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PRIVATE PROPERTY RIGHTS FROM AN INTERNATIONAL HUMAN RIGHTS LAW PERSPECTIVE. THE BLACK SHEEPS OF HUMAN RIGHTS?

Los derechos de propiedad privada en la perspectiva
del derecho internacional de los derechos humanos.
¿Las ovejas negras de los derechos humanos?

I diritti di proprietà privata nella prospettiva del diritto
internazionale dei diritti umani. Le pecore nere dei
diritti umani?

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ABSTRACT

This paper involves a study of private property rights from the perspective of international human rights law. To this end, the United Nations, European and Inter-American systems of protection will be analyzed, both in terms of the treatment of private property rights in their main normative documents, as well as regarding the interpretations of the bodies belonging to those systems. Although enshrined in the declarations, treaties and conventions of these systems, private property rights enjoy an extremely precarious and limited membership. Their constant subordination to other rights -such as economic, social and

cultural rights- and concepts -social function, social justice, democratic society, etc.- leaves them largely subject to the discretion of the State, which ends up undermining their possibility of being classified as human rights in the light of international law.

Key words: human rights; private property rights; human rights protection systems.

Indexing terms: right to property; private ownership; human rights (Source: Unesco Thesaurus).

RESUMEN

El presente trabajo implica un estudio de los derechos de propiedad privada desde la óptica del derecho internacional de los derechos humanos. Para ello se analizarán los sistemas de protección de Naciones Unidas, europeo e interamericano, tanto en lo referido al tratamiento que se hace del derecho de propiedad privada en sus principales cuerpos normativos, como en lo relativo a las interpretaciones de los órganos pertenecientes a aquellos. Aún estando consagrados en declaraciones, tratados y convenciones de esos sistemas, los derechos de propiedad privada gozan de una pertenencia sumamente precaria y limitada a estos. Su subordinación constante a otros derechos —como los DESC— e instituciones —función social, justicia social, sociedad democrática, etc.— los deja ampliamente sometidos al arbitrio estatal, lo que termina atentando contra la posibilidad de ser catalogados como derechos humanos a la luz del derecho internacional.

Palabras clave: derechos humanos; derechos de propiedad privada; sistemas de protección de los derechos humanos.

Términos de indización: derecho a la propiedad; propiedad privada; derechos humanos (Fuente: Tesauro Unesco).

RIASSUNTO

Il presente lavoro si propone di studiare i diritti di proprietà privata dal punto di vista del diritto internazionale dei diritti umani. A tal fine, verranno analizzati i sistemi di protezione delle Nazioni Unite, dell'Europa

e dell'Interamerica, sia per quanto riguarda il trattamento del diritto di proprietà privata nei loro principali corpi legislativi, sia per quanto riguarda le interpretazioni degli organi che ne fanno parte. Sebbene sia sancito da dichiarazioni, trattati e convenzioni di questi sistemi, il diritto di proprietà privata gode di un'appartenenza estremamente precaria e limitata. La loro costante subordinazione ad altri diritti - come la CESR - e istituzioni - funzione sociale, giustizia sociale, società democratica, eccetera - li lascia in gran parte soggetti all'arbitrio degli Stati, il che finisce per minare la possibilità di classificarli come diritti umani alla luce del diritto internazionale.

Parole chiave: diritti umani; diritti di proprietà privata; sistemi di protezione dei diritti umani.

Termini di indicizzazione: diritto di proprietà; proprietà privata; diritti umani (Fonte: Unesco Thesaurus).

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1. INTRODUCTION

Are private property rights considered human rights from an international human rights law perspective? If so, how and to what extent are recognized as such? How do they relate to other human rights? Is it then possible to reconcile the tensions that arise between property rights -as human rights- and other rights, including access to property of other persons,

without losing their character as such? Does a state that attacks private property become a human rights violator?

This paper seeks to investigate some of these aspects and others derived from them. Here, the property right is studied from the perspective of what might be called international human rights law. To this end, the private property right is analyzed as incorporated or absent in the main human rights documents, that is, declarations, treaties, conventions, as well as the categorizations that are made of it by international bodies including regional Courts in charge of interpreting those.

In line with that, particular consideration will be given to the issue of recognition of private property in the Universal Declaration of Human Rights, as well as its absence from the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Other documents where the United Nations deals with the subject directly or indirectly will be also analyzed as examples. With regard to the law derived from regional protection systems, the European Convention on Human Rights -with its Additional Protocol- and the American Convention on Human Rights will be interpreted, as well as a review of case law emanating from regional enforcement bodies.

This analysis will show the categorization of property rights in the various human rights protection systems. The study of the relationship with other rights, such as economic, social and cultural rights, as well as the limitations to property rights that arise from the normative documents themselves and the interpretations of the protection bodies, will enable certain statements to be made. In this sense, the precarious belonging of private property rights to the field of international human rights law becomes evident. So precarious that it could be said that their categorization as human rights is impossible, or at least extremely weakened.

2. THE PRIVATE PROPERTY RIGHTS AS HUMAN RIGHTS IN THE UNITED NATIONS PROTECTION SYSTEM

In advance, it must be made clear that the human rights protection system of the United Nations is at least ambiguous in its treatment of

private property rights. It is a “yes, but actually no”. On the one hand, it can be argued that this is enshrined in the Universal Declaration of Human Rights of 1948, thus belonging to that privileged body of rights. But on the other hand, it is absent from the two main binding treaties of the system, these are the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, adopted in 1966 but in force since 1976.

Article 17 of the Universal Declaration states:

1. Everyone has the right to own property alone as well as in association with others.
2. No one shall be arbitrarily deprived of his property (UN, 1948).

A first reading of the rule makes it possible to affirm that the property right as a human right includes any type of property -personal, commercial, industrial, intellectual, etc.- and that it can be enjoyed and exercised individually or in association with others, this being a consequence of freedom of association. Likewise, the only guarantee established for these property rights holders would be the limit of arbitrary deprivation (by the State, or by third parties), a very vague concept indeed.

It should be noted, however, that this final version was not originally intended to be so. John Humphrey, in charge of the first draft of the Declaration, simply recognized the “own personal property” and in particular the collective ownership (Mchangama, 2011, par. 3). Individual (“non-personal”) private property, in particular that relating to means of production, commercial and lucrative, was outside the scope of the protection of the Declaration, at the mercy of the domestic law of states, something that found political support in communist and Latin American countries (Mchangama, 2011, par. 4).

Beyond the fact that the Universal Declaration of Human Rights is not binding, and is then a rather indicative bill of rights, its provisions, in general, are considered to have become part of customary international law, at the same time that it conforms with the International Covenants on Civil and Political Rights and on Economic, Social and Cultural

Rights, the “international bill of rights” (Hannum, 1996, p. 318). However, it is striking -although not a coincidence- that the private property right, even in the timid version established in the Declaration, has been completely omitted in the legally binding covenants.

Thus, it could be said that the two most important binding human rights covenants of the United Nations protection system do not consider the private property right a human right. They do not consider it a civil, political, economic, social or cultural right. Starting off by the above-mentioned documents, the private property does not exist as a human right, or at least should not be characterized as such.

This political decision to leave out of the binding documents of the “international bill of rights” the private property right finds logic in the then desire of the USSR and the aligned states, as well as other countries, in particular new independent states, to prevent a human right from being enshrined by invoking the primacy of the right of self-determination¹ to opt for the most appropriate political/economic system (Alvarez, 2018, p. 5). It was in that sense an entirely reasonable position. States that considered that it was possible (or desirable) to sustain a regime of communal ownership, in particular of the “means of production”, or at least high governmental economic interventionism, could never have enshrined a human right to private property, because they despise this idea and consider it the cause of all problems.

The term “property” is not absent, however, in both covenants, which in their Articles N° 2, although partially diverse, establish that “property” cannot be a cause of distinction or discrimination in the implementation of the norms contained therein. This clause is merely indicative and is intended to avoid arbitrary distinctions, as it is evident that “property” was at the time of the adoption of the covenants, as at the present time, a cause of permanent distinction or discrimination.

But it is also possible to say that private property, or at least access to property (which could be called “right to property”), is deployed at least throughout the International Covenant on Economic, Social and Cultural Rights. For example, where it provides for the right to

1 In fact that right to self determination is found in both Covenants in Article 1.

remuneration for work performed (Article 7), to social security (Article 9), to food, clothing and housing (Article 11), to land and natural resources (indirectly through Article 11), among others, it is clear that it is regulating access to private property. Earnings obtained from works are private property of the worker, as are the food, clothing and housing of individuals, and those received as social security benefits, just to mention some examples.

The complexities begin when obtaining that private property, for example food, depends on contributions from the state, because it is assuming a right to the private property of another person. The “right” is guaranteed by altering (or at least interfering) the right of another person, against his/her will. This perhaps also explains why the absence of private property as a right in the covenants, as without the category of human right it is easier to go against it -even politically- for the purpose of guaranteeing other rights, which can also be considered to end up as a property right, but without being expressly recognized. Otherwise, it would be claimed that there is a human right to the human right of another person. Thus, the power of states to alter, restrict, or violate private property is less risky, because it is not a human right, if one is guided by the covenants.

From the United Nations human rights “protection” system, these disputes between private property rights and economic and social rights can be observed constantly, and are the result of the numerous observations, recommendations, resolutions, reports, among others, issued daily by experts of the United Nations.

For example, a 2020 report by the Special Rapporteur on the right to food warns that the “States continue to neglect economic, social and cultural rights, particularly the right to food” (p. 14), and condemns itself, among other things, the neoliberal system in general (without further clarification and criticizing both the austerity of some states and certain subsidies and protectionist measures), and the growing role of the market in the distribution of land and access to food (p. 4).

The report concludes that states must adopt positive measures to counteract inequality and the inequitable distribution of productive resources as a barrier to guaranteeing the right to food (2020, p. 17). It

proposes to interfere (ultimately by means of expropriations) with the right of third-party ownership of land for the purpose of guaranteeing the right to food of other people. The tension -created by the rapporteur- between the right to food and property rights is evident. It proposes guaranteeing the right to food, which is ultimately a right to access to private property, to the detriment of the property rights of others. Although of course, the United Nations system does not have the certainty that property rights are human rights.

That report does not constitute an isolated position within the vast United Nations human rights protection system. Another report submitted by a previous Special Rapporteur on the right to food in 2010 recognizes that in certain cases where

landlessness is a cause of particular vulnerability, the obligation of the State goes further: it is to strengthen such access or make it possible - for example, through redistributive programmes that may in turn result in restrictions on others right to property. (p. 4)

It undoubtedly implies an open and at least sincere proposal to carry out expropriations (“restrictions”) in order to achieve a “more equitable distribution of land” (2010, p. 14), in particular of historically disadvantaged groups, which should be accompanied by a rural policy that promotes access to credit and markets, all in order to contribute to greater food security.

Without trying to analyze here the viability and economic effectiveness of these -massive?- projects of expropriation of land to enable access to natural resources and thus finally guarantee the right to food, it must be taken into account that it is going against -human?- rights of other persons. While the issue of expropriations will be analyzed in detail when reviewing the jurisprudence of the European Court of Human Rights and the Inter-American Court of Human Rights, it should be recognized that the positions of the above-mentioned special rapporteurs are at least openly contrary to the existence of private property rights as human rights.

In a different position there is a report drawn up by the Commission on Legal Empowerment of the Poor, which for the purposes of “Making the Law Work for Everyone”, proposes an agenda to vindicate the importance of access to justice and the rule of law, property rights, labor rights and business rights in the development of the poorest sectors of society, and of society in general. The report openly acknowledges that “Property Rights are human rights” (2008, p. 42), highlighting not only economic aspects of the existence of a system based on private property, but also the positive effects on the development of the sense of “identity, dignity and belonging” of the person and of the communities (2008, p. 34).

The report also promotes the development of “functioning market for the exchange of assets” (2008, p. 7), something inherent in a system based on private property. Also, in relation to the latter, it encourages the adoption of positive measures for the recognition of land titling of occupied spaces informally or on the basis of customary rights, as well as providing access to housing ownership for the poor, offering low-interest loans and distributing state land (2008, p. 65), something that in a certain point, according to how would be implemented, could be contradictory with a system that recognizes property rights as human right. In any case, the report constitutes an open recognition of the private property right as a human right and affirms its importance in the development of communities in general and of individuals in particular, something, as has been and will be seen, not so frequent from the “field” of human rights.

And the Agenda 2030 for Sustainable Development from the United Nations, what does it say about private property? Directly not much, but several of the statements displayed there as the proposed objectives allow some comments regarding the figure that is assigned to private property. In principle, it can be said that it proposes strong measures for the “redistribution” of wealth -therefore of property- in order to combat inequalities in and between countries, something that in fact constitutes one of the Sustainable Development Goals, Number 10 more precisely. In this sense, it is proposed that “Sustained, inclusive and sustainable economic growth is essential for prosperity. This will

only be possible if wealth is shared and income inequality is addressed” (UN, 2015). It is clear that “sharing” wealth inevitably implies measures on the part of the states to ensure that this is carried out, for example through fiscal policies imposed more heavily on those who have greater resources, if not also by expropriation. This undoubtedly implies altering the private property rights of individuals.

This position is contradictory in relation to other premises of the Agenda, which stipulates that member states should “respect, protect and promote human rights and fundamental freedoms for all”, without distinction, inter alia, of *property* (UN, 2015, par. 19). It is necessary to ask how states would promote measures that serve to “share wealth” without going against this prohibition of making distinctions based on property. If states, for the purpose of combating inequality, must take measures to share or redistribute wealth, it is clear that they will have to make distinctions based on people’s property, which is forbidden for the same statement.

Additionally, and in another reference to property, it should be noted that the Sustainable Development Goal N° 1.4 (End Poverty in all its forms everywhere) establishes in one of its points that:

By 2030, ensure that all men and women, in particular the poor and the vulnerable, have equal rights to economic resources, as well as access to basic services, ownership and control over land and other forms of property, inheritance, natural resources, appropriate new technology and financial services, including microfinance. (UN, 2015)

If the idea is to have formal “equal rights” to access, for example, to property, it would not be contradicting the possibility of considering it a human right. It can be said that today, at least throughout the Western world, people enjoy formal equality in access to property. However, if it is promoted that everyone should have equal results in that access to property, it would be unfailingly going against the property rights of other people. This relates to another objective, Number 10.3, already cited, which for the purpose of reducing inequality in countries and between countries, proposes “ensure equal opportunity and reduce

inequalities of outcome, including by eliminating discriminatory laws, policies and practices and promoting appropriate legislation, policies and action in this regard” (UN, 2015).

Formal equality of access to income, that is to say property, finds harmony with private property as a human right, and is a derivation of ensuring equality before the law. But promoting positive measures to “reduce inequalities of outcome” could be contrary to equality before the law and interfere with private property rights.

In the preceding paragraphs, a brief analysis of property rights has been made from the perspective of the United Nations human rights protection system. It is clear that the system is -at least- ambiguous with the right in question. However, it is also true that this ambiguity has a strong tendency to lean towards disregarding the private property right as a fundamental human right. The mere presence in the Declaration and the absence in the binding covenants of the system incites that thinking. But in addition to this, the positions adopted by the United Nations own organs, expressed through rapporteurs, resolutions, or the 2030 Agenda itself, and the consequences derived from them, make it very difficult to sustain the idea of a private property right as a fundamental human right protected by the system. Rather, these documents constitute authorizations to the state power to limit or violate rights, including private property rights.

The “yes, but actually no”, taking into account the United Nations system, is perhaps too generous. There does not seem to be a consideration of private property rights as fundamental human rights from the system, as they are totally exposed to state interference.

3. THE PRIVATE PROPERTY RIGHT AS A HUMAN RIGHT IN THE EUROPEAN PROTECTION SYSTEM

The oldest and most influential system of human rights protection on the European continent is not part of the European Union, but of the Council of Europe. Within the framework of this is the “Convention for the Protection of Human Rights and Fundamental Freedoms” (CoE, 1950), popularly known as the European Convention on Human Rights

(ECHR), adopted in 1950 but in force since 1953. In addition to the Member States, which are the first to interpret and apply the ECHR, it is the European Court of Human Rights that ultimately ensures compliance with it.

However, if one reads the 58 articles of the European Convention, can observe that in the first instance the private property right is absent. One should turn to Additional Protocol 1, adopted in 1952, to observe there the “Protection of Property”, in Article 1 thereof.

Before analysing the content and scope of the article, consideration should be given to the debate that existed on the basis of the wording of the European Convention, which in some ways explains the absence of the private property right as an article and its subsequent addition in the First Protocol. As Danny Nicol (2020) recounts, at the time of the negotiations many delegations did not intend to establish a “right of property ownership at all, since they were anxious to preserve national autonomy in the sphere of economic policy”. In this sense, there were diverse motivations and proposals among those who sought to install it as a right, while on the one hand some sought to establish a brake on authoritarian governments that used confiscation as a tool to intimidate political opponents, others sought to limit extreme or aggressive distributive measures by democratic governments (Nicol, 2020).

The discussion about whether to include it or not was so big that the property right was, along with the right of parents in the education of their children and the right to vote in the election of the legislature, vetoed by the Council of Ministers after being proposed by the Council of Europe’s Consultative Assembly (Nicol, 2020). Finally, followed by further discussion and pressure from some states, the Council of Ministers elevated these three articles to a committee of experts for further study, whose work would be the subject of the First Protocol.

But what does Article 1 of the Protocol say?

Protection of Property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions

except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties. (CoE, 1950)

An initial analysis of the article shows that the way in which this property right is established is rather weak and leaves a wide margin of *manoeuvre* to the states. From the use of “peaceful enjoyment of his possessions”, avoiding using the term properties, and empowering states to deprive people of those in the name of “public interest” -without establishing a right to compensation-, it is noted that the commitment to property rights is not very strong. The second part ratifies this, as it leaves states enormous power to control (which implies a different intervention to “deprive”) this human right for the purposes of satisfying the “general interest” or achieving, among others, the collection of taxes. However, it is important to note that at least the rule protects, albeit weakly, the rights of both natural and legal persons.

Nevertheless, beyond that authorization granted to states to limit the right, it is obvious to note that many of those concepts involve an enormous vagueness. In this sense, it is possible to think that in the face of so many discussions regarding the approval of the article on the protection of the property right, the European Court of Human Rights has been left to its interpretation. As will be seen, it has ruled in numerous cases in relation to Article 1 of the First Protocol, establishing several rules of interpretation that in a certain way indicate that more protection of the property right has been given beyond the content of the rule, and despite the wide margin that is given to states, which ultimately puts at risk the effective categorization of it as a human right.

It should be made clear here that the case law of the European Court of Human Rights in the matter is extremely extensive.² Nevertheless, it

2 To get a sense of the number of cases the Court has ruled in relation to the right to property, it is highly illustrative to analyze the “Guide on Article 1 of Protocol No. 1

is possible through the study of some leading cases to clarify certain lines of interpretation concerning certain points to understand the position of the European Court in relation to the property right, its scope as a human right and its limitations.

First, and in a matter that seems merely semantic but is extremely relevant, the Court has made it clear that “By recognising that everyone has the right to the peaceful enjoyment of his possessions, Article 1 is in substance guaranteeing the right of property” (ECHR, 1979, par. 63).

With this certainty it is worth investigating what -and therefore what not- is considered to be within the term, at least under a first approximation. Thus, the European Court has been forceful on numerous occasions that the term “possessions” “can be either ‘existing possessions’ or assets, including claims, in respect of which the applicant can argue that he or she has at least a ‘legitimate expectation’ of obtaining effective enjoyment of a property right” (ECHR, 2022, p. 8).

As the European Court therefore provides that the term includes “existing possessions” and “legitimate expectation” (2020, p. 9),³ it could then be said that it does not recognize in the first instance a general right of access to property that states are responsible for guaranteeing -through controls, limitations and attacks on the rights of third parties-. It will then be seen that this statement finds several nuances considering the broad powers given to states to limit property in the name of public interest and “social justice”, or by the intersection of it with other rights recognized in the European Convention, but it can now be taken for granted.⁴

- Protection of property” (European Court of Human Rights [ECHR], 2022) prepared by the Court. It summarizes all the case law in which the protection of private property right has been discussed in some way or another.

3 See Guide on Article 1 of Protocol No. 1 - Protection of property: “For an ‘expectation’ to be ‘legitimate’, it must be of a nature more concrete than a mere hope and be based on a legal provision or a legal act such as a judicial decision, bearing on the property interest in question” (p. 9).

4 This interpretation is also shared by Nicol Danny in his previously cited paper (“The Fundamental Right of the Well-to-Do: Property as a Human Right. The Constitutional Protection of Capitalism”), who analyzing a famous case of the European Court, this is,

According to the provisions of the Protocol of the European Convention, the subjects covered by the protection of Article 1 are both natural and legal persons, that is, both human persons and organizations, associations, companies, foundations, among others, something that clearly makes an enormous difference with the American Convention and the case law of the Inter-American Court, as will be seen.

Knowing at this point that the term possessions is equivalent to private property rights, which includes the existing possessions and the legitimate expectation, and that protects both natural persons and legal persons, the following must be clear. These “possessions” are “not limited to the ownership of physical goods: certain other rights and interests constituting assets can also be regarded as ‘property rights’, and thus as ‘possessions’ for the purposes of this provision” (2022, p. 7). These concepts are also independent of the categorizations that are made in the local law of the states (ECHR, 2007).

So, for the European Court ownership is not limited only to physical or tangible property, including movable and immovable property, but also includes intangible and immaterial elements. Property is thus as much a toothbrush as a slice of pizza, a house, a car, a company share, the professional clientele, the business licences, the intellectual property, the social security benefits, among many other things (ECHR, 2022, pp. 11-17).

At this point, it should already be known that the main limitations to the property right are generally driven by the states, which they guarantee it -?-, and to a greater extent, they regulate it in their internal systems, but alter it -or theoretically violate it- in the name of the interests of the rest of the society, the general interest, the people, the sovereignty, the democratic order, the security, the social justice, the equality, the most disadvantaged... among thousands of other possible categorizations. This is not something that happens exclusively with property, but here the situation is clear.

the former King of Greece and Others v. Greece (ECHR, 2000) states that “in general Article 1 of the First Protocol protects the existing possessions of a corporation or an individual: it is not a right to be put in possession of things one does not already have”.

Before starting the review of the Court's cases concerning "possible" interference, and the requirements for such interference to be classified by the Court as "in accordance" with the stipulations of the European Convention, it should be recalled that Article 1 distinguishes between the general *peaceful enjoyment of possessions* (known as the "first rule"), the *deprivation* of property ("second rule"), and the *control* of the use of it ("third rule"). Deprivation has conventional legitimacy in cases of public interest and is subject to "conditions provided for by law and by the general principles of international law". Control of use is subject to "general interest". Beyond those categorizations, the Court has made it clear that the rules are interconnected and that rules two and three must be interpreted in light of the first one (ECHR, 2000, par. 50). In this sense it is logical to argue that the rules are not isolated, because many situations can be at the boundary between any of the three, and even a case could be analyzed from more than one category (ECHR, 2022, p. 20).

With regard to deprivation, it is clear that the most obvious case is when the state, in the name of the public interest, carries out an expropriation through the constitutional or legal mechanisms envisaged. But as the case law of the Court shows, there could be situations that formally do not have the name of expropriations but that in practice have the effects of a deprivation of property. Thus, the court itself has been forceful in the sense that "the Court's case-law indicates that it may be necessary to look beyond the appearances and the language used and concentrate on the realities of the situation" (ECHR, 2016, par. 83).

For its part, the control of use present in the "third rule" of the article could take place in numerous cases, of the most diverse. Thus, it can occur in situations where rent regulations⁵ are set; in situations concerning state licenses to exercise certain activities; in cases linked

5 See the case from the European Court of Human Rights (1989), *Mellacher and Others v. Austria*, in which the Court had authorized the reduction of rental prices, is famous in that regard. The Court stated there in paragraph 56 that "The fact that the original rents were agreed upon and corresponded to the then prevailing market conditions does not mean that the legislature could not reasonably decide as a matter of policy that they were unacceptable from the point of view of social justice" in a clear violation of contractual freedom.

to the demolition of buildings; in relation to state monopolies, among many other (ECHR, 2022, p. 23).

Cases not covered by either the second or the third rule could fall under the general one concerning the guarantee of “peaceful enjoyment of possessions”, which left the Court with enormous freedom to act.

As can be seen from the analysis of the article, the authorizations given to states are enormous, but the Court has established numerous interpretative rules in relation to the terms displayed there, which are vague by the way. These rules have clearly emerged from some “leading cases”.

Among these is undoubtedly *Sporrong and Lönnroth v. Sweden* (ECHR), from 1982, related to urban planning issues in the city of Stockholm. Specifically, the properties of these two persons (Sporrong Estate was a legal person) had been subject to the state’s discretion to expropriate them through possible compensation for certain periods of time (more than 20 years in one case), while at the same time were prevented from being subject to reforms or constructions. While the state never exercised its “power” to expropriate, during these extended periods the owners were unable to offer and eventually sell their properties at market price.

The majority (10 votes against 9 of the minority) of the judges of the European Court ruled in the case that the Swedish state had violated Article 1, specifically the first part of it (also called “first rule”), concerning the “peaceful enjoyment of possessions”, which had clearly been altered by the measures taken by the government. On the other hand, the majority understood that the second part of Article 1, concerning “deprivation” (known as “second rule”) was not applicable in the case,⁶ as well as the third part of it, referring to control (“third rule”).

6 In relation to this part of the Article, the European Court makes it clear that “although the right in question lost some of its substance, it did not disappear. The effects of the measures involved are not such that they can be assimilated to a deprivation of possessions. The Court observes in this connection that the applicants could continue to utilise their possessions and that, although it became more difficult to sell properties in Stockholm affected by expropriation permits and prohibitions on construction, the possibility of selling subsisted”; in *Sporrong and Lönnroth v. Sweden*, Paragraph 63.

Having ruled in the first instance that the action of the Swedish state has not violated the “second” and the “third” rule, and for the purpose of analyzing whether there was a breach of the “first” one, the Court’s majority then established that it must check the existence or not of a *fair balance* between the general interest and the individual’s right (ECHR, 1982, par. 69). In this connection, the Court concludes that the governmental measures taken “created a situation which upset the fair balance which should be struck between the protection of the right of property and the requirements of the general interest: the Sporrong Estate and Mrs. Lönnroth bore an individual and excessive burden” (ECHR, 1982, par. 73). The plaintiffs then suffered from excessive weight on behalf of the general interest, which was incompatible with their property rights.

Before proceeding with the analysis of related cases, which in a certain way deepen the interpretative concept deployed in *Sporrong and Lönnroth*, it should be made clear that according to other cases of the Court, prior to analyzing the fair balance issue, it must be ensured that the measure serves the general interest, is not arbitrary, and respects the principle of lawfulness (ECHR, 2022, p. 30).

The latter principle, namely lawfulness, follows not only from what is known as rules 2 and 3 of Article 1 of the Protocol, inasmuch as they state that both the deprivation of “possessions” is “subject to the conditions provided for by law”, and ownership control can be done by “laws”, as the general content of the Convention. The principle does not imply that there is simply a law⁷ but that the legal basis is compatible with the rule of law and does not incur in arbitrariness (ECHR, 2022, p. 25).

What about the general or public interest? While these concepts were dealt with by the Court in one of the cases discussed below, it should be noted that these are broad terms, in which states are left with great power to move against property rights. All interference with the

7 According to the Court, such as the case of Špaček, s.r.o. v. the Czech Republic (ECHR, 1999), “the term ‘law’ is to be understood in its substantive sense and not in its formal one”.

right must be carried out on behalf of a legitimate general or public interest (ECHR, 2016). And in that sense, for example, by relying on state authorities, the

Court finds it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one and will respect the legislature's judgment as to what is "in the public interest" unless that judgment is manifestly without reasonable foundation. (ECHR, 2016, par. 113)

The creativity of the state authorities in limiting private property is immense, and it would be impossible to detail all the measures taken on behalf of the general or public interest, but it can be said that social and economic issues have been invoked, other aspects related to moral, environmental, justice, security, among others.⁸

8 The Guide on Article 1 of Protocol No. 1 (ECHR, 2022) details on page 27 some situations in which it has been claimed to protect the general or public interest. Thus he mentions in an exemplificative manner: "The following purposes have been found by the Court to fall within the notion of public interest within the meaning of this provision: elimination of social injustice in the housing sector (James and Others v. the United Kingdom, § 45; Grozdanić and Gršković-Grozdanić v. Croatia, §§ 102-103 and 113); combating the effects of a foreign-currency loan crisis particularly in the context of preventing mass homelessness (Béla Németh v. Hungary, §§ 42-45); nationalisation of specific industries (Lithgow and Others v. the United Kingdom, §§ 9 and 109); adoption of land and city development plans (Sporrong and Lönnroth v. Sweden, § 69); Cooperative La Laurentina v. Italy, § 94; securing land in connection with the implementation of the local land development plan (Skibińscy v. Poland, § 86); prevention of tax evasion (Hentrich v. France, § 39); measures to combat drug trafficking and smuggling (Butler v. the United Kingdom (dec.)); protection of the interests of the victims of the crime (Šeiko v. Lithuania, § 31); measures to restrict the consumption of alcohol (Tre Traktörer AB v. Sweden, § 62); protection of morals (Handyside v. the United Kingdom, § 62); control of legitimate origin of cars brought into circulation (Sildedzis v. Poland, § 50); confiscation of monies acquired unlawfully (Honecker and Others v. Germany (dec.)); the prevention of collusive practices and the protection of the public purse and promotion of fair competition (Kurban v. Turkey, § 78); transition from a socialist to a free-market economy (Lekić v. Slovenia [GC], §§ 103 and 105); and the smooth operation of the justice system, with further references to the importance of administering justice without delays which might jeopardise its effectiveness and credibility (Konstantin Stefanov v. Bulgaria, § 64)."

Now that it is clear that interference must respect the principle of lawfulness, not be arbitrary, and be carried out on behalf of the general or public interest, while also examining on a case-by-case basis whether there is a fair balance between that principle and individual rights, another concept comes into play. This is the “proportionality” test, developed particularly in the 1986 *James and Others vs The United Kingdom* (ECHR, 1986) case, which is undoubtedly another leading case of the European Court.

In concrete terms, the events that gave rise to the case occurred within the framework of a “Leasehold Reform Act”, which enabled tenants under long-term leases to acquire the full ownership of the property, on which they had rights as trustees the ones who initiated the case. The latter argued that this compulsory and reduced-value sale was against their property rights guaranteed by Article 1 of the Protocol.

First, the Court rejects the applicants’ argument that in the case there could not be a measure to satisfy the general interest as only a group of persons would benefit from them (ECHR, 1986, par. 45). Thus, leaving a wide margin for state interventionism, the Court states that

because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is “in the public interest”. Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment both of the existence of a problem of public concern warranting measures of deprivation of property and of the remedial action to be taken. (ECHR, 1986, par. 46)

Thereby, the states are amply empowered to adopt the measures they deem relevant in the economic and social field, but not only so, and the Court could not go against that assessment, as long as it does not look totally unreasonable (ECHR, 1986, par. 46). The enormous creativity of states in carrying out property interferences based on the general interest had already been mentioned above.

However, as anticipated and in what constitutes one of the central elements of the case, the Court establishes a new interpretative criterion. A measure depriving a person of ownership must not only be done on behalf of public interest, but there must also be “a reasonable relationship of proportionality between the means employed and the aim sought to be realised” (ECHR, 1986, par. 50). The Court then introduces a new category of analysis, based on the case-by-case conduct of a proportionality test, which entitles states to interfere with rights on behalf of the general interest as long as that intervention is not disproportionate. The insertion of this new test will not always imply a greater protection of property rights by the Court, but generally implies a greater discretion of it to analyze in each situation how to decide, being the trend that in situations related to economic measures the review will be less intensive (Nicol, 2020).

This discretion is clear when the Court applies the proportionality test to the compensation topic. The Court clarifies that “the taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which could not be considered justifiable” (ECHR, 1986, par. 54), but nevertheless establishes that there is no right to full compensation in all circumstances. In that sense, and in what could be classified as a severe violation of property rights, the Court finds that “Legitimate objectives of ‘public interest’, such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of the full market value” (ECHR, 1986, par. 54). In concrete terms, not only does the Court enable it to force the owners to sell, under legal threats, but they must do so below the value of the market -which is nothing other than the value under which the owner is willing to sell-. All this in the name of the general interest, and without being possible to speak, according to the Court interpretation, that there is a discriminatory treatment towards the original owners, while the unequal treatment was justified in the case, as reasonable and proportional (ECHR, 1986, par. 77).

In short, applying the Court's test of proportionality both in relation to the deprivation and to the issue of the compensation generated by it, the Court issued that Article 1 of the Protocol had not been violated in the case.

But this discretion in relation to the compensation also attributed to the Court, sometimes channeled through the proportionality test, has its origins in the content, as well as its silences, of Article 1 of the Protocol. As can be seen, it does not establish a specific rule on compensation, but simply provides that deprivation should be made subject to the "conditions provided for by law and by the general principles of international law". In the *James* case itself, the Court reviews the preparatory work for the drafting of the Convention and the Protocol, making it clear that the position of states was that these "principles of international law", from which the right to compensation arises when an expropriation takes place, applies not to nationals of the state, but only to foreigners (ECHR, 1986, par. 64). However, as has been seen, beyond the absence of an explicit reference to reparation to nationals, it would also not be in line with the test of proportionality for the Court to expropriate without a "reasonable related to its value" compensation,⁹ which does not necessarily have to be the value of the "market".

In the preceding paragraphs, a review has been made of the treatment given to property rights from the European system for the protection of human rights. It is a more sophisticated system than that of the United Nations, as it has a Court that permanently interprets the provisions of the main document of the system, the European Convention. Although it is possible to affirm that the property rights enjoy a more important consideration than that given to it by the United Nations system, both the Convention and the Court leave ample room for state intervention to interfere with them. All this beyond the requirements established by the Court itself for those to proceed, as analyzed. Is there a fundamental human right of private property from the European system

9 See Guide on Article 1 of Protocol No. 1 (ECHR, 2022). In exceptional cases, for example "in the unique context of German reunification, the Court has accepted that the lack of any compensation did not upset the 'fair balance' that has to be struck between the protection of property and the requirements of the general interest" (p. 72).

if the powers given to the states to interfere and to advance in private property, through controls or deprivations, is so great? It could be easily argued that no.

4. THE PRIVATE PROPERTY RIGHT AS A HUMAN RIGHT IN THE INTER-AMERICAN PROTECTION SYSTEM

The greatest novelty of this system is that in practice it makes enormous distinctions in the treatment of property rights in relation to the subject concerned, insofar as it establishes a differential treatment between “non-indigenous” persons and persons belonging to indigenous communities, who are generally treated as a community, as a group, without regard for the individuality of their members. These communities enjoy, if one observes the case law of the Inter-American Court, a super right to property. They are in a way a group with particular consideration from the Inter-American system of protection. Not only because they are considered to be related to property in a way that no other group or person is even capable of experiencing, which in itself is a totally striking manifestation, but because they are recognized as having a positive right of access to property. It is then a right to property -of access-, and not only of property, being perhaps the strongest right to access to property that is established in all systems of protection.

These considerations do not imply delegitimizing members of indigenous communities or denying that they may have been forcibly removed from their possessions, properties or territories in the past. Nor is it recognized here that today the premises of the jurisprudence derived from the Inter-American system of “protection” in relation to indigenous property are fully fulfilled. It may be impossible for that to ever happen. It is simply noted that, according to the Inter-American system, indigenous communities constitute a particular group in relation to property rights.

Before analyzing in a timely manner the cases of the Inter-American Court concerning the private property right, which will have to be analyzed separately according to whether the subjects involved are indigenous or non-indigenous, it is necessary to review the norms that recognize this particular right.

Within the Organization of American States are, among others, the American Declaration of the Rights and Duties of Man, adopted in 1948, and the American Convention on Human Rights, also popularly known as the Pact of San José, Costa Rica, adopted in 1969 and in force since 1978. This legal document, which is accompanied by two Additional Protocols (OAS, 1988, 1990), is binding, unlike the Declaration. The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights are the bodies responsible for ensuring compliance with the conventional standards. By the system's own method of formation, some states had ratified the Declaration but not the Convention, and others are subject to the Commission's investigations but had not ratified the Court's jurisdiction.

Leaving aside these details concerning the historical formation of the Inter-American system of protection, as well as those relating to the specific powers of the Commission and the Court, it is appropriate to go directly to what is relevant here, the analysis of property rights.

The American Declaration of the Rights and Duties of Man states in its Article XXIII:

Property right

Everyone has the right to private property corresponding to the essential needs of a decent life, which contributes to maintaining the dignity of the person and the home (OAS, 1948).

This is undoubtedly a very limited conception of the property right and therefore an extremely weak protection, so to speak. It can be said that it focuses exclusively on what is called personal private property, leaving out all other types of private property, such as that relating to means of production, to entrepreneurial actions, to intellectual property, to acquired rights, and ultimately anything that exceeds the "essential needs of a decent life".

But going to the most important norm of the system, the American Convention on Human Rights, it can be seen that the treatment of the property right is not identical to the Declaration. And in the end, this rule is the most relevant, as part of a binding treaty, and since it is on this

that the Inter-American Court will analyze it permanently, as will be seen later. But what exactly does it say about property rights?

Article 21 provides as follows:

Right to Property

1. 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.
2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.
3. Usury and any other form of exploitation of man by man shall be prohibited by law. (OAS, 1969)

A first and basic reading of the article once again reveals the immediate need, or fear, of human rights treaties to clarify that the property right, and in this case the “use and enjoyment of property” is subject to the social interest or “interest of society”. Likewise, in paragraph 2, it can be seen that this own social interest or a reason of public utility enables the deprivation of property, as long as a fair compensation is provided. The latter sets the American Convention apart from Article 1 of the First Protocol to the European Convention, which, it will be recalled, omits any reference to compensation for deprivation, which was however developed by the jurisprudence of the European Court. Paragraph 3 of the article is also strange, while in general it has been omitted by the Inter-American Court when analyzing property rights.

As it could not be otherwise, while the same thing also happened at the time of the drafting of the European Convention, or of the covenants of the United Nations system, there was much discussion about whether or not to incorporate an article establishing the human right of property rights. As scholar Funzalida Bascuñán (2020) points out, there

were several projects relating to the article, as well as many proposals and reasons to eliminate it, “because it does not constitute a fundamental right, because it is a proper ESC right, because it is

a matter that must be handed over to State sovereignty; for being an obstacle to agrarian reform processes, etc.), but was finally included in the list of conventional rights”. (p. 267)

Knowing that it has finally been recognized, it is opportune to continue the analysis of the case law of the Inter-American Court in relation to the article in question. This is in order to understand what is meant by property rights in the system, who are the beneficiaries, the ways to interfere¹⁰ those, what requirements should meet these actions -among which are, of course, expropriations-, among other interesting things, to analyze later the issue of indigenous communal property.

First, it should be clear what the Inter-American Court understands by property rights. It has openly acknowledged the same that

“Property” may be defined as those material objects that may be appropriated, and also any right that may form part of a person’s patrimony; this concept includes all movable and immovable property, corporal and incorporeal elements, and any other intangible object of any value. (IACHR, 2001a, par. 122)

It is in this sense a broad concept of the property rights, identical in this respect to that established by the case law of the European Court. Therefore, it falls under the sphere of property rights, for example, the real estate -as a house-, a car, a business share, a toothbrush, a slice of pizza, intellectual property,¹¹ acquired rights,¹² among countless other objects, goods and rights.

10 Unlike the European Convention and the jurisprudence of the European Court, the Inter-American system is not as clear on the distinctions between deprivation and limitations -controls- and in many cases the Inter-American Court uses the terms interchangeably.

11 Inter-American Court, Palamara Iribarne vs. Chile. Merits, Reparations and Costs. Judgment of November 22, 2005, paragraph 102. There, the Court has ruled that “within the broad concept of ‘goods’ whose use and enjoyment are protected by the Convention, works resulting from the intellectual creation of a person are also included, who, by virtue of having made such a creation, acquires in this copyright related to the use and enjoyment thereof”.

12 Without a doubt, a leading case on acquired rights in the Inter-American System is that of “Five Pensioners v. Peru” (Inter-American Court of Human Rights, 2005) where the

However, for one of those examples, some clarifications should be made. In analyzing the issue of property over shares, some other particular observations of the Inter-American system can be made that differentiate it to some extent from the European system of protection.

In this regard, it should be recalled that Article 1 of the Additional Protocol to the European Convention provides that “Every natural or legal person is entitled to the peaceful enjoyment of his possessions” (1952), and in general, the system of protection itself is open to action by legal persons to seek redress from the European Court in order to assert their rights.¹³ On the contrary, the American Convention establishes a general rule that explicitly states: “Article 1. [...] 2. For the purposes of this Convention, ‘person’ means every human being”, thus excluding, in principle, legal persons, which, from this point of view, are not subject to the provisions of the Convention. Of course, indigenous communities can make claims and invoke their treaty rights as a group, which is a particular feature, something similar to what happens with trade unions.

With regard to the issue of ownership of shares, the definitions made by the Inter-American Court should be analyzed to make it clear that legal persons were not beneficiaries of the rights established in the Convention. But to say this does not imply, as has been advanced, that there cannot be a conventional right concerning the properties on shares of companies, in so far as the person is not only covering a right to the participation of the dividends and the profits thereof, but they grant a series of rights such as attendance at assemblies, votes, liquidations, among others.¹⁴ According to the interpretation of the Inter-American

State was condemned for arbitrarily changing the amounts of pensions received by the actors. Another case that analyzes the issue of acquired rights is *Abrill Alosilla v. Peru*.

13 In this regard, account should be taken, for example, of Article 34 of the European Convention, which provides: “The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties [...]”.

14 In the case of *Chaparro Álvarez and Lapo Íñiguez v. Ecuador* (IACHR, 2007), the Court has clearly established: “This Court has made a difference between the rights of the shareholders of a company and those of the company itself, indicating that domestic laws grant shareholders certain direct rights, such as the right to receive the agreed dividends, to attend and vote at general meetings, and to receive part of the

Court, there is a conventional property right that must be protected, but in each specific case “it must be demonstrated how the damage or impairment of the assets owned by the legal person could in turn imply an impairment of the rights of shareholders or members” (IACHR, 2016, par. 114).¹⁵ That is to say, according to this interpretation, not every attack against a company immediately involves a violation of the shareholder’s property right, who must prove the particular affectation.

The Inter-American Court held in the case of *Granier and others (Radio Caracas Televisión) vs. Venezuela* that this particular affectation had not taken place, because due to the complex structure of the company, direct damage to the shareholders was not demonstrated (IACHR, 2015). For its part, it resolved differently in the *Chaparro vs. Ecuador* case, as there was an undoubted link between the owner and the company, given that

Mr. Chaparro held shares in the Plumavit company amounting to 50% of its capital. In addition, Mr. Chaparro was the general manager of the company. It is clear that a value could be placed on this participation in the company’s shares, which formed part of its owner’s patrimony from the moment it was acquired. As such, this participation constituted an asset to which Mr. Chaparro had the right to use and enjoyment. (IACHR, 2007, par. 182)

Similar was the resolution in one of the leading cases of the Inter-American system in the matter, *Ivcher Bronstein v. Peru* (2001a), which not only left definitions on the issue of ownership, but also around the limitations and deprivations of the private property right, more specifically about expropriations. With regard to shareholding, the Inter-American Court recognized that the claimant had been arbitrarily deprived of its rights as a shareholder (IACHR, 2001a, par. 130). However, before

company’s assets when it is liquidated”, referring to Case of Ivcher Bronstein, and also, Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970, p. 36, par. 47.

¹⁵ The Court specifically invoked the Case of Perozo and Others v. Venezuela, par. 402, and Granier and others (Radio Caracas Televisión) vs. Venezuela, par. 356.

continuing with the succinct account of the facts and the important definitions that the case leaves in relation to interference with property, it is worth reviewing some concepts that emerge from the Convention.

In this sense, it follows from the reading of the first and second subparagraphs of Article 21 that the law may subordinate the use and enjoyment of property in the name of the interests of society, and that the deprivation thereof must be done by means of just compensation, “for reasons of public utility or social interest”, and in cases and forms established by law. The breadth of powers granted to states is thus evident, and in that sense that property, while recognized as a conventional right, is “subordinate” to the general interests of society. Beyond that, the vagueness of the concepts presented in the article has been the subject of numerous interpretations by the Inter-American Court.

Returning to *Ivcher-Bronstein v. Peru*, succinctly, it should be borne in mind that the actor was a media entrepreneur born in Israel but who had later acquired Peruvian nationality. He was a majority shareholder in a television channel whose content began to be critical of President Fujimori’s government. In what was a clear act of intimidation, Ivcher-Bronstein was canceled his Peruvian nationality, which immediately put him in a critical position as owner of the television station, since a local law provided that media shareholders should be national. The final blow was struck by a series of measures taken by the Peruvian justice system, which, taking into account the “novelties” prevented Ivcher-Bronstein from exercising his rights as majority shareholder, and as director of the company, being subject to the decisions of the minority, which removed the former from its functions and clearly changed the channel’s editorial line. While this was already a fierce attack on his property rights, the actor could not sell or transfer his shares or receive profits.

The Inter-American Court declared that the deprivation of Ivcher-Bronstein’s property rights was arbitrary. Although there was no formal expropriation process, the deprivation of the use and enjoyment of the shareholding took place without reasons of public utility or social interest and with no compensation (IACHR, 2001a, par. 129 & 130). In the same sense, the Court concluded that the actions initiated by the

Peruvian state had not respected the guarantees of due process, so that their consequences were also illegitimate (IACHR, 2001a, par. 130).

Another leading case of the Inter-American Court is undoubtedly that of *Salvador Chiriboga vs. Ecuador* (IACHR, 2008), which leaves numerous definitions regarding interference with the private property right and the requirements for those to proceed, the role of that right in society, in particular its social function and its inherent subordination to the general interest for the “common good”, among other things.

In order to create an area of recreation and ecological protection in the city of Quito, the municipal authorities declared the public utility for expropriation purposes and the occupation of a property owned by the brothers Salvador Chiriboga. These, and then their heirs, for the purpose of promoting a resolution that renders null and void the declaration of public utility or in any case to obtain a fair financial compensation, promoted several administrative and judicial procedures, not getting any answer for many years, which ultimately violated their right to due process. During this period, the owners had been effectively dispossessed of the property, making it impossible for them to exercise their rights to use and enjoy the property. When the case came to the Inter-American Court, it left many reflections on the role of property rights in society.

Before studying them in more detail, it may be said that the Court established that the property rights had been violated, because, although there was a justification for the declaration of public utility (IACHR, 2008, par. 116), the requirements for restricting it were not met, as the required formal mechanisms were ignored -and minimum judicial guarantees denied- every time fair compensation was omitted (IACHR, 2008, par. 114). All of this created legal and factual uncertainty for the party concerned, as well as placing an unjustified burden on the party concerned, thus resulting in arbitrary expropriation (IACHR, 2008, par. 117).

Beyond that resolution, some of the Court's reflections are extremely interesting because of the place it assigns to property rights. In a very illuminating paragraph, states that “The right to property must be understood within the context of a democratic society where in order for the public welfare and the collective rights to prevail there must

be proportional measures that guarantee individual rights” (IACHR, 2008, par. 60). Individual rights are therefore, from this point of view, subordinated to collective rights and the public welfare, although, in application of the proportionality test,¹⁶ there must also be measures -compensation- to protect individual rights in some way. But establishing prevalence is in itself a political position. In the same way, the Court adds that

The social role of the property is a fundamental element for its functioning and for this reason, the State, in order to guarantee other fundamental rights of vital relevance in a specific society, can limit or restrict the right to property, always respecting the cases contained in Article 21 of the Convention and the general principles of international law. (IACHR, 2008, par. 60)

The social role of the private property -and one might wonder whether there is a right that does not have a social function- therefore includes, from the interpretation of the Court, the sacrifice of that right in the name of other rights, on behalf of the community. Violating a -human?- right to satisfy others, in the name of democratic society. Human rights are thus subject to the decisions of the democratic majorities. What would happen if that majority were to promote torture to improve the efficiency of the judicial system? Court appears ready to give the green light.

In what would seem a search to moderate a little this decision, which as detailed above, leaves an immense power in the hands of the states, clarifies that

in order for the State to legally satisfy a social interest and find a fair balance of an individual’s interest, it must use the less costly means to damage, the least, the right to property of the person, subject-matter of the restriction. (IACHR, 2008, par. 63)

16 The Court reiterates the necessity of proportionality in many cases, such as the *Herrera Ulloa v. Costa Rica* case, where it openly states in paragraph 123: “the restriction must be proportionate to the legitimate interest that justifies it and must be limited to what is strictly necessary to achieve that objective. It should interfere as little as possible with effective exercise of the right to freedom ‘of expression’”.

In a paragraph which undoubtedly contains an enormous influence of the European Court and the concept of *fair balance*.

In the same sense, the Court states “that every limitation to such right must be exceptional. As a consequence, all restrictive measure must be necessary for the attainment of a legal goal in a democratic society” (IACHR, 2008, par. 65). By that time, the subordination of the property right to other collective rights, its social function, and the need to restrict it in the name of the common good, the public welfare and the democratic society had already been made clear. In that way, these objectives justify the classification of a good as a public utility and social interest (IACHR, 2008, par. 65).

Leaving more interpretations, the Court also analyzed the aspect of compensation as a prerequisite for expropriation. In this sense, makes it clear that “the payment of a compensation constitutes a general principle of the international law, which derives from the need to look for a balance between the general interest and the owner’s interest” (IACHR, 2008, par. 96), which also derives from Article 21 of the Convention itself, which speaks of “just compensation”. The latter, for the Court, “must be prompt, adequate and effective” (IACHR, 2008, par. 96), for which the trade value of the asset must be taken into account before the declaration of public utility, as well as the general principle of fair balance (IACHR, 2008, par. 96). It can be seen that this trade value should be taken as a reference but it is not the one that should actually be granted, so that the states are empowered to expropriate by paying lower prices than the “value of the market”, which means that a fair balance can hardly be found between the community and the affected party.

Having reviewed some of the interpretations that the Inter-American Court has left on Article 21 in cases where indigenous communities were not linked, it is now necessary to analyze cases where this occurred. The need to make a distinction between indigenous communities and other persons in relation to Article 21 is due to the interpretative distinctions made by the Inter-American Court itself, which from the beginning raised enormous differences between indigenous and non-indigenous property.

The issue of indigenous property is undoubtedly a trademark of the Inter-American Court. Being located in a region with an enormous diversity where numerous indigenous communities are present, distributed throughout the continent, without a doubt that puts it assiduously in situations where it has to analyze the issue of indigenous communal property. But in addition, the Inter-American Court has made efforts to create an original interpretative line, giving the indigenous communities a strong property right¹⁷ -and specifically *to* property- that is different from that enjoyed by the rest of the people.

In this sense, without a doubt, the case of the *Mayagna Community (Sumo) Awas Tingni v. Nicaragua* (IACHR), from 2001, leaves several interesting reflections. There, the Inter-American Court states that

Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community. (IACHR, 2001b, par. 149)

The Court thus made it clear that it was a type of communal, collective property, thus escaping the concept of individual property protected by the Convention, which should be recalled, generally did not protect the rights of legal persons or groups. And in that sense, openly states that for indigenous communities, “relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations” (IACHR, 2001b, par. 149). It is clear that attributing exclusively these connections with their possessions -lands- to the indigenous communities, is something totally discretionary that does not find any reasonable justification, and this is simply an interpretation of the Court’s own to protect this type of property in a particular way.

17 And as Sebastián López Escarcena (2015) adds it could be said that this is due to an interpretation of the Inter-American Court based on the principles of progressivity, pro homine and universality, because Article 21 of the American Convention simply speaks of individual property.

These comments are not intended to deny that indigenous communities do not have the right to live freely in their territories, or that they establish extremely strong links and connections with their properties. But that is not exclusively attributable to these communities. Non-indigenous persons also establish connections and ties with their property, whether tangible or intangible, or to make it comparable, also with their lands. And those connections can also be emotional, spiritual, or religious. But for the Inter-American Court, only the indigenous -as a community- would have these links with their possessions.

Many of the cases that come before the Inter-American Court are related to indigenous communities that demand access to territories that were dispossessed in the 19th and 20th centuries -but also in recent years-. They then claim access to property. It is true that many of these acts of dispossession were carried out violently by the states in collusion with individuals or legal entities, many from foreign countries that saw in the Latin American territories enormous possibilities to carry out agro business. In any case, what underlies this discussion regarding the issue of indigenous communities is that it is often argued that they were somehow violently entered into modern states, and that in that process they were dispossessed of their lands. It can be replicated that hardly anyone has actually asked to enter the modern state.

But returning to the topic, numerous cases of contradiction between the right of access to property claimed by indigenous peoples and the private property rights of non-indigenous persons have been analyzed by the Inter-American Court.

Thus, in *Yakye Axa Community v. Paraguay*, the Inter-American Court leaves some interpretative guidelines for the purpose of resolving conflicts between communal property and, individual, non-indigenous property. Reiterating that the denial of recognition of ancestral property may alter other rights, such as the cultural identity of indigenous peoples, demonstrates a clear position in favour of the property of those peoples, over the property of the rest of the people, non-indigenous. Thus, stipulates that the

restriction of the right of private individuals to private property might be necessary to attain the collective objective of preserving cultural identities in a democratic and pluralist society, in the sense given to this by the American Convention; and it could be proportional, if fair compensation is paid to those affected pursuant to Article 21(2) of the Convention. (IACHR, 2005b, par. 148)

In the name of democracy and pluralism, it is permissible to restrict the right of private property of non-indigenous persons, providing that “fair compensation”, which is worth remembering, is not equivalent to the value of the market. Again, democracy -and now pluralism- as an excuse to interfere/violate rights.

But in an act of common sense, it recognizes in the case that the Inter-American Court does not imply

that every time there is a conflict between the territorial interests of private individuals or of the State and those of the members of the indigenous communities, the latter must prevail over the former. When States are unable, for concrete and justified reasons, to adopt measures to return the traditional territory and communal resources to indigenous populations, the compensation granted must be guided primarily by the meaning of the land for them. (IACHR, 2005b, par. 149)

Along these lines, there could be cases in which it is best to compensate the indigenous people economically and not return the land to them, thus avoiding the dispossession of third parties, which are sometimes entire cities or towns.

However, in the case of *Sawhoyamaxa Indigenous Community v. Paraguay*, the Inter-American Court again showed its preference for indigenous communal property. In this case, where ancestral ownership of territories currently held by private individuals engaged in land-work activities was claimed, the Court reaffirms that indigenous communities have a notion of collective ownership that escapes the classic individual

concept, but that deserves “equal” protection in the light of the Convention (IACHR, 2006, par. 120). In the case, the Court

considers that the fact that the claimed lands are privately held by third parties is not in itself an “objective and reasoned” ground for dismissing *prima facie* the claims by the Indigenous people. Otherwise, restitution rights become meaningless and would not entail an actual possibility of recovering traditional lands, as it would be exclusively limited to an expectation on the will of the current holders, forcing indigenous communities to accept alternative lands or economic compensations. In this respect, the Court has pointed out that, when there be conflicting interests in indigenous claims, it must assess in each case the legality, necessity, proportionality and fulfillment of a lawful purpose in a democratic society (public purposes and public benefit), to impose restrictions on the right to property, on the one hand, or the right to traditional lands, on the other. (IACHR, 2006, par. 138)

Of course, the possibility of expropriating in the name of the ancestral community should be analyzed on a case-by-case basis, but that is undoubtedly the Court’s preference.¹⁸

As can be seen, the Inter-American system of protection in relation to private property is quite particular. Present in the American Convention on Human Rights, private property rights are nevertheless subject to strong limitations. In this sense, private property rights enjoy limited protection in the system, and yield to social justice, collective rights, the development of democratic society, the public interest, the

18 In paragraph 128, the Inter-American Court leaves a number of relevant definitions: “1) traditional possession of their lands by indigenous people has equivalent effects to those of a state-granted full property title; 2) traditional possession entitles indigenous people to demand official recognition and registration of property title; 3) the members of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith; and 4) the members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to innocent third parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality”.

common good, among other concepts. All this establishing that the economic compensation proceeds in situations of expropriation, but that it does not necessarily have to be a value according to the market. But the particularity of the Inter-American system is given by the Court's own jurisprudence, which has created a distinction of treatment between "non-indigenous" cases and "indigenous" cases. The latter are authorized to act as a group within the system, and according to case law, they enjoy strong recognition as regards access to property. Indigenous communities are attributed ties to private property that no other group would be able to experience, and when it comes to settling cases between a positive right to access private property by indigenous people, and the private property rights of the "non-indigenous people", in general, those end up prevailing.

In short, from the Inter-American system of protection, there do not seem to be strong private property rights for everybody, leaving them at the discretion of the state. In this way, it could be argued that the system does not consider private property rights as fundamental human rights. Of course, these conclusions differ regarding the property rights of indigenous communities, as groups with particular consideration from the system.

5. SO, IS THE PRIVATE PROPERTY RIGHT A HUMAN RIGHT UNDER INTERNATIONAL HUMAN RIGHTS LAW?

It is certainly complex to give a definitive answer to the question in the title. Perhaps it is feasible to bring back the definition "yes, but actually no". The private property right, analyzed from the field of human rights, is always struggling to belong, in permanent tension -perhaps fictitious- with their "peers", in particular with economic and social rights. It is a toxic relationship. This is because -sometimes- private property rights are recognized by human rights treaties and declarations, but immediately reduced and made available to the state for the satisfaction of other interests, which deny private property rights but in a certain way need them.

It is clear that the private property rights are not absolute. No right is. But it is one thing to be sure about that and another to

observe the frequent reluctance to consider the private property right as a fundamental human right. It has been seen that the rapporteurs of the United Nations, for example, in order to guarantee the right to food, propose to carry out massive expropriations of land. In addition, the Agenda 2030 leaves definitions that might suggest that it does not consider the private property right as a human right. And, of course, it should be borne in mind that the two main binding conventions of the system do not consider it as such. From the European and Inter-American systems, states are left with very broad powers to interfere with property in the name of the public or general interest, among others, being able, for example, to control it in the name of social justice or carry out expropriations by compensating the owners for lower values than those of the market. All this after having used euphemisms such as proportionality, fair balance, among others, really creative by the way.

Something that is related to this, is that under those interferences that are made to the private property right, access to property of other people is being proposed. For example, in proposing that states should take measures to ensure that everyone has their right to food, and even without going to the extreme of the expropriations proposed by the rapporteurs, it is being said that these people have the right to property. If the state gave them money or food itself, it would give them property. But to do so, the state had to move against someone else's property rights. The latter had its private property right affected so that other people could access private property, which could be called a right to property. A positive right to access to private property.

When there is a positive right to access property (which could be called right to property), someone -the state- must be inevitably limiting, or directly attacking someone else's private property rights. Is it not then that what human rights treaties and conventions are intended to ensure is the right to property -to access to property (of another person)-? Well, it's risky to make sure, too. From the analysis of the Declarations and Conventions on Human Rights analyzed in these pages, it is observed that their chapters on private property, when they exist, seem to regulate the existing private property, as it is now assigned. Of course, other rules by those and some interpretations by the bodies applying them could lead to other conclusions.

The right to fair remuneration implies a -legitimate- right to private property, as well as the right to food, clothing and housing, among others, such as the right of indigenous peoples to access private property from the Inter-American system. But these own documents conventions, treaties, and the interpretations that are made- do not speak of access to private property -right to property-. They omit to say that the right to food or clothing implies a right of access to private property. Of course, everyone should be able to have the right to access to these goods, that is, to access to property, in a legitimate way. But if for this right to property to be fulfilled other people's property rights have to be affected without consent, it would be difficult to say that these rights of access are human rights, much less those of the affected people. They would in turn be extremely weak. If the state, in a coercive way, advances against the property rights of certain people to guarantee the rights of access -right to property- of other people, these in turn will be later subject to the discretion of the state to interfere or not with their rights in order to guarantee the right to property -housing, food, clothing- of other people. The instability would be permanent. In that sense, the whole society would simply be the holder of goods that belong to the discretion of the state.

In general, however, the human rights field does not categorize in different ways "private property rights" or "right to property". Nor is it mentioned that certain economic and social rights are ultimately rights of access to property, for which the property rights of another person often had to be affected.

The analysis of declarations, conventions and their interpretations allow to affirm that from the field of human rights there is, at least, reluctance, fear or animosity to consider private property rights fundamental human rights. Even when property rights are incorporated in the texts of human rights documents, the need to state that they are subject to the general or public interest, and that they are in some way subordinate to collective rights, is immediate. And the interpretations of the organs that apply to those are also so, beyond some differences that exist between the three systems analyzed in the paper. When they mention it as a right to protect in the light of treaties and conventions, they hardly classify it as a human right, but beyond that, it is automatically necessary

to clarify that it is not absolute and that it yields to the general interest, when not mentioning its “social function” -that from this perspective only implies leaving it free to expropriations-. From the beginning their category of human rights is under suspicion. Are private property rights the black sheep of human rights? There are indications that they are, in the best case.

It is indeed very difficult after all to argue that the property right is a fundamental human right from the perspective of international human rights law. Its permanent tension with other rights, many of which depend on it, and the constant interferences made by the state call into question their membership. Perhaps what is conflicting is the current concept of human rights, which many times are nothing more than concessions to the state to advance rights, and not limits to its action. In any case it is a belonging with many conditions. A forced acceptance. A constant “yes, but actually no”.

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