UNECE - WPLA WORKSHOP
Tenure Security
- Legal aspects of Tenure Security -

Madrid, 2/3 November 2023
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STRUCTURE

1. **Property Right as a Fundamental Right**

2. **Property right framework and its protection**

3. **The role of Land Registries**

4. **Tenure insecurity**

Property Right as a Fundamental Right

» Universal Declaration of Human Rights - "*everyone has the right to own property alone as well as in association with others*"

» African Charter on Human and Peoples' Rights - "*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.*"

» Convention for the Protection of Human Rights and Fundamental Freedoms - right for natural and legal persons to the "*peaceful enjoyment of his possessions*"

» Charter of Fundamental Rights of the European Union - "*everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions.*"

Property Right as a Fundamental Right

Private property – direct consequence of a person's need and ability to provide for subsistence

Property right

- Linked to the body, to the space it takes, the place it needs to be and the labour it executes.
- Naturally linked to housing and land rights
- A guarantee, assigned to every person, of being a **potential property owner**
- No one excluded from potentially owning for reasons of gender, race, social status, or others
- **Opportunity and capacity for every human person becoming an owner**, despite all social barriers
- **Mutual recognition of personhood**

➡️ IDEALLY, EVERYBODY SHOULD HAVE PROPERTY
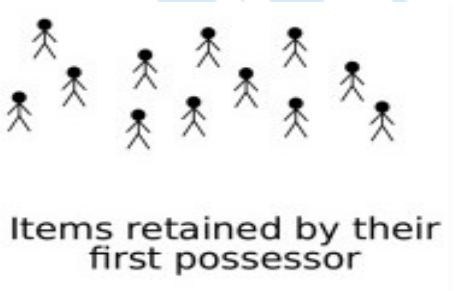
Property Right as a Fundamental Right

➡️ In 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

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

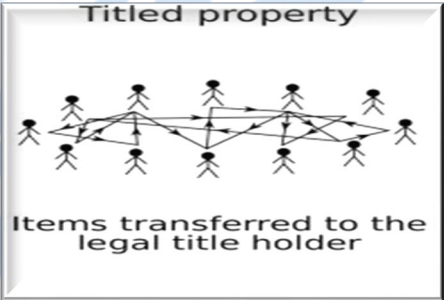# Property right framework and its protection

Ownership

simple using purposes   transferring to members of the community

Items retained by their first possessor

Items transferred to community members

increasing amount of resources, thus **producing wealth**

Essential to demonstrate or prove ownership.

Titled property

Items transferred to the legal title holder

Property right framework and its protection

- Nations need to establish a system of rights that puts **property at the reach of all the people**

- Responsibility to install **efficient property rig**hts systems to promote its fair access.

- Property rights system is fundamental for achieving individual well-being, peace, poverty reduction, economic development and political justice

Property right framework and its protection

Property's Social Function

- **Rational use** for the benefit of the community

- **Rural property** - **restrictions** imposed in view of the **correct use** of agricultural or forest land, and the protection of the environment

- **Urban property** - relevant **limitations** as the ones on sealing and soil contamination or on the scale of construction allowed.

➡️   PROPERTY IS, NOW, A RIGHT AND A DUTY

"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"

Property right framework and its protection

» A legally **binding system of property rights**, protected by the State authority, ensures trust and enables citizens to be equally treated.

» *No State is modern without a register of property and without the right to dispose of it freely* – Nicholas Nogueroles

» Immovable properties – protection 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**.

The role of Land Registries

UN Committee on Economic, Social and Cultural Rights - "*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*"

FAO - Food and Agriculture Organization - 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** that provide accessible information and constitute the basis for the defence of property, preventing arbitrary eviction.

The role of Land Registries

European Court of Human Rights - 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

Portuguese Constitutional Court - *"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."*

The role of Land Registries

Immovable property rights

- Common recognition of a bundle of relations of persons and things
- Network of linked interdependent dealings - **positive and negative** relationships.
- <u>Positive</u> - relationship with an object recognized by the transferor
- <u>Negative</u> - all members of the community refrain from interfering with that right over the object

- Mutual recognition of property rights - **who is the owner**, **what preferred liens or burdens** may affect the acquirer and whether the **description of the property is exact**

- **Possession is not a trustworthy sign of ownership**

The role of Land Registries

Property registries

- The **less overriding interests** on immovable properties, the better the Land Registry System, the more reliable the information on the property right

- **Restrictions** arising from community interests - urban planning and environmental protection shape the substantive content of property right and are registered

- The system aims to assure the most **accurate information** lined up with **strong legal effects**. This means that the system to protect property rights will be better depending on the effects, and the consequences, that the **law recognizes to a title right.**

The role of Land Registries

- Public faith - allows to demonstrate the right before anyone - before court and any other authorities

- Whoever acquires a right over an immovable from the registered owner **protected by the State legal authority**, enjoys a high level of **indefeasibility** regarding his acquired right.

This is <u>Tenure Security in the legal perspective</u>

Tenure insecurity

Ownership insecurity still affects the majority of the world's population.

- **War**, territorial invasion and destruction - migration of entire communities - legal reconstruction of the ownership structure,

- **Climate disasters**, like floods, volcanic eruptions, earthquakes, fires or others that vanish buildings or pieces of land. The increasing frequency of natural disasters - demand more information on land use restrictions.
Proprietors need to demonstrate their rights, at least for compensation purposes.

- **Gender inequalities** in places where women are not allowed to own immovable property, raise instability in single families with no male presence undermining the fundamental right to housing.

Tenure insecurity

- **Informal and lack of documentation** boost discretionary practices. Possession is not a trustworthy sign of ownership, undocumented rights are weak and easily encroached.

Lack of regulation for conveyancing and registering property rights, obstruct the proof of entitlement and make it unable for collateral purposes such as for financial purposes (whether macro or micro credit).

Excessive regulation or overregulation, turning procurement too costly and inefficient, lead to transactions that tend to run aside of the law, thus becoming disregarded.

Undocumented property and housing rights are not duly respected.

"*At his best, mas is the noblest of all animals; however separated from law and justice he can be the worst*" - Aristotele

Thank you very much for your attention!

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