out as rights of the Convention that were violated: the right to a fair trial, the right to humane treatment, the right to collective property and access to justice (Articles 5, 8, 21 and 25).

The Inter-American Commission on Human Rights considered that the case allows the court to deepen its jurisprudence on the issue of collective ownership of indigenous peoples' land of their ancestors.

The Commission stressed that the right to collective property of indigenous peoples has particular characteristics due to the special relationship of these peoples with their traditional lands and territories, on whose integrity their very survival as a people depends, and is the object of international legal protection. Indigenous territory is a form of property that is not based on official recognition by the State, but on the traditional use and possession of lands and resources.

With regard to the obligation of demarcation and recognition, the Commission stated that this procedure constitutes the means by which legal certainty is provided for the collective property of indigenous peoples and conflicts with various actors are prevented, laying the foundations for the achievement of possession and peaceful use of their lands and territories through disintrusion.

According to the Commission, the violations resulting from the delay in resolving the lawsuits filed by non-indigenous third parties in 1992 and 2002 are due to the fact that they were maintained indefinitely without a solution, causing a permanent threat to the right to collective property and constituting a factor of greater legal uncertainty for the Xucuru Indigenous People. For all these reasons, the Commission concluded that the State was responsible for the violation of Article 21 in relation to Articles 1.1 and 2 of the American Convention.

In that judgment, the Inter-American Court of Human Rights (IACHR) recalled that Article 21 of the American Convention protects the close bond that indigenous peoples maintain with their lands, as well as with their natural resources and with the embodied elements that originate from them. Among indigenous and tribal peoples there is a communal tradition of a communal form of collective ownership of land, in the sense that land ownership is not centered on an individual, but on the group and its community. These notions of dominion and possession over land do not necessarily correspond to the classical conception of property, but the Court has established that they deserve equal protection under Article 21 of the American Convention. Not knowing the specific versions of the right to use and enjoy goods, given by the culture, uses, customs and beliefs of each people, would be equivalent to stating that there is only one way to use goods, and dispose



of them, which, in turn, would mean making the protection of these collectives through this provision illusory. By ignoring the ancestral right of the members of the indigenous communities over their territories, other basic rights could be affected, such as the right to cultural identity and to the very survival of the indigenous communities and their members.

Thus, the concept of property has been broadened to grant legal protection to those territories occupied by the indigenous population, to the extent that they "acquire" the domain by occupation in respect for the uses, customs, beliefs and religions of each indigenous people, regardless of the administrative procedure of ownership and demarcation of indigenous lands.

CONCLUSION

Property is recognized as a human right within the scope of all human rights declarations, a fundamental right in the Brazilian legal system, a subjective right and a real right. The right to property must be guaranteed as a stimulus to economic and social development, because the growth capacity of a State is measured in the way in which private property is guaranteed: that is, the more effective its protection, the greater the investments in the economy.

However, the exercise of this right must be harmonized with its social function due not only to the determination of the 1988 Constituent Assembly, but mainly to the society currently installed. The concern for the individual gives way to the collective, for social well-being, without forgetting the expansion of the concept of collective property of indigenous peoples, in accordance with the decision of the Inter-American Court of Human Rights.

The social function of property is part of the concept of the institute: its non-implementation removes the legitimacy of the holder of the right to exercise the dominial faculties and requires the public authorities to act in a way that is capable of harmonizing with the desires of the law.



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