Koldo Casla

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THE SOCIAL RIGHT TO PROPERTY

Social Function and Human Rights

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To Leire and Nahia, and to your ability to value what really counts.

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Social Function and Human Rights

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Contents

Acknowledgements

I write at home, in northeast London. Through my window, across the train tracks, I see a high-rise council estate, followed by Victorian houses with their private back gardens. I hear a train accelerate, a plane approaching (at a distance) London City Airport, and cars driving by the park, which locals know as the common and my daughter knows as the playground. From where I write, I can also see the kitchen windows of some of my neighbours, co-residents in this court. In this and other buildings, some own their home outright, some with a mortgage-secured loan, others must be renting privately, there are those who receive housing benefits, and those who are social tenants. We are all here and I don't know the details – neither should I. My surroundings are a welcome reminder of our human interdependence, of the fine line between public and private, of the extent to which the individual is shaped by the collective.

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I owe a debt of gratitude to the people who, through their writing and our conversations, have inspired me to think about property differently. This includes many who sit outside what we might conventionally call the global human rights community. They share many of the same concerns; only their vocabulary is a little different.

Friends and colleagues have generously read and commented on previous iterations of various segments of this book. I am very grateful to Donald Nicolson, Bruce Porter (Canada in Chapter 3, section 3.1), Aakanksha Badkur (India in Chapter 3, section 3.1), Daniela Sánchez Carro (Mexico in Chapter 3, section 3.1), Jackie Dugard, Sue-Mari Viljoen and Elsabe Van der Sijde (South Africa in Chapter 3, section 3.2), Sergio Fuenzalida Bascuñán, Verónica

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London, September 2025

List of abbreviations

ACHR	American Convention on Human Rights
ACHPR	African Commission on Human and Peoples' Rights
ACtHPR	African Court on Human and Peoples' Rights
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CESCR	Committee on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
ECHR	European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms)
ECSR	European Committee of Social Rights
ECtHR	European Court of Human Rights
ESCR	Economic, social and cultural rights
EU	European Union
FOI	Freedom of information
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of all Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRMW	International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families
ICSID	International Centre for Settlement of Investment Disputes
ILO	International Labour Organization
NGO	Non-governmental organisation
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights

UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UPR	Universal Periodic Review
US	United States (of America)

1. Introduction: is the ancient institution of property fit for contemporary social rights?

It was spring 2014 and we were at Barcelona airport. I was working as a research consultant for Amnesty International on a project on the human rights impacts of foreclosure procedures in Spain, a problem affecting tens of thousands of families up and down the country in the midst of an economic crisis. I travelled to Barcelona for some exploratory interviews. I was eager to meet with a well-known private law professor who taught nearby. He agreed to an appointment, but he explained by email that his schedule was extremely busy. He was going to land in Barcelona between two international conferences. He had a couple of hours to spare. Could I come to the airport and meet him there? Of course I could. The day in question arrived. It was going to be the last conversation in a very rich week of meetings with lawyers, activists, academics and people affected by evictions for mortgage arrears. The dialogue with the professor was just as illuminating. I took notes tirelessly. He seemed willing to engage, constructively, if not to indulge me. The professor, nonetheless, did not hide his scepticism about an international law and human rights-based perspective to mortgages and evictions. I am paraphrasing, but he said something like this: 'Property, contracts, loans, debt… these are institutions that have been with us since Roman law for two millennia or more; international human rights law is… what…? 60 years old?' In his eyes, private law was a pillar of the rule of law in a liberal society of rational individuals and free markets. By contrast, international human rights law was circumstantial and infantile in comparison with anything dating from the Romans. Surely, I could not expect to use it to shift the foundations of private ownership. Or could I?

It was not an academic seminar, and I missed my chance to follow up the interrogation. In a parallel universe, I might have gone on as follows. The Roman property included ownership of human beings by other human beings, and modern societies are no longer influenced by public laws and criminal laws articulated 20 or more centuries ago in the Apennine peninsula. It is essentially private law that jurists have preserved from the Romans. I would have asked how they could be so right about property and debt, and yet so

wrong about punishment and democracy. The professor might have responded that I was missing something important from the argument. The significance of private ownership and related private law institutions does not lie in the belief that Romans were morally superior and enjoyed the company of particularly brilliant legal minds. Above and beyond universal formulations of rights, there is an inherent value in preserving long-lasting institutions, not because they are necessarily *better* in abstract terms, but precisely because they have lasted for so long. These institutions have been embedded in the formation of complex societies over the centuries. To question them on the basis of comparatively fresh norms that claim to be global would be misguided.

The way I am presenting it, the professor's (imagined) position seems excessively Burkean for my intellectual comfort. But the proposition has stayed in the back of my mind for years. Some have argued that the extension of one's limbs over the external world to claim 'this is mine' is a sort of natural impetus (find some names in the history of Western political theory in Chapter 4, section 4.1). On the other hand, not all civilisations and cultures have visualised ownership equally; in fact, the idea of individual, exclusive and extractive possession is not embraced by many indigenous peoples and non-Western cosmovisions (an issue we shall return to in Chapter 4, section 4.2). This would suggest that humans are not set up with the property semiconductor chip. Ownership would be a social convention, and as such it can evolve, as it could come and go. At the same time, however, it is very hard to imagine the existing world's history and global politics without ownership. Whatever its philosophical and historical origins, the idea of private property has been a feature of political communities from time immemorial.

I met someone else that week of 2014 in Barcelona. This was a first-instance judge dealing with private and commercial law matters, including foreclosures and evictions. In our conversation, the judge lamented that, compared with public law, most legal operators did not think of private law as an area germane to the fulfilment of the bill of rights with a progressive mindset. And yet, he argued, further regulation and a more constitutionally sensitive adjudication could help in the delivery of the mandate for freedom, equality and solidarity in relation to, for example, family, housing or debt management. Along similar lines, years later I came across this quote by Hanoch Dagan: 'People's self-determination cannot be fully secured by public law; private law must not abdicate its distinct responsibility to form and sustain the variety of frameworks necessary for our ability to lead our chosen conception of life.'[1]

[1] Hanoch Dagan, Autonomy and property, in *Research Handbook on Private Law Theory* 185 (Hanoch Dagan and Benjamin Zipursky eds. Edward Elgar, 2020), at 187.

Private property plays a central role in economic growth and prosperity, but also in the concentration of wealth, engendering the conditions in which poverty and inequality take root. According to Oxfam, the wealth of the world's five richest men skyrocketed from US$405 billion to US$869 billion between 2020 and 2023, while that of the poorest 60% of the world's population decreased; the organisation projects that, as a result of the staggering accumulation of wealth at the top, poverty is projected to persist, at least, for 230 years.[2] Oxfam also estimates that, in just the first ten days of 2025, the richest 1% surpassed the amount of carbon dioxide that can be added to the atmosphere in a whole year without pushing the limits of 1.5°C of warming.[3] If property is essentially the 'interests in things',[4] why should society recognise those interests at all? The question is important because the state faces multiple and potentially conflicting demands. It is expected to refrain from interfering with private property and to prevent private actors from interloping as well. But in this day and age, the state is also mandated, constitutionally and as a matter of international law, to preserve the environment and to respect, protect and fulfil economic, social and cultural rights, rights such as housing, food, water, education, social security, health, access to work, and good working conditions – for short, 'social rights' in this book.[5] The state can and must use public resources to that end, but some of the resources necessary to sustain those rights are privately owned. In fact, since the public services to deliver social rights stand on taxes, it can be said, as Reich did more than six decades ago, that 'valuables that flow from government are often substitutes for, rather than supplements to, other forms of wealth'.[6] It follows, as put by Vitale much more recently, that 'citizens are giving the elected branches control over these social goods and services, entrusting them with the social goods and services that they need'.[7]

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[2] Oxfam, 'Inequality Inc. How corporate power divides our world and the need for a new era of public action' (2024).

[3] Oxfam, 'Richest 1% burn through their entire annual carbon limit in just 10 days' (press release, 10 January 2025).

[4] J.W. Harris, *Property and Justice* (Oxford University Press, 2002), 25.

[5] Besides economic, social and cultural rights, property affects civil and political rights as well. For example, private property rights can be weaponised to issue injunctions that can curtail the right to peaceful protest in public spaces – as with Occupy in the early 2010s and Extinction Rebellion in the early 2020s.

[6] Charles Reich, The New Property, 73(5) *Yale Law Journal* 733 (1964), at 737.

[7] David Vitale, *Trust, Courts and Social Rights: A Trust-Based Framework for Social Rights Enforcement* (Cambridge University Press, 2024), 36.

It thus becomes necessary to interrogate how much one owes others in society, and relatedly how much one can deem their property actually theirs and nobody else's. This book explores these issues by combining international human rights law, comparative law and property theory. I argue that it is time to recalibrate the meaning, scope and limits of the right and the institution of property in light of all the rights states are meant to respect, protect and fulfil, particularly social rights, in accordance with international human rights law as well as with constitutional bills of rights. In much of Western political theory, property has often been thought of as individual ownership, as protection from interference, as a negative liberty (we will return to this in Chapter 4, section 4.1). This particular idea of private property creates a divide between those who have and those who have not. Historically, the idea created a fundamental political cleavage, both in national politics – as only landowners were allowed to vote – and in global politics – as acquiring property rights over resources was the driver of imperialism and colonialism. Ownership does not exist in a vacuum. In most instances, it is not the result of mere talent and effort in a framework of equal opportunities. Property is often inherited. And even when it is not, its accumulation relies on infrastructures and policies that enable it in the first place and that rely on the sustenance and support from the collective. In this book I argue that we should think of property as a social right and a positive liberty. From ancient days, in its different forms – public or private, economically productive or not, communal or personal, etc – property is and has been consubstantial to human interaction, both with one another and with the natural environment. Property in general, and private property in particular, is a socially created institution that confers power and is constituted by rules and regulations. This institution serves both individual and social functions. The resources that are owned are inherently limited and scarce, which can lead to various competing claims, both individual and collective. Proper regulation of property is necessary, grounded in a range of values that society aims to uphold through the institutions it creates. These include principles of distributive justice, the advancement of human well-being, safeguarding physical security, and ensuring that individuals, especially those on the fringes of society, have the freedom to make choices.

Six substantive chapters follow from this introduction. Chapter 2 is devoted to how property is recognised in international human rights law. Property was proclaimed in the 1948 Universal Declaration of Human Rights. However, none of the two key treaties that elaborate on that declaration – the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, both adopted on 16 December 1966 – acknowledge this right. They only mention property as one of the prohibited grounds of discrimination, as do, with variations, the other key universal treaties in relation to equality between men and women, children's rights, racial

discrimination, rights of persons with disabilities, and migrant workers. There are similarities but also remarkable differences between the regional human rights systems. In Europe, the right is frequently asserted before the European Court of Human Rights. Unlike the American Convention on Human Rights and the African Charter on Human and Peoples' Rights, the European Convention on Human Rights explicitly recognises legal entities as rights-holders. However, under certain circumstances, both the African Commission on Human and Peoples' Rights and the Inter-American Court of Human Rights – monitoring compliance with international human rights obligations in Africa and the Americas, respectively – have extended the protection of treaty rights to corporations and individuals attempting to exercise their rights via legal entities. The Inter-American Court adopts a flexible and expansive interpretation of property rights to safeguard collective interests, especially those of indigenous peoples, a practice mirrored in the African human rights system. Despite the absence of explicit references in the treaties, monitoring bodies across all three regional systems utilise market benchmarks to assess the adequacy of compensation in cases of public takings. Besides pinpointing the differences and nuances between treaties and international bodies' exegeses, the chapter shows that the UN Committee on Economic, Social and Cultural Rights and UN Special Procedures have largely avoided the uncomfortable question of the meaning and contour of property in relation to the social rights proclaimed in international law. There are some recent valuable exceptions, though, which will be noted in Chapter 2.

Chapter 3 deals with comparative law on property, particularly comparative constitutional law. Property is proclaimed in the bills of rights of nearly all of the world's constitutions, and limitations to the right are formally recognised in approximately three-quarters of them. The social function is explicitly named as a qualifier of property in 23 states, particularly in Europe, Latin America and the Arabian Peninsula; 11 more use equivalent formulations; and many others have developed the social function, explicitly or not, in legislation and case law. Broadly speaking, the social function can be understood as the idea that private property ought to serve the owner's individual interests, but also the interests of the community where the owner is operating. A sizeable part of Chapter 3 is devoted to the analysis of three case studies: South Africa, Spain and Chile. The three countries have significant disparities in terms of economic development, and they live in radically different planetary neighbourhoods. At the same time, however, the three of them are medium-sized countries, of civil law tradition (mixed in the case of South Africa, but most matters pertaining to property fall under civil law), and they had traumatic and character-building experiences of authoritarianism in the twentieth century. Furthermore, South Africa, Spain and Chile are countries where the social function has been constitutionalised, through case law in South Africa. The

chapter will show that the concept of social function runs away from standardised readings, allowing for a wide margin of interpretation for law-makers and legal operators at the national level. While the flexibility can be welcomed insofar as the principle can be more easily adjusted to local realities and needs, it could also become problematic if one is left with the impression that the idea is devoid of any substantive meaning. In light of this, at the end of the chapter I call for a holistic reinterpretation of property and its social function to harmonise the fragmented international law in light of international standards on social rights.

As said earlier, this book combines international human rights law (Chapter 2), comparative law (Chapter 3) and property theory (Chapter 4). Chapter 4 looks at property as ideology and as an institution. Historically, property has been in the driving seat of the global expansion of the European international society. The chapter begins by examining the prominent role that property has played in Western legal and political theory, starting with Ancient Rome, followed by Thomas Aquinas, Locke, Rousseau, Kant, nineteenth-century utilitarians (and twentieth-century followers of 'Law and Economics') and Marxists. Next, the chapter covers some of the main theoretical critiques of the liberal approach to property as a matter of natural, fundamental and/or human rights, as well as the more empirical and political critiques of property as a lever of colonialism, inequality, neoliberal capitalism, Western-centric epistemology, and the assault against the commons. At that point, the chapter presents the contributions of a series of authors associated with progressive property theory, a school of thought that emerged in the 2000s and that grapples with the role of property in human flourishing and freedom, the relation between the property-holder and the community, and the role of the state. The chapter also introduces the thinking behind the concept of social function, coined by Léon Duguit in the early twentieth century, a concept that some in the progressive property community made their own in the last two decades.

The discussion sets the stage for Chapter 5 and my proposal to mesh property – as a right and as an institution – with social rights through an adaptation of Duguit's social function for the present time. The proposal is articulated in five principles: (1) property is a human right, of a social kind; (2) some of the maximum available resources to satisfy social rights are privately owned; (3) a social right to property should set limits to *jus abutendi*, meaning that it would not condone the destruction of a good or the sort of use that is contrary to its social function; (4) we should reconsider the value of compensation for public takings of property when the general interest is the fulfilment of social rights; and (5) it is necessary to distinguish between belongings, or personal private property, and investment in the form of property as capital, because not all holdings of property deserve the same level of protection from the social right to property.

Chapter 6 applies the principles of the proposal for a social right to property to housing, with three recommendations in relation to the private sector. First, human rights law can challenge the financialisation of housing by asserting and ensuring that residential properties should not be intentionally left vacant. Second, a law and policy framework grounded in the social function of property and in social rights should impose additional obligations, conditions and restrictions on corporate landlords and those with substantial real estate investment portfolios. Lastly, public authorities ought to proactively assess the merits of rent control measures, not as exceptionally valid forms of interference with the right to property, but as potentially necessary tools to maintain security of tenure and ensure the affordability of housing in the private sector.

Finally, Chapter 7 explores some of the implications of the proposal for the private provision of public services. Across the globe, private entities play a significant role in the direct and indirect delivery of public services that are essential for realising social rights. While these private suppliers possess ownership of some or all the resources required for providing these services, their authority and position are fundamentally derived from public authorities and society as a whole. As such, they are obligated to adhere to certain public duties. This chapter examines the application of the social right to property to navigate this inherent tension. To begin with, it asks the question of how human rights laws and principles may limit public authorities' ability to privatise essential public services. A considerable number of these private service providers operate as transnational corporations; hence, the second part of the chapter delves into the interplay between international human rights law and international investment law. Finally, the third and fourth segments concentrate on two specific public services frequently managed by private actors: transportation and energy.

There is a tension between private property and social rights. In this book, I argue that there is value in making such a tension explicit in order to delineate their scope and their interaction. This is not an invitation for human rights campaigners to advocate for the right to property, not even for a redefined version of it. Instead, this is an appeal to the human rights community to engage with property and to develop policies accordingly. With this book, I hope to contribute to assessing property's function in a democratic society that aims to secure the material conditions of freedom for everyone.

2. Property and social rights in international human rights law: between mutism and polysemy

The right to property is recognised in international law, but it is missing from some treaties where one would expect to find it, and it has been interpreted in a variety of ways by global and regional bodies in the human rights system.[1] In section 2.1, I start from the two foundational declarations from 1948, the American Declaration of the Rights and Duties of Man and the Universal Declaration of Human Rights. Next, I look at the two key treaties from 1966, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, including the discussions on property during the preparatory works in the 1950s. The chapter also includes the group-specific treaties at the UN level in relation to racial discrimination, women's rights, children, persons with disabilities and migrant workers, as well as coverage of property by Special Procedures and the Universal Periodic Review under the UN Human Rights Council. Finally, I identify points of convergence and divergence in the way property is being protected in the three continental regional systems. In section 2.2, I pay attention to the way the UN Committee on Economic, Social and Cultural Rights and UN Special Procedure holders with a mandate relevant for social rights have dealt with – or chosen not to deal with – property issues. I will show that, instead of addressing the question head on, international bodies dealing with social rights issues tend to treat property as an inconvenience. In future chapters I will elaborate on why and how that should change.

This chapter contributes to erecting the scaffold for the construction of a social right to property later on. That is why the analysis is circumscribed to international human rights law, not international law in general. Álvarez and Bauder count 16 binding human rights treaties inclusive of property rights in the four human rights subsystems at the UN level, and in Africa, the Americas

[1] Koldo Casla, The Right to Property: Taking Economic, Social and Cultural Rights Seriously, 45(2) *Human Rights Quarterly* 171 (2023), at 173–188.

and Europe.[2] We go beyond treaties in this chapter, paying attention to soft law forms, such as UN resolutions and independent human rights reports. In addition to international human rights law, property is subject to regulation in other areas of international law, in relation to health, refugee protection, criminal law, trade and investment, and the law of armed conflict, to name the most significant ones. For example, international investment law, both customary and treaty-based, protects foreign investors' interests; there are multiple conventions on intellectual property; international humanitarian law protects cultural and religious property, prohibits the destruction and confiscation of property, and regulates proportionate requisition; and there are anti-drug and anti-slavery treaties, effectively prohibiting certain forms of property.[3] We will return to some of these principles and provisions in the fragmented framework of international law in subsequent chapters.

2.1 PROPERTY IN INTERNATIONAL HUMAN RIGHTS LAW: A BUNDLE OF DEFINITIONS

2.1.1 Property in the Universal Declaration, the American Declaration and the 1966 Covenants

The Universal Declaration of Human Rights (UDHR) of December 1948 recognises the right to property in Article 17: 'Everyone has the right to own property alone as well as in association with others', and 'no one shall be arbitrarily deprived of *his* property' (italics added).[4]

The language of the UDHR is different from that of the American Declaration of Rights and Duties of Man, adopted in Bogotá, Colombia, seven months before the Universal Declaration. Article 23 of the American Declaration establishes that 'every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home'.[5] In other words, not all forms of ownership would deserve the consideration of human rights. For the drafters in the Americas, private property seemed to be a human right only to the extent that it is necessary to maintain dignity and to cover *essential needs of decent living*. We will return to this nuance more than once later in this book.

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[2] José E. Álvarez and Judith Bauder, *Women's Property Rights under CEDAW* (Oxford University Press, 2024), 12.

[3] John G. Sprankling, *The International Law of Property* (Oxford University Press, 2014), 50–51, 71–78, 100–110.

[4] General Assembly Resolution 217 (III) A, Article 17 (10 December 1948).

[5] American Declaration of the Rights and Duties of Man, Article 23 (2 May 1948).

Johannes Morsink's archival research shows that, due to the lack of consensus about property among national constitutions, the drafters of the UDHR considered borrowing the wording of the Bogotá Declaration.[6] At the early stages of the process, the Soviet delegation sought to secure 'some abstract formula which made allowance for different social systems', so the right to property would only be 'in conformity with the laws of the state in which such property is located'.[7] Such a formulation did not find its way into the final text, as delegates rightly pointed out that making the international recognition of rights entirely dependent on national laws would make such a recognition meaningless in practice. However, the Soviet Union persuaded other delegations to drop the word 'private' and to add 'in association with others', because of the differences between capitalist private property, collective or communal property, and property over personal items and incomes from work, a distinction that was essential in the Soviet legal system.[8] Nevertheless, the Soviet Union and its allies ended up abstaining on the UDHR at the General Assembly on 10 December 1948. The United States and others successfully advocated for the removal of the words 'essential needs' and 'decent living', alleging they were too vague.[9]

In the midst of the Cold War, neither the International Covenant on Economic, Social and Cultural Rights (ICESCR)[10] nor the International Covenant on Civil and Political Rights (ICCPR),[11] both adopted on 16 December 1966, proclaimed property as a right as such. According to Luis Valencia Rodríguez, author of a vast compilation of comparative constitutionalism in relation to property in the early 1990s, this was due to fundamental differences of opinion about the very concept of property and the extent to which the right could be subjected to restrictions.[12]

Property is only mentioned as one of the explicit grounds of prohibited discrimination in Article 2(2) of the ICESCR, and in Articles 2(1), 24 and 26 of

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6 Johannes Morsink, *Article by Article: The Universal Declaration of Human Rights for a New Generation* (University of Pennsylvania Press, 2022), 110.

7 Ibid.

8 Constitution of the Union of Soviet Socialist Republics (1936), Articles 6–10.

9 Johannes Morsink, *Article by Article: The Universal Declaration of Human Rights for a New Generation* (University of Pennsylvania Press, 2022), 112–14.

10 General Assembly Resolution 2200A (XXI), International Covenant on Economic, Social and Cultural Rights (16 December 1966).

11 General Assembly Resolution 2200A (XXI), International Covenant on Civil and Political Rights (16 December 1966).

12 Luis Valencia Rodríguez (Independent Expert), The Right of Everyone to Own Property Alone as well as in Association with Others, UN Doc. E/CN.4/1994/19 (15 November 1993), para. 34.

the ICCPR. Property is, at best, obliquely present in the ICESCR in Article 1 – the collective right of peoples to freely dispose of their natural wealth and resources – and in Article 15 – the moral and material dimension of an author's intellectual property right. We will return to the phantasmagorical manifestation of property in the ICESCR in section 2.2. As regards the ICCPR, the UN Human Rights Committee has several times declared claims partly or totally inadmissible *ratione materiae* because they alleged the violation of the right to property.[13] It is worth noting that enslavement and slave trade are prohibited in Article 8 ICCPR, which is essentially an exclusion of a type of ownership that had been widely practised in previous centuries.

Given the economic nature of property, one could have expected to find the right in the ICESCR. In its report of the 10th session, in 1954, the UN Commission on Human Rights recorded that 'no member of the Commission expressed opposition in principle to the inclusion of an article on the right of property' under the then draft ICESCR.[14] In fact, between 25 February and 2 March 1954, the Commission on Human Rights considered, debated and even passed by a majority several aspects pertaining to property, for example, in relation to the permissible limitation of the right, constraints to expropriations, or the meaning of compensation for state takings.[15] However, on the morning of 2 March 1954, the draft article in full was rejected by seven votes to six, with five abstentions.[16] In the afternoon, the Commission adjourned *sine die* the consideration of the inclusion of the right to property in the treaty.[17] The right to property was thereby effectively barred from the ICESCR.

According to Sprankling, property was deliberately excluded due to two main reasons: the ideological objection of the Soviet Union, and the strategic

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[13] For example, Human Rights Committee, *Famara Koné v. Senegal*, Communication No. 386/1989, UN Doc. CCPR/C/52/D/386/1989 (1994), para. 5.1; *Alina Simunek and Others v. Czech Republic*, Communication No. 516/1992, UN Doc. CCPR/C/54/D/516/1992 (1995), para. 4.3; *Kéténguéré Ackla v. Togo*, Communication No. 505/1992, UN Doc. CCPR/C/51/D/505/1992 (1996), para. 6.3; *PEEP v. Estonia*, Communication No. 2682/2015, UN Doc. CCPR/C/128/D/2682/2015 (2020), para. 7.6.

[14] Commission on Human Rights, Report of the Tenth Session (23 February – 16 April 1954), UN Doc. E/2573 E/CN.4/705 (April 1954), para. 40.

[15] Ben Saul (ed.), *The International Covenant on Economic, Social and Cultural Rights: Travaux Préparatoires, Volume II* (Oxford University Press, 2016), 1428–1453.

[16] John G. Sprankling, *The International Law of Property* (Oxford University Press, 2014), 11; Commission on Human Rights, Summary Record of the 417th Meeting, 2 March 1954 (UN Doc. E/CN.4/SR.417), p. 14.

[17] Commission on Human Rights, Summary Record of the 418th Meeting, 2 March 1954 (UN Doc. E/CN.4/SR.418), pp. 6–7.

rejection of newly decolonised nations, which expropriated property owned by former colonisers.[18] Schabas, on the other hand, expresses the view that ideological differences were relatively inconsequential.[19] As proclaimed in Article 17 UDHR, the scope and the limitations of the right to property were not overtly off-putting for either side. Schabas concludes with an exclamation mark: 'The real conclusion to be drawn from the *travaux préparatoires* is that the right to property was left out because it simply was not important or fundamental enough!'[20] Why is the right to property absent from the ICESCR? Despite appearances, Sprankling and Schabas may both be right at the same time. Sprankling appreciates that, in the Cold War context, the dispute about property was profoundly political, a deeply contentious topic. On the other side, relying on doctrinal analysis, including the preparatory works of the treaties, Schabas contends that the reason why property is conspicuously absent from the ICESCR is primarily technical – lack of consensus and clarity about the precise wording of a right of secondary importance. In fact, the different types of sources may explain the apparent conflict between the two authors. In his analysis, Schabas renders account of positions expressed by country delegates in technical and diplomatic meetings with formal minutes and summary records. However, not all diplomatic positions are given equal importance in a world shaped by core and periphery dynamics. Moreover, one must entertain the possibility that not all discussions were fully and officially recorded, while certain underlying conditions – colonialism, capitalism, etc – like elephants in the room, need not be verbalised to be present.

2.1.2 Property in the Group-specific Treaties and the Human Rights Council

The prohibition of discrimination in relation to property has been proclaimed in group-specific human rights instruments. Men and women are meant to enjoy equal rights to administer, enjoy and dispose of property (Articles 15(2), and 16(1)(h) of the 1979 Convention on the Elimination of All Forms of Discrimination Against Women, CEDAW).[21] Persons with disabilities must

[18] John G. Sprankling, The Global Right to Property, 52 *Columbia Journal of Transnational Law* 464 (2014), at 470–472.

[19] William Schabas, Omission of the Right to Property in the International Covenants, 4 *The Hague Yearbook of International Law* 135 (1991), at 158; R. G. Van Banning, *The Human Right to Property* (Intersentia, 2002), 37–38.

[20] William Schabas, Omission of the Right to Property in the International Covenants, 4 *The Hague Yearbook of International Law* 135 (1991), at 159.

[21] General Assembly Resolution 34/180, Convention on the Elimination of All Forms of Discrimination Against Women, Articles 15(2), 16(1)(h) (18 December 1979).

have equal rights to own and inherit property and to control their finances, and they cannot be arbitrarily deprived of their property (Article 12(5) of the 2007 Convention on the Rights of Persons with Disabilities, CRPD).[22] Children are to be protected from discrimination based on property among other grounds (Article 2(1) of the 1989 Convention on Rights of the Child, CRC),[23] which means that their rights should not depend upon tenure status. Racial discrimination ought to be prohibited also in relation to property (Article 5(d)(v) of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, ICERD).[24] Migrant workers should be protected from discrimination based on property, as well as from arbitrary deprivation of property (Articles 1(2), 7 and 15 of the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, ICRMW).[25]

It can be argued, as Sprankling does, that the recognition of the right to property in the group-specific treaties goes beyond the prohibition of discrimination, and that these treaties implicitly oblige signing states to respect the free enjoyment of property for all.[26] One could see these treaties as a sort of reaffirmation of Article 17 UDHR. The two newest treaties from this group, the 1990 ICRMW and the 2006 CRPD, explicitly prohibit the arbitrary deprivation of property. Excluding everyone from private property would formally be equal treatment, but it would render the prohibition of discrimination pointless in practice. In addition, while the group-specific treaties focus primarily on non-discrimination, the bodies that monitor them often espouse expansive and holistic readings of the rights contained in the treaties, potentially engaging with issues concerning property and its relationship with other rights. For example, as observed by Álvarez and Bauder, the CEDAW Committee tends to interpret women's rights broadly, based on an intersectional approach to discrimination, and directing its gaze to substantive – as opposed to formal – equality.[27]

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[22] General Assembly Resolution 61/106, Convention on the Rights of Persons with Disabilities, Article 12(5) (24 January 2007).

[23] General Assembly Resolution 44/25, Convention on the Rights of the Child, Article 2(1) (20 November 1989).

[24] General Assembly Resolution 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination, Article 5(d)(v) (21 December 1965).

[25] General Assembly Resolution 45/158, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Articles 1(2), 7, 15 (18 December 1990).

[26] John G. Sprankling, *The International Law of Property* (Oxford University Press, 2014), 207–208.

[27] José E. Álvarez and Judith Bauder, *Women's Property Rights under CEDAW* (Oxford University Press, 2024), 5, 10 and 329.

The 1989 ILO Convention No. 169 on Indigenous and Tribal Peoples proclaimed their right to 'ownership and possession', as two distinct legal categories, over their traditional lands.[28] Similarly, the 2007 Declaration on the Rights of Indigenous Peoples established that they have the right to 'own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership'.[29] We shall return to this materially and culturally specific expression of collective property later when dealing with the Inter-American and African case law.

The right to property is not synonymous with the right to *private* property in international human rights treaties and in the authoritative interpretation of these standards by UN bodies – Treaty Bodies, Special Procedures and the Universal Periodic Review (UPR). A search in the Universal Human Rights Index of the Office of the High Commissioner for Human Rights shows that, as of September 2025, the 'right to private property' is only mentioned twice.[30] The first one is in a recommendation from Mexico to Burkina Faso in the UPR in relation to equality between men and women,[31] and the second one is in the report of the Special Rapporteur on Adequate Housing on Argentina, calling for the redefinition 'of the right to private property as regulated in the civil code so as to include the concept of the social function of property'.[32] 'Private property', with no mention of a right, appears in 19 recommendations or observations from 12 human rights mechanisms, inclusive of the mentioned two references about Burkina Faso and Argentina. Examples include access to land of indigenous peoples in Congo and Paraguay (by the Special Rapporteur on the Rights of Indigenous Peoples),[33] compensation for losses of businesses in the aftermath of protests in Zimbabwe (Special Rapporteur on

[28] ILO, Indigenous and Tribal Peoples Convention, Article 14, ILO No. 169 (1989).

[29] General Assembly Resolution 61/295, Declaration on the Rights of Indigenous Peoples, Article 26(2) (2 October 2007).

[30] Universal Human Rights Index, https://uhri.ohchr.org/en/

[31] Human Rights Council, Report of the Working Group on the Universal Periodic Review: Burkina Faso, UN Doc. A/HRC/24/4 (8 July 2013), para. 135.59.

[32] Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context, Report: Mission to Argentina, UN Doc. A/HRC/19/53/Add.1 (21 December 2011), para. 59.

[33] Special Rapporteur on the Rights of Indigenous Peoples, Visit to the Congo, UN Doc. A/HRC/45/34/Add.1 (10 July 2020), para. 79; Special Rapporteur on the Rights of Indigenous Peoples, The Situation of Indigenous Peoples in Paraguay, UN Doc. A/HRC/30/41/Add.1 (13 August 2015), para. 88.

Freedom of Association),[34] demolition of houses and private property in Israel and the Occupied Palestinian Territories (Committee on Economic, Social and Cultural Rights, CESCR),[35] state acquisition of private property in Venezuela (Independent Expert on a Democratic and Equitable International Order),[36] or protection of victims of slavery in Kazakhstan (Special Rapporteur on Modern Forms of Slavery).[37] 'Right to property' is cited in 70 recommendations or observations by 11 human rights mechanisms, most of them from the CEDAW Committee and under the UPR, primarily in relation to access to land of indigenous peoples,[38] and equality between men and women.[39] 'Property rights'

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[34] Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, Visit to Zimbabwe, UN Doc. A/HRC/44/50/Add.2 (22 May 2020), para. 61.

[35] CESCR, Concluding Observations on the Fourth Periodic Report of Israel, UN Doc. E/C.12/ISR/CO/4 (12 November 2019), para. 53; Human Rights Council, Report of the Working Group on the Universal Periodic Review: Israel, UN Doc. A/HRC/38/15 (20 April 2018), para. 118.232; Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, Report: Mission to Israel and Occupied Palestinian Territory, UN Doc. A/HRC/6/17/Add.4 (16 November 2007), para. 61.

[36] Independent Expert on the Promotion of a Democratic and Equitable International Order, Report: Mission to Venezuela and Ecuador, UN Doc. A/HRC/39/47/Add.1 (3 August 2018), para. 25.

[37] Special Rapporteur on Contemporary Forms of Slavery, Including its Causes and Consequences, Report: Mission to Kazakhstan, UN Doc. A/HRC/24/43/Add.1 (27 June 2013), para. 130.

[38] Human Rights Council, Report of the Working Group on the Universal Periodic Review: Argentina, UN Doc. A/HRC/37/5 (22 December 2017), para. 107.171; Human Rights Council, Report of the Working Group on the Universal Periodic Review: Colombia, UN Doc. A/HRC/24/6 (4 July 2013), para. 116.119; Human Rights Council, Report of the Working Group on the Universal Periodic Review: Argentina, UN Doc. A/HRC/22/4 (12 December 2012), para. 99.111; CESCR, Concluding Observations: Brazil, UN Doc. E/C.12/BRA/CO/2 (12 June 2009), para. 9; Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context, Follow-up to Country Recommendations: Brazil, Cambodia, Kenya, UN Doc. A/HRC/13/20/Add.2 (26 February 2010), para. 15; Special Rapporteur on the Rights of Indigenous Peoples, Report: Mission to Suriname, UN Doc. A/HRC/18/35/Add.7 (18 August 2011), para. 19; Committee on the Rights of the Child, Concluding Observations: Brazil, UN Doc. CRC/C/BRA/CO/2-4 (30 October 2015), para. 79.d.

[39] Human Rights Committee, Concluding Observations: Togo, UN Doc. CCPR/C/TGO/CO/5 (24 August 2021), para. 19; Human Rights Council, Report of the Working Group on the Universal Periodic Review: Lebanon, UN Doc. A/

are mentioned in 231 recommendations or observations from 25 mechanisms, particularly the Committee on Enforced Disappearances,[40] the CEDAW Committee,[41] and the UPR.[42] Finally, the word 'property', obviously inclusive of the previous references, but not necessarily in the form of private property or as a right, appears in 1,489 recommendations or observations in 912 documents issued by 61 mechanisms. While in some of these occasions

HRC/47/5 (7 April 2021), para. 150.237; Human Rights Council, Report of the Working Group on the Universal Periodic Review: Gambia, UN Doc. A/HRC/43/6 (19 December 2019), para. 127.79; Human Rights Council, Report of the Working Group on the Universal Periodic Review: Tonga, UN Doc. A/HRC/38/5 (16 April 2018), para. 94.56; Human Rights Council, Report of the Working Group on the Universal Periodic Review: Liberia, UN Doc. A/HRC/30/4 (13 July 2015), para. 100.46; Human Rights Council, Report of the Working Group on the Universal Periodic Review: Cambodia, UN Doc. A/HRC/26/16 (27 March 2014), para. 118.53; Human Rights Council, Report of the Working Group on the Universal Periodic Review: Congo, UN Doc. A/HRC/25/16 (6 January 2014), para. 111.32; Human Rights Council, Report of the Working Group on the Universal Periodic Review: India, UN Doc. A/HRC/8/26 (23 May 2008), para. 86.17; CEDAW Committee, Concluding Observations: Bosnia and Herzegovina, UN Doc. CEDAW/C/BIH/CO/6 (8 November 2019), para. 40; CEDAW Committee, Concluding Observations: Saudi Arabia, UN Doc. CEDAW/C/SAU/CO/3-4 (2018), para. 64; CEDAW Committee, Concluding Observations: Oman, UN Doc. CEDAW/C/OMN/CO/2-3 (2017), para. 54; CEDAW Committee, Concluding Observations: Namibia, UN Doc. CEDAW/C/NAM/CO/4-5 (28 July 2015), para. 39; Independent Expert on Minority Issues, Report: Mission to Ethiopia, UN Doc. A/HRC/4/9/Add.3 (28 February 2007), para. 99.

[40] Committee on Enforced Disappearances, Concluding Observations: Cambodia, UN Doc. CED/C/KHM/CO/1 (25 March 2024), para. 58; Committee on Enforced Disappearances, Concluding Observations: Mauritania, UN Doc. CED/C/MRT/CO/1 (13 October 2023), para. 50; Committee on Enforced Disappearances, Concluding Observations: Costa Rica, UN Doc. CED/C/CRI/CO/1 (12 April 2023), para. 38–39.

[41] CEDAW Committee, Concluding Observations: Albania, UN Doc. CEDAW/C/ALB/CO/5 (14 November 2023), para. 47; CEDAW Committee, Concluding Observations: Guatemala, UN Doc. CEDAW/C/GTM/CO/10 (14 November 2023), para. 40; CEDAW Committee, Concluding Observations: China, UN Doc. CEDAW/C/CHN/CO/9 (31 May 2023), para. 47.

[42] Human Rights Council, Report of the Working Group on the Universal Periodic Review: Azerbaijan, UN Doc. A/HRC/55/15 (28 December 2023), para. 44.83, 44.91 and 44.97; Human Rights Council, Report of the Working Group on the Universal Periodic Review: Israel, UN Doc. A/HRC/54/16 (28 June 2023), para. 39.287; Human Rights Council, Report of the Working Group on the Universal Periodic Review: Botswana, UN Doc. A/HRC/54/9 (23 June 2023), para. 137.222.

the word might be used with a different meaning, for example to refer to an attribution or a characteristic, the numbers are striking, showing that sometimes UN human rights bodies choose to specify they refer to *private* property, but sometimes they choose not to do so.

The right to property – whether private, public, traditional, communal or personal – can be considered a socioeconomic right, insofar as property consists of ownership and possession over things that have or can have an economic value. The Commission on Human Rights seriously debated including property in the ICESCR, not the ICCPR, as we saw earlier (subsection 2.1.1). Property has also been considered a civil right, notably because of the central role of private property, together with liberty and formal equality, in the construction of liberalism in Western political theory (we shall return to this in Chapter 4).[43] For example, Article 5 ICERD includes 'the right to own property alone as well as in association with others' and 'the right to inherit' in its list of civil rights, alongside freedom of movement, right to nationality, marriage, and freedom of opinion, thought or association.[44] As we will see in section 2.1.3, property as a civil right is also the approach taken by the European Court of Human Rights, while the human rights bodies in the Americas and Africa have different views on the matter.

2.1.3 Property in the Regional Human Rights Systems in Europe, the Americas and Africa

The protection of property is proclaimed in Article 1 of the first Protocol to the European Convention on Human Rights (ECHR), a treaty devoted essentially to civil and political rights. The right was not included in the main text of the Convention due to difficulties in agreeing on the meaning and scope of the

[43] Robert Lamb, Liberty, Equality, and the Boundaries of Ownership: Thomas Paine's Theory of Property Rights, 72 *Review of Politics* 483 (2010); Robert Lamb, Locke on Ownership, Imperfect Duties and 'the Art of Governing', 12 *British Journal of Politics and International Relations* 126 (2010); Ellen Meiksins Wood, *Liberty and Property: A Social History of Western Political Thought from Renaissance to Enlightenment* (Verso, 2012); Julia McClure, The Legal Construction of Poverty: Examining Historic Tensions Between Property Rights and Subsistence Rights, in *Poverty and Human Rights* 54 (Suzanne Egan and Anna Chadwick eds, Edward Elgar, 2021); Erik J Olsen, The Early Modern 'Creation' of Property and its Enduring Influence, 21 *European Journal of Political Theory* 111 (2022).

[44] General Assembly Resolution 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination, Article 5(d)(v) and (vi) (21 December 1965).

right. In fact, it was argued during the preparatory works that the Convention should not address property given the socioeconomic nature of this right.[45] For example, as documented by Duranti, in the post-war era, 'the British Labour government was hostile to the codification of property rights provisions in any human rights treaty, suspecting that its political opponents at home might invoke them to oppose its economic planning, nationalization, and taxation measures'.[46] Diplomats from Sweden, Norway and Greece, among others, also expressed reservations, but differences were reconciled in the drafting process of the first protocol.[47] Article 1 of Protocol 1 ECHR contains three key statements. First, it protects the right of 'every natural or legal person' to the 'peaceful enjoyment' of 'possessions' ('*biens*' in the French version). The second rule is that no one shall be 'deprived' of their possessions except in the public interest and in accordance with the law. The caveat is the third rule: the state can 'control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties'.[48]

Both the ECHR and its monitoring judicial institution, the European Court of Human Rights, are very influential beyond the confines of Europe and international human rights law. For example, in an empirical analysis of 46 cases of international investment arbitration, all of which included references to human rights, Steininger found that 31 of them cited case law by human rights courts, and in more than 80% of the occasions to the European Court's interpretation of Article 1 of Protocol 1 ECHR, even though in most cases the defending country in question was not a European state.[49]

According to Simpson, despite the debate about the accommodation of an economic right in a treaty on civil and political rights, during the drafting

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[45] Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford University Press, 2004), 762; Tom Allen, Liberalism, Social Democracy and the Value of Property under the European Convention on Human Rights, 59(4) *International and Comparative Law Quarterly* 1055 (2010), at 1057.

[46] Marco Duranti, *The Conservative Human Rights Revolution: European Identity, Transnational Politics, and the Origins of the European Convention* (Oxford University Press, 2017), 330.

[47] Douglas Maxwell, *The Human Right to Property: A Practical Approach to Article 1 of Protocol No. 1 to the ECHR* (Hart, 2022), 65–76.

[48] Council of Europe, Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 1 (20 March 1952), ETS No. 9; ECtHR, *Sporrong and Lönnroth v. Sweden* [Plenary], Application No. 7151/75 (23 September 1982), para. 61.

[49] Silvia Steininger, What's Human Rights Got To Do With It? An Empirical Analysis of Human Rights References in Investment Arbitration, 31(1) *Leiden Journal of International Law* 33 (2018), at 39–40.

process there was wide support for the idea that 'private property was a prerequisite of human freedom', while at the same time 'it was legitimate, within reason, for the state to regulate and impose limits upon the right to property in the general welfare'.[50] For Allen, the primary purpose of Article 1 of Protocol 1 ECHR was to preserve stability in matters relating to individuals' control of their resources, even when such predictability meant consolidating a potentially unjust distribution of wealth.[51]

The right to property is one of the most commonly alleged violations in front of the European Court of Human Rights. Between 1959 and 2022, the European Court found a violation of Article 1 of Protocol 1 ECHR on 3,816 occasions, a number only behind Article 6 ECHR (fair trial within reasonable time, with 11,847 judgments) and Article 5 ECHR (right to liberty and security, with 4,903 judgments).[52] Many of these cases were brought by companies, which are explicitly covered by Article 1 Protocol 1 ECHR ('every natural or legal person'). Furthermore, Article 34 ECHR states that 'the Court may receive applications from any person, non-governmental organisation (NGO) or group of individuals',[53] and private companies are considered NGOs in this respect.[54] The European Court of Human Rights has not been coy about extending the protection of the ECHR to corporations in paradoxical ways. This is the case of Article 8 ECHR, on the right to *private* and *family* life,[55] even though businesses technically have neither.

While Article 1 of Protocol 1 ECHR is entitled 'protection of property', the first paragraph speaks of 'possessions', blurring the legal distinction between the legal entitlement and the effective occupation or physical control. *Property* and *possessions* mean the same thing for the purposes of the ECHR. Both terms have an autonomous meaning, independent from whether and how property is recognised and regulated at the national level.[56] In practice, anyway, all potential interests categorised as property nationally are likely to be treated

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[50] Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford University Press, 2004), 757.

[51] Tom Allen, *Property and the Human Rights Act 1998* (Hart, 2005), 285.

[52] Table Violations by Article and by State (1959–2022), ECtHR: https://www.echr.coe.int/Documents/Stats_violation_1959_2022_ENG.pdf

[53] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, Article 34 (4 November 1950), ETS No. 5.

[54] ECtHR, *Slovenia v. Croatia* [GC] (dec.), Application No. 54155/16 (18 November 2020), para. 62–63.

[55] ECtHR, *Société Colas Est and Others v. France*, Application No. 37971/97 (16 April 2002), para 41.

[56] ECtHR, *Depalle v. France* [GC], Application No. 34044/02 (29 March 2010), para. 68.

as possessions by the European Court of Human Rights.[57] According to the interpretation of the Court, '"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',[58] based, for example, 'on a reasonably justified reliance on a legal act which has a sound legal basis and which bears on property rights'.[59] Article 1 Protocol 1 ECHR also protects incomplete property rights when the claimant has a substantive economic interest, enjoying a right to use but lacking full ownership.[60] Both contributory and non-contributory social security or housing benefits would in principle be covered by Article 1 Protocol 1 ECHR, but the provision does not include the right to a certain type or amount of benefit.[61] As interpreted by the European Court of Human Rights, the right to property is no proxy for the right to social security,[62] nor for the right to adequate housing.[63]

Article 1(1) Protocol 1 ECHR states that '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'.[64] On paper, this provision does not make compensation mandatory in case of expropriation as a form of deprivation. A significant interference with the right to property, a deprivation of a possession, must be lawful and serve the general interest, but compensation is not explicitly required in the treaty. However, since the 1980s, it has been the standing case law of the European Court of Human Rights that, in all but 'exceptional circumstances', compensation of 'an amount reasonably related' to the market value would be required, because the absence of such a requirement would make the right to property 'largely illusory and

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57 Alison Clarke, *Principles of Property Law* (Cambridge University Press, 2020), 145.

58 ECtHR, *Kopecký v. Slovakia* [GC], Application No. 44912/98 (28 September 2004), para. 35(c).

59 Id, para. 47.

60 ECtHR, *Chiragov and Others v. Armenia* [GC], Application No. 13216/05 (16 June 2015), para. 147.

61 ECtHR, *Stec and Others v. UK* [GC], Application Nos. 65731/01 and 65900/01 (12 April 2006), para. 53.

62 Ingrid Leijten, The Right to Minimum Subsistence and Property Protection under the ECHR: Never the Twain Shall Meet?, 21 *European Journal of Social Security* 307 (2019).

63 ECtHR, *Tchokontio Happi v. France*, Application No. 65829/12 (9 July 2015), para. 59–60.

64 Council of Europe, Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 1(1) (20 March 1952), ETS No. 9.

ineffective'.[65] The Court reached this conclusion despite the fact that drafters very consciously decided not to include compensation in the Protocol given the lack of agreement in the 1940s and 1950s about whether full or even partial compensation should be part of the essential content of the right to property.[66] The terms of compensation, including the extent to which it is adjusted to the market value, are a key part of the Court's assessment of whether the deprivation of property is in the public interest, keeps a fair balance between means and ends, and between individual property rights and the general interests of the community.[67] The European Court tends to pay obeisance to the market as the ultimate indicator of the value of the property at the time it was lost, departing from it only rarely.[68] Strasbourg judges have declared: 'Any other approach could open the door to a degree of uncertainty or even arbitrariness.'[69] However, the Court has also been clear that the right to property of Protocol 1 ECHR does not include the right to full compensation: '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.'[70]

The phrasing and the conceptualisation of the right to property is noticeably different in the regional human rights systems in the Americas and Africa. Article 21 of the 1969 American Convention on Human Rights (ACHR)

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[65] ECtHR, *James and Others v. UK* [Plenary], Application No. 8793/79 (21 February 1986), para. 54.

[66] Tom Allen, Liberalism, Social Democracy and the Value of Property under the European Convention on Human Rights, 59(4) *International and Comparative Law Quarterly* 1055 (2010).

[67] ECtHR, *Sporrong and Lönnroth v. Sweden* [Plenary], Application No. 7151/75 (23 September 1982), para. 69; ECtHR, *The Holy Monasteries v. Greece*, Application No. 13092/87 and 13984/88 (9 December 1994), para. 71; ECtHR, *Former King of Greece and Others v. Greece*, Application No. 25701/94 (28 November 2002), para. 89; ECtHR, *Jahn and Others v. Germany* [GC], Applications No. 46720/99, 72203/01 and 72552/01 (30 June 2005), para. 93–94.

[68] Douglas Maxwell, *The Human Right to Property: A Practical Approach to Article 1 of Protocol No. 1 to the ECHR* (Hart, 2022), 244.

[69] ECtHR, *Guiso-Gallisay v. Italy* [GC], Application No. 58858/00 (22 December 2009), para. 109.

[70] ECtHR, *James and Others v. UK* [Plenary], Application No. 8793/79 (21 February 1986), para. 54. For an insightful study of clusters of topics, sub-topics and key judgments under Article 1 Protocol 1 ECHR, see: Víðir Smári Petersen, Valgerður Sólnes, Bram Akkermans and Gijs van Dijck, A Network Analysis for Determining the Topics and Precedents of Article 1 of Protocol No 1 (A1P1) to the European Convention on Human Rights, 14(2) *European Property Law Journal* 147 (2025).

proclaims that 'everyone has the right to the use and enjoyment of *his* property' (italics added), and that such use and enjoyment can be subordinated by law to the 'interest of society'; the law would establish the exceptional circumstances under which one could be 'deprived of *his* property… upon payment of just compensation, for reasons of public utility or social interest' (italics added).[71] Like its European counterpart, the Inter-American Court of Human Rights has developed a broad interpretation of property, 'including material goods that can be possessed or… intangible things, as well as any right that may form part of a person's assets… [and] rights that have been incorporated into a person's patrimony'.[72] Property 'includes all movable and immovable property, corporal and incorporeal elements, and any other intangible object of any value'.[73] For example, a retirement pension is an acquired right, therefore incorporated into personal patrimony, and hence covered by Article 21 ACHR.[74] In this regard, Article 21 ACHR is similar to Article 1 Protocol 1 ECHR, in line with what Reich called 'new property' rights.[75] In general, as observed by Sprankling, property rights under international law can cover a potentially unlimited range of *things*, movable or immovable, tangible or intangible, including intellectual property, shares, stocks and other financial instruments, but also contracts, licences, and, as said, legitimate expectations over public pensions and benefits.[76]

In the African system, the right to property can be found in Article 14 of the 1981 African Charter on Human and Peoples' Rights (Banjul Charter), containing two principles: 'The right to property shall be guaranteed', and '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'.[77] The guarantee of the right to property entails, according to the African

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[71] Organization of American States, American Convention on Human Rights, Article 21 (22 November 1969), OASTS. No. 36, 1144 UNTS 123.

[72] IACtHR, *Furland and Family v. Argentina*, Preliminary Objections, Merits, Reparations and Costs, Judgment (31 August 2012), para. 220.

[73] IACtHR, *Ivcher Bronstein v. Peru*, Merits, Reparations and Costs, Judgment (6 February 2001), para. 74.

[74] IACtHR, *Five Pensioners v. Peru*, Merits, Reparations and Costs, Judgment (28 February 2003), para. 102–103.

[75] Charles Reich, The New Property, 73(5) *Yale Law Journal* 733 (1964).

[76] John G. Sprankling, *The International Law of Property* (Oxford University Press, 2014), 33.

[77] African Charter on Human and Peoples' Rights, Article 14 (27 June 1981), OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982); ACHPR, *Interights v. Mauritania*, Communication No. 373/2009, Decision (November 2009 – May 2010), para. 46.

Commission on Human and Peoples' Rights, the right to have access to one's property and protection in case of unlawful removal of the property.[78] The African Commission has also established that the right to adequate housing, despite not being cited in the Banjul Charter, is implicit and can be derived from a combined reading of the right to health, protection of the family and the right to property.[79] The right to property is the first of the articles listed in the 2011 Principles and Guidelines on the Implementation of ESCR in the African Charter on Human and Peoples' Rights,[80] in light of the socioeconomic nature of this right, but in stark contrast with the ECHR. The Principles and Guidelines on the Implementation of ESCR make clear that the right 'includes the protection of a legitimate expectation of the acquisition of property',[81] as is the case in the European and Inter-American case law.

The foundational human rights treaties in the Americas and Africa do not explicitly recognise companies as rights-holders. This lack of recognition of legal entities did not prevent the African Commission on Human and Peoples' Rights from establishing that the seizure of land owned by a company violated the right to property,[82] or from calling for compensation to certain corporations.[83] For its part, in *Cantos v. Argentina* (2001), the Inter-American Court of Human Rights was of the opinion that 'the rights and obligations attributed to companies become rights and obligations for the individuals who comprise them or who act in their name or representation'.[84] In this way, the doors of the Inter-American system were opened so individuals could seek enforcement of their rights even 'when they are encompassed in a legal figure or fiction' created by the same system of law.[85] In an Advisory Opinion from 2016, the Inter-American Court clarified that legal entities are not holders of ACHR rights, but that natural persons may seek help from the Inter-American system to

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78 ACHPR, *Media Rights Agenda et al v. Nigeria*, Communications No. 105/93, 128/94, 130/94 and 152/96, Decision (1998), para. 77.

79 ACHPR, *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*, Communication 155/96, Decision (2002), para. 60.

80 ACHPR, African Commission on Human and Peoples' Rights, Principles and Guidelines on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (October 2011), para. 51.

81 Ibid, para. 53.

82 ACHPR, *Ivorian Human Rights Movement v. Côte d'Ivoire*, Communication No. 262/2002, Decision (7–22 May 2008).

83 ACHPR, *Kevin Mgwanga Gunme and Others v. Cameroon*, Communication No. 266/03, Decision (13–27 May 2009).

84 IACtHR, *Cantos v. Argentina*, Preliminary Objections, Judgment (7 September 2001), para. 27.

85 Ibid, para. 29.

claim the violation of rights they exercise through legal entities.[86] The impact on natural persons' rights has to be clearly proven, and this involves demonstrating 'how the damage or harm to the assets owned by the legal entity could imply, in turn, injury of the rights of the shareholders or partners'.[87] The Inter-American Court's position seems to be more in line with the general UN take on the matter. The Human Rights Committee, which monitors compliance with the ICCPR, can only consider communications from individuals,[88] which 'does not prevent such individuals from claiming that actions or omissions that concern legal persons and similar entities amount to a violation of their own rights'.[89] It is similar for the CESCR, in charge of the ICESCR, which can only receive complaints from 'individuals or groups of individuals'.[90]

Regional case law in the Americas and Africa shows that the right to property does go beyond economically valuable private property. For example, in *Barrios Family v. Venezuela* (2011), the Inter-American Court held that the seizure of personal belongings, like 'household appliances, money, medicines, clothes and articles of personal hygiene' by police agents during the illegal search of a home violated the right to property under the ACHR.[91] The African Commission on Human and Peoples' Rights has adopted similar positions.[92]

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[86] IACtHR, Advisory Opinion OC-22/16, requested by the Republic of Panama, on the Entitlement of Legal Entities to Hold Rights under the Inter-American Human Rights System (26 February 2016), 45.

[87] Ibid, para. 114; IACtHR, *Ivcher Bronstein v. Peru*, Merits, Reparations and Costs, Judgment (6 February 2001), para. 127; IACtHR, *Granier et al (Radio Caracas Television) v. Venezuela*, Preliminary objections, Merits, Reparations and Costs, Judgment (22 June 2015), para. 338 and 352.

[88] General Assembly Resolution 2200A (XXI), Optional Protocol to the International Covenant on Civil and Political Rights, Article 1 (16 December 1966).

[89] Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add. 13 (26 May 2004), para. 9.

[90] General Assembly Resolution A/RES/63/117, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Article 2 (10 December 2008).

[91] IACtHR, *Barrios Family v. Venezuela*, Merits, Reparations and Costs, Judgment (24 November 2011), para. 149.

[92] ACHPR, *Institute for Human Rights and Development in Africa v. Angola*, Communication No. 202/04, Decision (7–22 May 2008), para. 73; ACHPR, *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan*, Communications No. 279/03 and 296/05, Decision (13–27 May 2009), para. 205.

The exploration of property beyond the realm of profit-seeking ownership is particularly relevant in relation to indigenous peoples' rights. In *Awas Tingni v. Nicaragua* (2001), the Inter-American Court recalled that in the ACHR drafting process, it was purposefully decided to leave the word 'private' out of Article 21,[93] a point the Court used to extend the application of this provision to other forms of communal and collective property rights of indigenous and tribal groups.[94] The Inter-American Court connected the right to property with the economic survival, spiritual life and cultural identity of indigenous peoples.[95] This interpretation has not gone without critique. For example, Townsend and Townsend lament that the Inter-American system has not disassociated the concept of property 'from its colonial history', nor has the system transformed 'it into a concept apt for articulating Indigenous relations to land'.[96]

In *Xákmok Kásek v. Paraguay* (2010), the Inter-American Court summarised the implications of expanding the right to property to the communal property of indigenous peoples. According to the Court, traditional possession has 'the same effects' as a legal title granted by the state; indigenous peoples have the right to have their ownership recognised and registered by the state, which 'must delimit, demarcate and grant collective title to the lands'.[97] Indigenous peoples who have lost possession of their land for reasons beyond their control 'retain ownership rights, even without legal title, except when the land has been legitimately transferred to third parties in good faith'; if the lands have been legitimately sold and transferred, indigenous peoples 'have the right to recover them or to obtain other lands of the same size and quality'.[98] These principles implicitly acknowledge the possible conflict between property claims and interests of indigenous peoples, on one side, and good-faith buyers of private property, on the other.

In *Lhaka Honhat v. Argentina* (2020), the Inter-American Court for the first time drew an explicit connection between the right to communal and

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[93] IACtHR, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Merits, Reparations and Costs, Judgment (31 August 2001), para. 145.

[94] Ibid, para. 148.

[95] Ibid, para. 149. See also: IACtHR, *Yakye Axa Indigenous Community v. Paraguay*, Merits, Reparations and Costs, Judgment (17 June 2005), para. 123–131; IACtHR, *Sawhoyamaxa Indigenous Community v. Paraguay*, Merits, Reparations and Costs, Judgment (29 March 2006), para. 116–121.

[96] Dina Lupin Townsend and Leo Townsend, Epistemic Injustice and Indigenous Peoples in the Inter-American Human Rights System, 35(2) *Social Epistemology* 147 (2021), at 152.

[97] IACtHR, *Xákmok Kásek Indigenous Cmty. v. Paraguay*, Merits, Reparations and Costs, Judgment (24 August 2010), para. 109.

[98] Ibid.

traditional property of indigenous peoples through Article 21 ACHR, on the one hand, and the rights to food, water, cultural identity and diversity, and the right to a healthy environment through Article 26, on the other hand.[99] Similar to Article 2(1) ICESCR,[100] Article 26 ACHR urges states to 'adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization' of economic, social and cultural rights (ESCR).[101] Thus, in *Lhaka Honhat*, the Inter-American Court took into consideration the interdependence of rights, observing, for example in relation to nature, food and cultural rights:

> The environment is connected to other rights and that there are "threats to the environment" that may have an impact on food, water and cultural life. Furthermore, it is not just any food that meets the requirements of the respective right, but it must be acceptable to a specific culture, which means that values that are unrelated to nutrition must be taken into account. At the same time, food is essential for the enjoyment of other rights and, for it to be "adequate", this may depend on environmental and cultural factors. Thus, food may be considered as one of the "distinctive features" that characterize a social group and, consequently, included in the protection of the right to cultural identity by the safeguard of such features, without this entailing a denial of the historical, dynamic and evolutive nature of culture.[102]

In *Lhaka Honhat*, the Inter-American Court concluded that the state failed to intervene to protect the indigenous community from environmentally harmful activities that negatively affected their way of life, the access to and enjoyment of communal property, as well as their right to food and water as part of the right to an adequate standard of living.[103]

The African Commission has established that Article 14 of the Banjul Charter protects the 'rights, interests and benefits' of indigenous peoples 'in their traditional lands'.[104] The Commission has urged African states to 'adopt

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[99] IACtHR, *Indigenous Communities of Lhaka Honhat (Our Land) Association v. Argentina*, Merits, Reparations and Costs, Judgment (6 February 2020), para. 92–98 and 202–54.

[100] General Assembly Resolution 2200A (XXI), International Covenant on Economic, Social and Cultural Rights (16 December 1966).

[101] Organization of American States, American Convention on Human Rights, Article 26 (22 November 1969), OASTS. No. 36, 1144 UNTS 123.

[102] IACtHR, *Indigenous Communities of Lhaka Honhat (Our Land) Association v. Argentina*, Merits, Reparations and Costs, Judgment (6 February 2020), para. 274.

[103] Ibid, para. 278–289.

[104] ACHPR, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*,

policies and laws that secure the rights of indigenous populations/communities to own, control and manage their ancestral lands in the forests and protected areas'.[105] Echoing Inter-American jurisprudence, as well as the UN Declaration on the Rights of Indigenous Peoples, for the African Commission, the right to property gives indigenous peoples the 'claim to ownership to ancestral land under international law, even in the absence of official title deeds'.[106] Both the African Commission and the African Court on Human and Peoples' Rights have established that this right includes access to one's land, possession, prevention of encroachment by others, use, enjoyment of fruits, control and transfer – in the traditional Roman law vocabulary, *usus*, *abusus* and *fructus*.[107] (We shall return to these three Latin categories in Chapters 4 and 5.)

The European human rights system had the chance to engage rather early with the question of indigenous peoples' collective property rights. It was in 1983 when the European Commission of Human Rights – where European citizens were required to lodge their complaints first before the adoption of Protocol 11 in 1998 – received a grievance from two Norwegian Sámi people concerning the construction of a dam in their ancestral lands. The European Commission of Human Rights dismissed the case because domestic resources had not been exhausted. However, it also showed little disposition to exploring non-individual ideas of property: 'The Commission notes that the applicants do not appear to have any "property rights" to this area in the traditional sense of that concept. Nor have they claimed compensation for any such rights.'[108] The tone shifted with the *Könkämä* case (1996), brought by Swedish Sámi, when the European Commission of Human Rights, while declaring the case inadmissible, recognised indigenous hunting and fishing rights as common property; despite lacking formal title, the Commission admitted the applicants

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Communication No. 276/2003, Decision (2010), para. 187.

[105] ACHPR, Resolution on Indigenous Populations/Communities in Africa, ACHPR/Res.334(EXT.OS/XIX)2016 (25 February 2016).

[106] ACHPR, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, Communication No. 276/2003, Decision (2010), para. 207.

[107] ACtHPR, *African Commission on Human and Peoples' Rights v. Republic of Kenya*, Application No. 6/2012, Judgment (26 May 2017), para. 124; ACtHPR, *Ernest Karatta, Walafried Millinga, Ahmed Kabunga and 1744 Others v. United Republic of Tanzania*, Application No. 2/2017, Judgment (30 September 2021), para. 93; ACHPR, *Minority Rights Group International and Environnement Ressources Naturelles et Développement (on behalf of the Batwa of Kahuzi-Biega National Park) v. DRC*, Communication No. 588/15, Decision (21 April 2022 – 13 May 2022), para. 149.

[108] European Commission of Human Rights, *G. and E. v. Norway*, Application No. 9278/81 and 9415/81 (3 October 1983), 35.

had a property interest in the land.[109] Later on, in *Johtti Sapmelaccat RY et al v. Finland* (2005) and *Hingitaq 53 v. Denmark* (2006), the European Court of Human Rights seemed open to the principle that traditional hunting and fishing territories continuously held by indigenous peoples may be protected by Protocol 1 ECHR.[110] However, in *Hingitaq*, the European Court refused to consider the adequacy of state compensation for the sustenance of the lifestyle and identity of the community, not only for the claimants individually considered.[111] In Strasbourg, applications from indigenous groups have generally been ruled inadmissible for being manifestly unfounded in substance or for lack of exhaustion of domestic remedies. The Court seems unwilling to deal with complex philosophical, political and historical questions that precede the entry into force of the ECHR. As a result, the European Court lags behind its American and African equivalents in the development of international law on indigenous peoples' rights.

Article 14 of the African Charter on Human and Peoples' Rights remains silent about compensation, but Article 21(2), on the collective right to accessing natural resources, says that 'dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation'.[112] Despite the silence of Article 14 of the African Charter, the African Commission has held that the compensation must be 'prompt', 'full', 'fair and just',[113] and its Principles and Guidelines on the Implementation of ESCR say that the compensation for public acquisition of property should in general 'be reasonably related to the market value of the acquired property'.[114] The African Commission opens the door to exceptions, without much detail, but noting that consideration should be given to the individual rights and wider social

[109] European Commission of Human Rights, *Könkämä and 38 other Sámi villages v. Sweden* (dec.), Application No. 27033/95 (25 November 1996), 7.

[110] ECtHR, *Johtti Sapmelaccat RY et al v. Finland* (dec.), Application No. 42969/98 (18 January 2005), 17–18; *Hingitaq 53 v. Denmark* (dec.), Application No. 18584/04 (12 January 2006), 18–19.

[111] Ting Xu, A Law-and-Community Approach to Compensation for Takings of Property under the European Convention on Human Rights, 39(3) *Legal Studies* 398 (2019), 412.

[112] African Charter on Human and Peoples' Rights, Article 21(2) (27 June 1981), OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982); Rachel Murray, *The African Charter on Human and Peoples' Rights: A Commentary* (Oxford University Press, 2019), 374.

[113] ACHPR, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, Communication No. 276/2003, Decision (2010), para. 231–232.

[114] ACHPR, Principles and Guidelines on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (October 2011), para. 55.

interests at stake.[115] In the case of the Americas, while Article 21 ACHR does not specify it,[116] the Inter-American Court of Human Rights interprets that, when assessing the adequacy of 'just compensation', 'the market value of the property object of the expropriation prior to its declaration of public interest must be used, seeking a just balance between the public interest and the individual interest'.[117]

In sum, the right to property was proclaimed in the UDHR in 1948, but neither of the two fundamental treaties of 1966, the ICCPR and the ICESCR, acknowledge property as a self-standing right. They only mention property as one of the prohibited grounds of discrimination, as do primarily the other key universal treaties in relation to equality between men and women, children's rights, racial discrimination, rights of persons with disabilities, and migrant workers. The two newest group-specific treaties – the ICRMW on migrant workers, and the CRPD on disability rights – though, also address the issue of arbitrary deprivation. There is no univocal definition of the right to property, but particularly outside Europe it has been recognised that the concept comprises other forms besides private property, including personal property of little or no economic value. There are similarities but also remarkable differences between the regional human rights systems. In Europe, the right is one of the most frequently claimed in front of the European Court of Human Rights. The ECHR protects legal persons as rights-holders, which neither the American Convention nor the African Charter do explicitly. Having said that, in certain circumstances, both the African Commission and the Inter-American Court have extended the protection of treaty rights to corporations and/or to individuals who sought to exercise their rights through legal entities. The human rights system in the Americas began in the 1948 Bogotá Declaration on the Rights and Duties of Man by looking at the preservation of property necessary to the satisfaction of the essential needs of decent living. The 1969 ACHR, however, did not retain that wording, while the Inter-American Court of Human Rights has applied a flexible and broad interpretation of property to protect groups and collective interests. A similar practice has been followed by the African Commission on Human and Peoples' Rights. This is one of the starkest contrasts with the European Court of Human Rights, which has not really contributed with its jurisprudence to the development of indigenous communal property rights. Despite the lack of an explicit mention in the relevant treaties,

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115 Ibid.

116 Organization of American States, American Convention on Human Rights, Article 21 (22 November 1969), OASTS. No. 36, 1144 UNTS 123.

117 IACtHR, *Salvador Chiriboga v. Ecuador*, Reparations and Costs, Judgment (3 March 2011), para. 62; IACtHR, *Salvador Chiriboga v. Ecuador*, Preliminary Objection and Merits, Judgment (6 May 2008), para. 98.

the monitoring bodies in all three regional systems rely on the reference of the market to ascertain the adequacy of the compensation in the case of expropriation or deprivation. One significant difference between them is that, while in the case of Europe the right to (private) property is shoehorned into a civil rights treaty, that is not the case in the Americas and Africa. Their respective human rights bodies see property as an economic right, and recent jurisprudence from San José de Costa Rica has explicitly addressed the interdependence between property and other social, economic, cultural and environmental rights.

2.2 SOCIAL RIGHTS IN INTERNATIONAL HUMAN RIGHTS LAW: PRIVATE PROPERTY AS AN INCONVENIENCE

As indicated in the introduction, in this book I am using 'social rights' as shorthand for the economic, social and cultural rights (ESCR) recognised in international law. ESCR are proclaimed in the Universal Declaration of Human Rights,[118] and in multiple other declarations, statements and binding treaties, both at the UN level and in Europe (the European Social Charter, either in its original form of 1961 or the revised version of 1996), the Americas (Article 26 ACHR and the 1988 Protocol of San Salvador on ESCR), and Africa (above all, the Banjul Charter of 1981).[119] ESCR are also part of the UN group-specific treaties on racial discrimination, women's rights, children's rights, rights of migrant workers and their families, and rights of persons with disabilities.[120] The most significant treaty on ESCR is the 1966 International

[118] General Assembly Resolution 217 (III) A, Articles 22–27 (10 December 1948).

[119] Council of Europe, European Social Charter (18 October 1961), ETS No. 35; Council of Europe, European Social Charter (Revised) (3 May 1996), ETS No. 163; Organization of American States, American Convention on Human Rights, Article 26 (22 November 1969), OASTS. No. 36, 1144 UNTS 123; Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights, 'Protocol of San Salvador' (17 November 1988), OAS Doc. OEA/Ser.A/44; African Charter on Human and Peoples' Rights, Articles 15–17, 21–22 and 24 (27 June 1981), OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982).

[120] General Assembly Resolution 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination, Article 5(e) (21 December 1965); General Assembly Resolution 34/180, Convention on the Elimination of All Forms of Discrimination Against Women, Articles 10–14 (18 December 1979); General Assembly Resolution 44/25, Convention on the Rights of the Child, Articles 23–29 and 32 (20 November 1989); General Assembly Resolution 45/158,

Covenant on Economic, Social and Cultural Rights (section 2.1.1). This treaty recognises the right to work and rights at work, the right to form and join a trade union, the right to social security, the right to protection and assistance to the family, the right to an adequate standard of living (which includes housing, food, water and sanitation, clothing and the continuous improvement of living conditions), the right to the highest attainable level of health, the right to education, and the right to take part in cultural life, to enjoy the benefits of science and to benefit from one's intellectual and creative productions.[121]

Under Article 2(1) ICESCR, states must mobilise the maximum of available resources to achieve progressively the full realisation of ESCR.[122] More than an easily identifiable finish line, the idea of full realisation is a sort of compass for legislative, administrative, policy and judicial action. While progressive realisation entails the passing of time, states are expected to adopt 'deliberate, concrete and targeted' actions 'by all appropriate means', and some of these actions – while not the results – will be immediate obligations.[123] Apart from the obligation to take steps towards the progressive realisation of ESCR, under the ICESCR, states are under the immediate obligation of guaranteeing that these rights 'will be exercised without discrimination of any kind'.[124] There is a presumption of non-retrogression derived from the principle of progressive realisation.[125] As interpreted by UN human rights bodies, measures that would result in backwards steps in the enjoyment of ESCR would only be permissible if they are: (a) strictly temporary, (b) legitimate in light of the ultimate aims, (c) reasonable in light of the appropriateness of the means for those aims, (d) necessary, in the sense that there is no other reasonable and less harmful alternative, (e) proportionate, because the benefits are greater than the costs, (f) non-discriminatory, (g) protective of the minimum core content of rights, (h) based on transparent processes where active participation of people most

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International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (18 December 1990); General Assembly Resolution 61/106, Convention on the Rights of Persons with Disabilities, Articles 19 and 24–28 (24 January 2007).

121 General Assembly Resolution 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, Articles 7–15 (16 December 1966).

122 Ibid, Article 2(1).

123 CESCR, General Comment No. 3: The Nature of States Parties' Obligations, UN doc. E/1991/23 (14 December 1990), para. 2–4.

124 General Assembly Resolution 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, Article 2(2) (16 December 1966).

125 CESCR, General Comment No. 3: The Nature of States Parties' Obligations, UN doc. E/1991/23 (14 December 1990), para. 9.

affected is allowed, and (i) subject to review, accountability and impact assessment.[126] States have a tripod of obligations in relation to ESCR: to respect, protect and fulfil. Respect is the obligation to refrain from interfering directly or indirectly with the enjoyment of an individual's right. Protect requires states to prevent private actors from interfering with the enjoyment of a right by an individual. Finally, the obligation to fulfil refers to states' obligation to take all appropriate measures – legislative, administrative, budgetary, judicial, etc – to ensure a satisfactory level of enjoyment of the rights considering all available resources and subject to progressive realisation.[127]

We covered in section 2.1.1 how the right to property is not enshrined in the ICESCR. One could argue that the UN Committee on Economic, Social and Cultural Rights does not have a mandate to elaborate on the definition of rights not contained in the baseline covenant. However, the right to property is proclaimed in other international human rights treaties and declarations, and Article 5(2) ICESCR declares that no right recognised in national laws, international treaties or customs shall be restricted or derogated on the pretext that such a right is not recognised in the ICESCR.[128] Moreover, the UN Committee has provided authoritative interpretations of rights not explicitly mentioned in the ICESCR, such as the right to water, and opinions about relevant issues not envisioned during the drafting process in the 1950s and 1960s, such as sustainable development, business and human rights, or access to land.

Over the years, the CESCR has developed principles in relation to property in line with positions expressed by other human rights bodies. For example, the CESCR has stressed that women must have access to land, housing, property, inheritance and economic resources on an equal basis with men.[129] The Committee also sees the recognition of indigenous peoples' access to their

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[126] Independent Expert on the effects of foreign debt on human rights, Guiding principles on human rights impact assessments of economic reforms, UN Doc. A/HRC/40/57 (19 December 2018), Principle 10. See also: CESCR, Public debt, austerity measures and the International Covenant on Economic, Social and Cultural Rights: Statement, UN Doc. E/C.12/2016/1 (22 July 2016); CESCR, General Comment No. 19: Right to Social Security, UN Doc. E/C.12/GC/19 (4 February 2008), para. 42.

[127] As an example, see: CESCR, General Comment No. 15: The Right to Water, UN Doc. E/C.12/2002/11 (20 January 2003), para. 20–25.

[128] General Assembly Resolution 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, Article 5(2) (16 December 1966).

[129] CESCR, General Comment No. 12: The Right to Adequate Food, UN Doc. E/C.12/1999/5 (12 May 1999), para. 26; CESCR, General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights, UN Doc. E/C.12/2005/4 (11 August 2005), para. 28.

cultural institutions, ancestral lands, natural resources and traditional knowledge as manifestations of the right of everyone to take part in cultural life of Article 15 ICESCR.[130]

At the same time, however, the CESCR has also developed its expansive interpretation of the rights contained in the ICESCR while implicitly restricting the scope of the right to property, or simply ignoring it entirely. For example, the CESCR's General Comment No. 17 spends some time on the distinction between, on the one hand, the moral and material interests resulting from one's artistic, literary or scientific productions, and, on the other hand, the right to intellectual private property.[131] In General Comment No. 17, the CESCR drew a clear distinction between property and human rights in the very first paragraph in a way that would shape the whole document: 'Human rights are fundamental as they are inherent to the human person as such, whereas intellectual property rights are first and foremost means by which States promote creativity, encourage the dissemination of innovation, and preserve scientific, literary and artistic productions, among other goals.'[132] In other words, intellectual property would play an important role, but at the end of the day it would remain a discretionary creation of the state, a mere legal claim that 'can be revoked, licensed or assigned to someone else', unlike human rights, which would be 'timeless expressions of fundamental entitlements of the human person'.[133]

General Comment No. 24, on state obligations under the ICESCR in the context of business activities, appears to take corporations as a reality of life but lacks an acknowledgement and an assessment of how businesses can also be an instrument or an expression of economically productive private property. The CESCR begins by observing that 'businesses play an important role in the realization of economic, social and cultural rights, inter alia by contributing to the creation of employment opportunities and – through private investment – to development'.[134] These businesses cannot operate without economically productive property – in other words, capital. However, property in this document

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130 CESCR, General comment No. 21: Right of everyone to take part in cultural life, UN Doc. E/C.12/GC/21 (21 December 2009), para. 3.

131 CESCR, General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He or She is the Author, UN Doc. E/C.12/GC/17 (12 January 2006), para. 2.

132 Ibid, para. 1.

133 Ibid, para. 2.

134 CESCR, General Comment No. 24: State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, UN Doc. E/C.12/GC/24 (10 August 2017), para. 1.

is only mentioned when the CESCR calls for national regulation of intellectual property so as to prevent the 'denial or restriction' of the right to health and food.[135] The right to property is not acknowledged anywhere else. Once again, the Committee appears to think of property in opposition to ESCR, as a limit to the expansion of these rights, but not as a right in itself that would need to be made compatible with the whole human rights corpus based on the principles of interdependence and interrelatedness.

In General Comment No. 25, on science and ESCR, the CESCR stated that 'a balance must be reached between intellectual property and the open access and sharing of scientific knowledge and its applications'.[136] The Committee invited states to use 'compulsory licenses' and to 'refrain from granting disproportionately lengthy terms of patent protection for new medicines' in order to facilitate the production and distribution of affordable medicines.[137] In its 2021 statement on intellectual property in relation to COVID-19 vaccinations, the CESCR cut to the chase: 'Intellectual property rights are not a human right, but a social product.'[138] As if human rights were not so.

Special Procedures with ESCR-related mandates have also largely evaded the substance of ownership. In 2010, then UN Special Rapporteur on the Right to Food, Olivier de Schutter, addressed the issue of traditional communal land use, with a particular focus on the situation of indigenous peoples, land-cultivating smallholders, and herders, pastoralists and fisherfolk.[139] One should separate issues arising from agricultural land from those pertaining to urban planning and land for development. For good reason, though, the report of the Special Rapporteur on the Right to Food focused on the agrarian context and did not consider the place of private property more broadly. In 2017, the Special Rapporteur on Adequate Housing, Leilani Farha, presented her report on the financialisation of housing and its negative impact on human rights. The UN expert pertinently described and critiqued how the expanding dominance of financial markets in the housing sector relied on 'legal systems governing property rights',[140] but nowhere in the report did she address the

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135 Ibid, para. 24.

136 CESCR, General Comment No. 25: Science and Economic, Social and Cultural Rights, UN Doc. E/C.12/GC/25 (30 April 2020), para. 62.

137 Ibid, para. 69.

138 CESCR, Statement on Universal Affordable Vaccination Against Coronavirus Disease (COVID-19), International Cooperation and Intellectual Property, UN Doc. E/C.12/2021/1 (12 March 2021), para. 7.

139 Special Rapporteur on the Right to Food, Report on access to land, UN Doc. A/65/281 (11 August 2010).

140 Special Rapporteur on Adequate Housing, Report on the financialization of housing, UN Doc. A/HRC/34/51 (18 January 2017), para. 1 and 51.

extent to which these practices may exceed the remit of the right to property considering the need to fulfil the right to adequate housing. In 2018, the UN Special Rapporteur on Extreme Poverty and Human Rights, Philip Alston, observed that 'privatization advocates promiscuously invoke the language of freedom, property rights, autonomy and dignity, albeit often in ways that are entirely alien to agreed international human rights standards', and issued a call to reclaim human rights against privatisations.[141] However, the report does not provide any indication of how the right to property might be reinterpreted to make it compatible with – and even to fulfil – other human rights. The 2020 report on privatisation of water and sanitation services by the UN Special Rapporteur on Safe Drinking Water and Sanitation, Léo Heller, did not mention the right to property and its limits either.[142]

The tide might be turning, as there are some exceptions to the general lack of attention to property by UN Special Procedure mandate holders. In April 2020, the Independent Expert on Foreign Debt and Human Rights, Juan Pablo Bohoslavsky, issued an 'urgent appeal for a human rights response to the economic recession' emerging from the COVID-19 pandemic.[143] Bohoslavsky reminded governments that 'property rights are not absolute and, if duly justified, States should be able to take the necessary economic and legal measures to more effectively face the current health crisis'.[144] Later that year, the Special Rapporteur on Adequate Housing, Balakrishnan Rajagopal, called for a global ban on evictions and foreclosures, asking governments to provide shelter for homeless people in hotels and second properties, inviting them to purchase or expropriate empty or vacant real estate as necessary, and to provide financial assistance to low-income tenants and small-scale landlords, but not to corporate landlords.[145] In their 2024 joint report on the criminalisation of homelessness and poverty, Rajagopal and the Special Rapporteur on Extreme Poverty and Human Rights, Olivier de Schutter, acknowledged that 'laws protecting private property may legitimately protect against nuisance or trespass, but the response to such violations must be human rights compliant where property

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[141] Special Rapporteur on Extreme Poverty and Human Rights, Report on privatization, UN Doc. A/73/396 (26 September 2018), para. 73.

[142] Special Rapporteur on the Human Rights to Safe Drinking Water and Sanitation, Human Rights and the Privatization of Water and Sanitation Services, UN Doc. A/75/208 (21 July 2020).

[143] Independent Expert on Foreign Debt and Human Rights, COVID-19: Urgent Appeal for a Human Rights Response to the Economic Recession (15 April 2020).

[144] Ibid, 10.

[145] Special Rapporteur on Adequate Housing, COVID-19 and the Right to Adequate Housing: Impacts and the Way Forward, UN Doc. A/75/148 (17 July 2020), para. 68(b), (c) and (g).

rights are violated because of life-sustaining activities by persons experiencing homelessness or poverty. Punishing them for such activities is not a human rights-compliant approach.'[146] In 2025, the UN Special Rapporteur on Adequate Housing made a significant contribution to the debate with his report on land and the right to adequate housing; the UN expert advocated for a move beyond exclusivist forms of ownership in light of the social function of property and encouraged new democratic approaches to land use and management, including communal forms of land tenure.[147]

Going back to the CESCR, another exception to the general avoidance of the question of property is General Comment No. 26, on access to land (2022). The document provides insightful standards regarding the diverse facets of the relationship between property and land, for example: the patrimony that is part of the cultural heritage of indigenous people, equality between men and women, fair compensation in case of deprivation, the importance of agrarian reform for a more equitable distribution of land, the need to ensure that the formalisation or titling of informal settlements does not lead to greater commodification, the call to limit large-scale land investments and transactions in order to preserve the right to an adequate standard of living of small tenure holders, and the need to ensure access to communal lands.[148] General Comment No. 26 is an important contribution to the very necessary conversation about the outline of the right to property in relation to other ESCR. However, the text focuses on the reality of peasants, rural communities and indigenous peoples in rural areas. The reality in urban settings is out of its scope. Considering that more than 57% of the world's population live in urban areas, and that the proportion has risen sharply since 1960, when it was 34%,[149] an authoritative interpretation of the right to property and ESCR in cities is necessary. Furthermore, General Comment No. 26 deals with land rights only, and not with other issues relevant to property, such as the private provision of public services, intellectual property, foreclosures and rental evictions, or the privatisation and exclusion of public spaces.

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[146] Special Rapporteur on Extreme Poverty and Human Rights and Special Rapporteur on Adequate Housing, Breaking the cycle: ending the criminalization of homelessness and poverty, UN Doc. A/HRC/56/61/Add.3 (26 June 2024), para 4.

[147] Special Rapporteur on Adequate Housing, Land and the Right to Adequate Housing, UN Doc. A/80/351 (27 August 2025), para. 1, 4.

[148] CESCR, General Comment No. 26: Land and Economic, Social and Cultural Rights, UN Doc. E/C.12/GC/26 (22 December 2022), para. 15–17, 23 and 31–35.

[149] The World Bank, Urban Population (% of Total Population), United Nations Population Division, World Urbanization Prospects, https://data.worldbank.org/indicator/SP.URB.TOTL.IN.ZS

Prior to the adoption of General Comment No. 26, the 2007 UN Basic Principles and Guidelines on Development-Based Evictions and Displacement had sought to articulate an understanding of access to land from the perspective of the right to adequate housing.[150] In accordance with the Basic Principles, evictions would only be human rights-proof if 'undertaken solely for the purpose of promoting the general welfare'.[151] General welfare would be understood as the 'steps taken by States consistent with their international human rights obligations, in particular the need to ensure the human rights of the most vulnerable'.[152] The circularity of the definition is striking: an eviction is only compatible with international human rights law when it is consistent with human rights obligations. That aside, the scope seems to be narrower than Article 4 ICESCR, which allows for limitations of ESCR for the purposes of promoting the general welfare in a democratic society.[153]

The 2007 Basic Principles on Evictions and Displacement were conceived for cases of relatively large-scale development projects initiated or actively promoted by public authorities. It was only with the entry into force of the Optional Protocol to the ICESCR that the CESCR started to hear about more ordinary situations arising from struggles involving private actors. When resolving individual complaints, the CESCR has called for better protection of the procedural rights of homeowners in mortgage foreclosures.[154] The CESCR has also established that there must be an independent assessment of the proportionality of evictions in the private rented sector on a case-by-case basis.[155] The right to adequate housing may also require postponing 'an eviction while the competent authorities negotiate with the persons concerned regarding the available alternatives'.[156] In *López Albán v. Spain* (2019), despite saying that states can adopt measures to protect private property from illegal occupation,

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[150] Miloon Kothari, The Human Right to Adequate Housing and the New Human Right to Land: Congruent Entitlements, in *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric* 81 (Andreas von Arnauld, Kerstin von der Decken and Mart Susi eds, Cambridge University Press, 2021).

[151] Special Rapporteur on Adequate Housing, Basic principles and guidelines on development-based evictions and displacement, UN Doc. A/HRC/4/18 (5 February 2007), Annex para 21.

[152] Ibid, Annex footnote d.

[153] General Assembly Resolution 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, Article 4 (16 December 1966).

[154] CESCR, *IDG v. Spain*, Communication No. 2/2014, UN Doc. E/C.12/55/D/2/2014 (2015).

[155] CESCR, *Ben Djazia and Bellili v. Spain*, Communication No. 5/2015, UN Doc. E/C.12/61/D/5/2015 (2017), para. 15.1.

[156] CESCR, *Gómez-Limón Pardo v. Spain*, Communication No. 52/2018, UN Doc. E/C.12/67/D/52/2018 (2020), para. 9.6.

the CESCR extended the principle of proportionality to an illegal occupation of property. The Committee established that the proportionality test:

> entails examining not only the consequences of the measures for the evicted persons but also the owner's need to recover possession of the property. This inevitably involves making a distinction between properties belonging to individuals who need them as a home, or to provide vital income and properties belonging to financial institutions.[157]

This position has been reiterated in multiple other cases.[158] In *Walters v. Belgium* (2021), the CESCR acknowledged that the fact that property is not in the ICESCR is no reason to restrict this right or to derogate from it.[159] However, immediately after saying that, the Committee attempted to swiftly solve the conundrum this way: 'States parties would violate their duty to protect Covenant rights by failing to prevent or to counter conduct by businesses that leads to such rights being abused, or that has the foreseeable effect of leading to such rights being abused.'[160] It is the same wording used in General Comment No. 24, on states' obligations in relation to business activities.[161]

The right to property is not dealt with substantively in the case law of the European Committee of Social Rights either, beyond the points that landlords' property claims are legitimate in light of domestic law, and that the right to property can indeed clash with tenants' right to adequate housing.[162] As

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157 CESCR, *López Albán v. Spain*, Communication No. 37/2018, UN Doc. E/C.12/66/D/37/2018 (2019), para. 10.1, 11.5.

158 CESCR, *El Ayoubi and El Azouan Azouz v. Spain*, Communication No. 54/2018, UN Doc. E/C.12/69/D/54/2018 (2021), para 14.5; CESCR, *Naser v. Spain*, Communication No. 127/2019, UN Doc. E/C.12/71/D/127/2019 (2022), para 8.3; CESCR, *Hernández Cortés and Rodríguez Bermúdez v. Spain*, Communication 26/2018, UN Doc. E/C.12/72/D/26/2018 (2022), para 8.3; CESCR, *Infante Díaz v. Spain*, Communication No. 134/2019, UN Doc. E/C.12/73/D/134/2019 (2023), para 7.8; CESCR, *Vázquez Guerreiro v. Spain*, Communication No. 70/2018, UN Doc. E/C.12/74/D/70/2018 (2023), para. 8.3; CESCR, *Saydawi and Farah v. Italy*, Communications No. 226/2021 and 227/2021, UN Doc. E/C.12/75/D/226/2021 & E/C.12/75/D/227/2021 (2024), para. 8.3.

159 CESCR, *Walters (L.J.W.) v. Belgium*, Communication No. 61/2018, UN Doc. E/C.12/70/D/61/2018 (2021), para. 11.5.

160 Ibid.

161 CESCR, General Comment No. 24: State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, UN Doc. E/C.12/GC/24 (10 August 2017), para. 18.

162 Emma N. Nic Shuibhne, Michelle Bruijn and Michel Vols, Deconstructing the Eviction Protections Under the Revised European Social Charter: A Systematic

lamented by Nic Shuibhne, Bruijn and Vols, the European Committee's 'lack of guidance on how the right to housing and property can be interpreted to make them compatible (through a proportionality analysis, for example) does not assist or encourage the State to develop the right to housing'.[163]

Since *López Albán*, the CESCR has consistently drawn a line between the property rights of small-scale landlords and the interests of corporate and large-scale landlords. Irrespective of the sympathies one might feel towards it, the distinction requires scrutiny and justification considering all the rights at play. In *Moreno Romero v. Spain* (2021), a case of squatting of a residential property owned by a financial institution, the CESCR dismissed the communication on merits, among other reasons, because 'States parties enjoy a degree of discretion when regulating matters such as the unlawful occupation of property and when deciding on judicial remedies aimed at protecting the peaceful enjoyment of property in a democratic society'.[164] Particularly if the Committee opens the door to greater state leeway in the application of ESCR obligations, it should be more specific about what those obligations entail precisely regarding property.

2.3 TIME TO RESET THE RELATIONSHIP BETWEEN PROPERTY AND SOCIAL RIGHTS

In December 1990, the UN General Assembly adopted without a vote Resolution 45/98 on the 'respect for the right of everyone to own property alone as well as in association with others and its contribution to the economic and social development of Member States'.[165] The resolution recognised that there are many forms of property. There is private property, but there is also 'communal, social and state forms'; Resolution 45/98 also considered that further national measures were necessary to protect and preserve 'economically productive property, including property associated with agriculture, commerce and industry', urging states to enhance the status of the right to property in their laws and constitutions.[166] A very similar resolution was adopted in

Content Analysis of the Interplay Between the Right to Housing and the Right to Property, 23(4) *Human Rights Law Review* 1 (2023), at 15–16.

163 Ibid, 20.

164 CESCR, *Moreno Romero v. Spain*, Communication No. 48/2018, UN Doc. E/C.12/69/D/48/2018 (2021), para. 12.4. Two other reasons for the finding of no violation were that the courts had had the chance to assess the proportionality of the eviction and that the author had been offered temporary accommodation (para. 12.3 and 12.6).

165 General Assembly Resolution 45/1998 (14 December 1990).

166 Ibid, para. 1, 3, 4.

1988, Resolution 43/123, under the same title, and also with no need for a vote, but this resolution had only dared to 'suggest' that states and UN specialised agencies and bodies 'may wish' to 'address' economically productive property, together with personal property.[167]

According to Howard-Hassmann, Resolution 45/98 'did not generate much further interest, leaving the right to own property in abeyance'.[168] In fact, to this day, the General Assembly has never again adopted a resolution on the right to property as such.[169] One consequence of Resolution 45/98 was that it led to the appointment of Luis Valencia Rodríguez as independent expert of the then Commission on Human Rights. After extensive research, Valencia Rodríguez presented his report in November 1993, where he concluded that the right to own property 'may be regarded as an essential human right and a fundamental freedom', but he also questioned the universalisability of the right 'given the enormous variety of forms of property and their social importance'.[170] It should be noted that Valencia Rodríguez's report did not rely on a universal comparative analysis, but rather on information provided by some states, international organisations and NGOs, and the amount and substance of information received varied from country to country. Furthermore, Valencia Rodríguez wrote his report at a time of profound political transformation around the world in capitalism's favour. No ESCR-related UN Special Procedure existed at the time, nor had the right to a healthy environment been constructed outside specialised academic circles.[171] The CESCR had only issued three general comments, and negotiations towards an individual complaint mechanism – what became the Optional Protocol to the ICESCR – would only begin a decade later.[172] The global human rights community had

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[167] General Assembly Resolution 43/123 (8 December 1998), para. 6.

[168] Rhoda E. Howard-Hassmann, Reconsidering the Right to Own Property, 12(2) *Journal of Human Rights* 180 (2013), at 182.

[169] UN General Assembly Resolutions Tables: Resolutions Adopted by the General Assembly at its 78th session: https://research.un.org/en/docs/ga/quick/regular/78

[170] Luis Valencia Rodríguez, The right of everyone to own property alone as well as in association with others, UN Doc. E/CN.4/1994/19 (25 November 1993), para. 474–475.

[171] John H. Knox, Constructing the Human Right to a Healthy Environment, 16 *Annual Review of Law and Social Science* 79 (2020), at 81.

[172] Catarina de Albuquerque, Chronicle of an Announced Birth: The Coming into Life of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights – The Missing Piece of the International Bill of Human Rights, 32(1) *Human Rights Quarterly* 144 (2010).

largely ignored ESCR, and international and national advocacy on these rights was in its infancy.[173]

More than three decades later, an increasing number of ESCR are recognised in one way or another in most national constitutions.[174] Domestic and international courts have applied ESCR in different cases and scenarios.[175] There are multiple thematic reports emerging from the Human Rights Council, in addition to Treaty Body general comments, and individual decisions from Geneva and from the regional human rights systems. This abundant material has sketched out the meaning and significance of ESCR. Human rights advocates are also more confident dealing with issues relating to taxation, inequality and socioeconomic justice than in the 1990s. At the current state of normative development, there is no reason to doubt that ESCR can coexist with the right to property. Clashes of rights will occur, but it should be possible to deal with them through compromise and assessment of the conflicting interests at play.

A long time has passed since Valencia Rodríguez's report. We live in a radically transformed environment in political and epistemic terms. An international and comparative update of such a study could provide a chance to refresh our perspective and to identify general trends and particular nuances in the recognition and practice of property around the world. It could also confirm the extent to which there is or there is not *opinio juris* among nations about property, its scope and its limitations. We need a more consistent and holistic approach to the interpretation of property in light of state practice, property theory and human rights. That is indeed what the next three chapters are about. Chapter 3 will look at comparative law on property. Chapter 4 will cover theory on property as ideology and as institution. Chapter 5 will present a proposal for a right to property consistent with the whole corpus of international human rights law, including social rights.

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[173] Mary Robinson, Advancing Economic, Social, and Cultural Rights: The Way Forward, 26(4) *Human Rights Quarterly* 866 (2004).

[174] Evan Rosevear, Ran Hirschl and Courtney Jung, Justiciable and Aspirational Economic and Social Rights in National Constitutions, in *The Future of Economic and Social Rights* 37 (Katharine G. Young ed., Cambridge University Press, 2019).

[175] Malcolm Langford, Judicial Politics and Social Rights, in *The Future of Economic and Social Rights* 66 (Katharine G. Young ed., Cambridge University Press, 2019).

3. Property in comparative law

Property is one of the most popular entries in national bills of rights. Research to be cited in this chapter shows that the right to property is proclaimed in 97% of the world's constitutions. Limitations of the right are also formally recognised in a good number of them, approximately three-quarters. The social function is explicitly named as a qualifier of property in no fewer than 23 states, particularly in Europe, Latin America and the Arabian Peninsula, while 11 more use semantically equivalent formulations, and others have applied the social function, directly or indirectly in legislation and case law. We will return to social function in Chapter 4, when I will use it as a conceptual springboard to reinterpret property from a holistic perspective of human rights (section 4.4). For now, it is sufficient to say that, broadly speaking, the social function refers to the idea that private property ought to serve the owner's individual interests, but also the interests of the community where the owner is operating.

This chapter will look carefully at three case studies: South Africa, Spain and Chile. The intention is to 'keep real' about constitutional property law,[1] focusing on explaining how constitutional principles and standards operate in practice in relation to property, leaving the normative argument for Chapter 4. South Africa, Spain and Chile are countries where the social function of property has been constitutionalised, while not in the foundational text in the South African case. As we will see, the three case studies illustrate that the social function is defined and interpreted in multiple and sometimes contradictory ways by legal operators and judges depending on the juridico-political context of each country.

3.1 PROPERTY IN COMPARATIVE CONSTITUTIONAL LAW

We can start this section where we left off in the last chapter. One of the key messages from Luis Valencia Rodríguez's 1993 UN report on the right to property was that the overwhelming majority of states recognise property as

[1] Aileen Kavanagh, Keeping it real in constitutional theory, 1(2) *Comparative Constitutional Studies* 244 (2023).

a fundamental right, often with a constitutional status, but at the same time, this recognition is often nuanced with conditions and limitations that make property less than absolute. Valencia Rodríguez concluded back then that 'the majority of States have declared their commitment to the principle of full recognition and protection of all types of property, including private property'.[2] At the same time, he observed, 'no other right is subject to more qualifications and limitations in order to allow the State to act in the general interest, to prevent discrimination or abuse of property or to promote a just and equitable distribution of wealth'.[3] 'A balance has to be struck,' he went on, 'between the individual interest, on the one hand, and the interests of society, on the other hand.'[4]

Valencia Rodríguez's study was based primarily on information voluntarily provided by governments and UN agencies. Global comparative analyses have grown in sophistication since then. For example, in their influential 2011 study of the evolution of global constitutionalism, Law and Versteeg found property squarely in both more libertarian and more statist constitutions; this observation was consistent with the process of comprehensiveness and convergence in constitutional bills of rights, which these authors refer to as the 'rights creep' in comparative constitutionalism.[5] Their large-N (large sample size) comparative study showed that property is indeed one of the most popular rights, proclaimed in 97% of constitutions in 2006 – it was 81% in 1946, and 87% in 1986 – even more so than the right to privacy (95%), the prohibition of arbitrary arrest and detention (94%), and the right to association (93%). At the same time, limitations on property rights – regulation, public interest, social function, restrictions concerning land rights, mandate for land reform, etc – were formally recognised in 73% of constitutions in 2006, in 51% in 1946, and in 70% in 1986.[6] Versteeg updated the dataset of national constitutions in 2017 and cross-checked the findings with the Comparative Constitutions Project, with no noticeable variances as far as property is concerned.[7] The high degree of acceptance of property immediately after the Second World

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2 Luis Valencia Rodríguez, The right of everyone to own property alone as well as in association with others, UN Doc. E/CN.4/1994/19 (25 November 1993), para. 479.

3 Ibid, para. 472.

4 Ibid.

5 David Law and Mila Versteeg, The evolution and ideology of global constitutionalism, 99(5) *California Law Review* 1163 (2011).

6 Ibid, 1200–1201.

7 Adam Chilton and Mila Versteeg, *How Constitutional Rights Matter* (Oxford University Press, 2020), 80–81 and chapter 4; Comparative Constitutions Project: https://comparativeconstitutionsproject.org/

War strengthens the argument in Chapter 2 that the idea of property as a human or fundamental right was not really questioned in the early years of international human rights law (IHRL), while, in Valencia Rodríguez's words, 'there were considerable differences of opinion with regard to the concept of property, its role and functions, and the restrictions to which the right to own property should be subjected'.[8]

Comparative law can offer researchers and practitioners the opportunity to have an overview of problems and solutions, discover how other systems address them, and perhaps develop the basis to create something new altogether.[9] Rosalind Dixon identifies at least six purposes of comparative constitutionalism: (1) to identify the *genealogy* or origin of a norm; (2) to identify and test *arguments* and discourse across countries; (3) from a *doctrinal* perspective, to discover how judges have answered similar questions in different places; (4) *functionally,* to understand how constitutional principles and standards work in practice in diverse contexts; (5) to reflect on one's constitutional framework compared with others; and (6) to develop *cosmopolitan* or shared and common values that may be valid across various systems.[10] According to Van Erp, the academic investigation into property has traditionally been excessively 'static' and 'technocratic', assuming there would be big disparities between common law and civil law traditions, when in fact the differences are not always greater between these two families than within them.[11] The insufficiency of country-to-country comparisons and cross-fertilisation is not helped by linguistic barriers and by the disproportionate Western-centrism in much of the academic literature, particularly in English language. Having said that, Van der Walt and Walsh observe that, despite 'significant divergences' in comparative constitutional property law as per state powers over private property, most jurisdictions distinguish in one way or another between regulatory limitations, normally without compensation, and expropriatory limitations, generally with

[8] Luis Valencia Rodríguez, The right of everyone to own property alone as well as in association with others, UN Doc. E/CN.4/1994/19 (25 November 1993), para. 34.

[9] Bram Akkermans, The Comparative Method in Property Law, in *Researching Property Law* 90 (Susan Bright and Sarah Blandy, eds, Palgrave, 2016), at 91–93.

[10] Rosalind Dixon, Comparative constitutional modalities: towards a rigorous but realistic comparative constitutional studies, 2(1) *Comparative Constitutional Studies* 60 (2024), 62–63.

[11] Sief Van Erp, Comparative Property Law, in *The Oxford Handbook of Comparative Law* 1031 (Mathias Reimann and Reinhard Zimmermann eds, Oxford University Press, 2019). See also: Michele Graziadei, The structure of property ownership and the common law/civil law divide, in *Comparative Property Law* 71 (Michele Graziadei and Lionel Smith, eds, Edward Elgar, 2017).

payment of compensation.[12] The dividing line between these forms of intervention, regulation and expropriation is open to debate, and so is the extent of compensation. Van der Walt and Walsh also say that courts normally cover a broad range of interests under constitutional property, from land and real estate to movable objects, intellectual property and legitimate expectations in the form of accrued social benefits, and in some jurisdictions, mortgages and other real security rights, as well as tenants' rights.[13] This is similar to the wide interpretation of property interests applied by international human rights courts and bodies (as shown in Chapter 2, section 2.1.3).

Comparative law research shows that *social function* is explicitly named as a qualifier of property in a good number of constitutions. As we will see later in this chapter, the social function has been interpreted in multiple and often contradictory ways around the world. The social function is related to but also different from the public, social or general interest, which generally points to possible grounds for public authorities to interfere with private property, including deprivation of property, subject to compensation. By contrast, the social function is a mandate for public authorities to regulate the institution of property in light of the individual and social interests it is meant to serve, including but beyond – and before – public takings. By public interest, social interest or general interest, I mean those values, goals or concerns that are deemed to be commonly shared and valued in society and whose appreciation is not directly detrimental to individual members of groups within that society.

Of the more than 190 constitutions in force in the dataset of the Comparative Constitutions Project, 23 states recognise the social function explicitly.[14] These are: Andorra (1993, Article 27), Angola (2010, Article 89), Bahrain (2002, Article 9), Bolivia (2009, Article 56), Brazil (1988, Article 5(23)), Central African Republic (2016, Article 18), Chile (1980, Article 19(24)), Colombia (1991, Article 58, ownership *is* social function with an inherent ecological function), Dominican Republic (2015, Article 51), Ecuador (2008, Article 66(26), as 'social and environmental function and responsibility'), El Salvador (1983, Article 103), Honduras (1982, Article 103), Italy (1947, Article 42), Kuwait (1962, Article 16), Nicaragua (1987, Article 44), Panama (1972, Article 48), Paraguay (1992, Article 109), Philippines (1987, Article 6), Qatar (2003, Article 26), Saudi Arabia (1992, Article 17), Spain (1978, Article 33(2)), Suriname (1987, Article 34(1)) and Timor-Leste (2002, Article 54(2)). In addition, 11 more use similar formulations: 'social responsibility', in Azerbaijan

[12] A. J. Van der Walt and Rachael Walsh, Comparative Constitutional Property Law, in *Comparative Property Law* 193 (Michele Graziadei and Lionel Smith, eds, Edward Elgar, 2017), at 193, 200–201, 205, 213.

[13] Ibid, 196–197.

[14] Comparative Constitutions Project: https://constituteproject.org/

(1995, Article 29) and Hungary (2011, Article 13(1)); 'social benefit', in Belarus (1994, Article 44); obligation to contribute to the general welfare, in Croatia (1991, Article 48); obligation not to misuse property against the rights of others, public interests and nature, in Czechia (1993, Article 11); obligation to serve the public good, in Germany (1949, Article 14(2)); 'social justice' and 'common good', in Ireland (1937, Article 43(2)); obligation to benefit society, in Kazakhstan (1995, Article 6); duty to serve the well-being of both the individual and the community, in North Macedonia (1991, Article 30); exercise in 'harmony with the common good', in Peru (1993, Article 70); and property as entailing responsibility, in Ukraine (1996, Article 13). In other countries, the social function has been recognised in infra-constitutional but fundamental legislation, such as the Mexican civil code of 1928,[15] in case law, like 'social obligation' by the South African Constitutional Court (to be elaborated on in section 3.2 below),[16] or in a combination of both legislation and jurisprudence, such as the case of Portugal in relation to housing.[17]

A closer look at comparative law and practice illustrates the patterns of convergence and divergence in the constitutional recognition of property rights. It is fitting to start with the United States, not only because of its role as a superpower, but also because as early as 1791 this country proclaimed that private property shall not 'be taken for public use, without just compensation'.[18] This was not a world first, though. The principle of 'just compensation' had indeed been established in the French Declaration of the Rights of Man and of the Citizen two years prior.[19] The 14th amendment to the US Constitution, in 1866, added that the state shall not 'deprive any person of life, liberty, or property, without due process of law'.[20] Maxwell observes that recent political moves are veering the US Supreme Court's doctrine towards ever greater protection

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15 M. C. Mirow, The Mexican Civil Code of 1928 and the Social Function of Property in Mexico and Latin America, 37(3) *Emory International Law Review* 365 (2023).

16 *Shoprite Checkers (Pty) Limited v. Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* (CCT 216/14) [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) (30 June 2015), para. 50.

17 Ana Cordeiro Santos and Raquel Ribeiro, Bringing the Concept of Property as a Social Function into the Housing Debate: The Case of Portugal, 39(4) *Housing, Theory and Society* 464 (2021).

18 Fifth Amendment, (1791). (Via Congress.gov.)

19 Declaration of the Rights of Man and of the Citizen of 1789, Article 17. (Via Élysée.)

20 Fourteenth Amendment, on Equal Protection and Other Rights, Section 1 (1866). (Via Congress.gov.)

of property rights through the understanding of comparatively minor forms of control as expropriatory in nature, therefore deserving of compensation (*Cedar Point Nursery et al v. Hassid*, 2021).[21] The US also provides an interesting example with regard to poverty and public property. Despite the non-existent recognition of social rights in the US Constitution, starting in 2018, a series of rulings by the Court of Appeals for the Ninth Circuit – covering the states of Hawaii, Alaska, California, Oregon, Washington, Montana, Nevada, Idaho and Arizona – indirectly granted a licence to people in homelessness to occupy public spaces with their belongings. The Ninth Circuit Court of Appeals interpreted that denying this right would amount to a form of cruel and unusual treatment, prohibited under the 8th amendment. The Court of Appeals did not mandate the administration to take proactive measures to end homelessness or to provide any social services. Local and state authorities were simply required to let them be. The rulings were an implicit acknowledgement of the mere fact that homelessness is, first and foremost, an affront against freedom, because, as Waldron put it, 'everything that is done has to be done somewhere. No one is free to perform an action unless there is somewhere he is free to perform it.'[22] However, in 2024, the Supreme Court overturned the Ninth Circuit's doctrine (*Grants Pass v. Johnson*), with uncertain and potentially daunting prospects for hundreds of thousands of homeless people in the United States.[23] Incidentally, the European Court of Human Rights has shown an ambivalent position regarding the criminalisation of poverty and homelessness, with situations where it has ruled that it is contrary to the European Convention on Human Rights (ECHR) (*Lacatus v. Switzerland*, 2021) and situations where it has decided that this is not necessarily the case (*Dian v. Denmark*, 2024), and the discerning criteria remain obscure for now.[24]

Across the border, Canada shows that the right to property is not necessarily a given in comparative constitutionalism. The 1982 Charter of Rights and Freedoms does not include private property rights. This was a conscious decision. An amendment to add the right to property was rejected partly because

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[21] Douglas Maxwell, *The Human Right to Property: A Practical Approach to Article 1 of Protocol No. 1 to the ECHR* (Hart, 2022), 53.

[22] Jeremy Waldron, Homelessness and the Issue of Freedom, 39(1) *UCLA Law Review* 295 (1991), at 296.

[23] Mila Versteeg, Kevin L. Cope and Gaurav Mukherjee, The New Homelessness, 113 *California Law Review* 433 (2025).

[24] ECtHR, *Lacatus v. Switzerland*, Application No. 14065/15 (19 January 2021); ECtHR, *Dian v. Denmark* [dec.], Application No. 44002/22 (21 May 2024); Adam Ploszka, One step forward, two steps back: the European Court of Human Rights' approach to the criminalisation of begging, 2024(6) *European Human Rights Law Review* 551 (2024).

drafters feared that such a right could conflict with Canada's social security and assistance programmes and could give way to challenges in court against public regulation of corporate interests, including environmental protection. The drafters of the Canadian Charter were also keen to prevent a possible expansive judicial interpretation of property rights, like that of the US Supreme Court connecting contractual freedom, property and due process (since *Lochner v. New York*, 1905).[25]

The Republic of Ireland embedded in its 1937 Constitution private property, proclaimed as a 'natural right', with a sort of social function, phrased as 'social justice' and the 'common good'.[26] At the same time, the Constitution mandates the state to protect the 'personal right' of property from 'unjust attacks'.[27] Walsh observes that Irish judges have been largely deferential to political actors to balance out private interests and social justice concerns, either through legislation or administrative decision-making.[28] Conservatism has traditionally prevailed, but the landscape has changed in recent years as a result of the housing affordability crisis, with rent controls being implemented, and various parties advocating for a referendum on a constitutional right to housing.

Inspired by a commitment to human dignity and the social-democratic principle, Article 14 of the German Basic Law of 1949 imposes an obligation on private property to serve the public good.[29] The German Constitutional Court interprets this provision as a mandate to construe the institution of property with its social function in mind. In his comparison between German and American constitutional property law, Alexander observes that, unlike the US, in Germany, 'property is a fundamental right that is accorded the highest degree of protection only in cases in which the affected interest immediately at stake implicates the owner's ability to act as an autonomous moral and political agent'.[30] Article 15 of the Basic Law is devoted to nationalisations, and it reads as follows: 'Land, natural resources and means of production may,

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[25] Martha Jackman and Bruce Porter, Social and Economic Rights, in *The Oxford Handbook of the Canadian Constitution* 843 (Peter Oliver, Patrick Maklem and Nathalie Des Rosiers, eds, Oxford University Press, 2017), at 846–847.

[26] Constitution of Ireland 1937, Article 43.

[27] Ibid, Article 40.

[28] Rachael Walsh, *Property Rights and Social Justice: Progressive Property in Action* (Cambridge University Press, 2021), 236.

[29] German Basic Law 1949, Article 14(2). Human dignity is in Article 1(1), and the social-democratic principle in Article 20(1). Translation from Comparative Constitutions Project: https://constituteproject.org/

[30] Gregory Alexander, Property as a Fundamental Constitutional Right? The German Example, 88(3) *Cornell Law Review* 733 (2003), at 739.

for the purpose of nationalisation, be transferred to public ownership or other forms of public enterprise by a law that determines the nature and extent of compensation.'[31] After a strong campaign by social movements, in a referendum held in September 2021, nearly 60% of Berliners voted to make use of that clause and expropriate some 240,000 apartments owned by corporate landlords.[32]

Since 2003, Scotland has been going through a process of land reform. The Land Reform (Scotland) Act 2016 introduced a community right to buy land to further sustainable development.[33] In considering a decision in response to a community application to buy land, the Act requires Scottish ministers to have due regard, not only to the ECHR and the right to property contained in its First Protocol, but also to the International Covenant on Economic, Social and Cultural Rights (ICESCR).[34] It seems clear from parliamentary debates that the explicit reference to the ICESCR was primarily intended to limit property rights in light of the rights proclaimed in that treaty, such as housing, food and water.[35] By September 2025, a Land Reform Bill is currently under consideration, which would, among other things, require landowners to develop a land management plan, give consideration to access requests by members of the community, and make arrangements regarding rent reviews in agricultural settings.[36] Tenant rights advocates persuaded the Scottish Parliament to make use of its devolved powers – from the UK Government after 1998 – to adopt the Private Residential (Tenancies) (Scotland) Act 2016 to abolish no-fault evictions and create additional obligations for landlords in rent pressure zones.[37] It is also worth noting that the Scottish Parliament implemented rent caps for residential tenancies in 2022, which the Court of Session – Scotland's highest civil court – deemed not a disproportionate interference with landlords' right

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31 German Basic Law 1949, Article 15.

32 Joanna Kusiak, *Radically Legal: Berlin Constitutes the Future* (Cambridge University Press, 2024).

33 Land Reform (Scotland) Act 2016, Part 5.

34 Ibid, Section 56(14).

35 Douglas Maxwell, Broadening the human rights discourse, realising socio-economic rights, and balancing rights to property: moving beyond the rhetoric of socio-economic rights and Scottish land reform, 2019(1) *Public Law* 121 (2019), at 125.

36 Stage of the Land Reform (Scotland) Bill in the Scottish Parliament: https://www.parliament.scot/bills-and-laws/bills/s6/land-reform-scotland-bill

37 Mark Jordan, Contesting the property paradigm amid 'radical' constitutional change: Living Rent and the Private Residential (Tenancies) (Scotland) Act 2016, 44(3) *Legal Studies* 399 (2024).

to property.[38] Since 2018, the Scottish Government and most parties in opposition have pledged to incorporate the ICESCR and other human rights treaties into Scottish law.[39] Nonetheless, after years of discussion, to the chagrin of civil society groups, in September 2024, the Scottish Government decided not to include a human rights bill inclusive of the ICESCR and other treaties in the legislative programme for 2025.

The 1949 Constitution of India had an egalitarian and democratic ambition, reflected in a series of 'directive principles', not directly justiciable, such as the call to the state to promote welfare, reduce inequality of income, avoid the concentration of wealth, and ensure an adequate standard of living.[40] Originally, the Constitution proclaimed property as a fundamental right.[41] However, after two and a half decades of tension between the Supreme Court and Parliament regarding the scope of property rights in relation to land distribution and social reform in general, the Constitution was amended in 1978 to remove property from the list of fundamental rights. A new provision was included, Article 300A, outside the bill of rights, which reads: 'No person shall be deprived of his property save by authority of law.'[42] India appears to be the only country in the world to have amended its current constitution to water down the right to property. While the constitutional amendment was discursively conducive to land reform in states where there was political backing for it, whether it resulted in any sort of practical diminution of constitutional protection of property rights has also been questioned.[43] At the same time, through public interest litigation, in the 1980s India's Supreme Court started to pay more attention to the role of the judiciary in fostering social change, bearing in mind not only the fundamental rights of Part III, but also the directive principles of state policy of Part IV.[44] For example, in *Tellis v. Bombay* (1985), the Supreme

[38] Cost of Living (Tenant Protection) (Scotland) Act 2022; Court of Session, [2023] CSOH 76 P46/23, *The Scottish Association of Landlords, Propertymark Limited and Scottish Land Estates Limited v. Lord Advocate and Scottish Ministers* (2 November 2023).

[39] Koldo Casla, Economic and social rights in the UK: between pessimism of the intellect and optimism of the will, (2024)(1) *European Human Rights Law Review* 23 (2024).

[40] Constitution of India 1949, Articles 37, 38 and 39.

[41] Ibid, Articles 19(1)(f) and 31(1) in the original version.

[42] Constitution of India 1949, Article 300A. Inserted by the Constitution (44th Amendment) Act, 1978.

[43] A. K. Ganguli, Right to property: its evolution and constitutional development in India, 48(4) *Journal of the Indian Law Institute* 489 (2006), at 521–523.

[44] Tom Allen, Property as a fundamental right in India, Europe and South Africa, 15(2) *Asia Pacific Law Review* 193 (2007), at 202–203.

Court extended the right to life and personal liberty of Article 21 to cover 'the means of livelihood', which slum dwellers would be deprived of in the case of eviction without adequate resettlement – in the case in question, however, the applicants were eventually evicted without resettlement.[45] At the same time, particularly since the liberalisation of the economy in the 1990s, and partly inspired by the jurisprudence of the European Court of Human Rights, the Supreme Court never abandoned the idea that judges are meant to preserve private property from what they may deem as excesses by the other two state powers.[46] For instance, in *Delhi Airtech Services v. State of Uttar Pradesh* (2011), the Supreme Court was emphatic: 'It is accepted in every jurisprudence and by different political thinkers that some amount of property right is an indispensable safeguard against tyranny and economic oppression of the Government.'[47] In *K.T. Plantation v. State of Karnataka* (2011), the Supreme Court concluded that the right to a fair compensation in the case of public takings, which is not as such recognised in Article 300A, can nonetheless be 'inferred' from it.[48] More recently, the Supreme Court listed seven non-exhaustive rights applicable to the compulsory deprivation of property: the right to notice, the right to be heard, the right to a reasonable decision, the duty to acquire only for public purpose, the right of restitution or fair compensation, the right to an efficient and expeditious process, and the right of conclusion (final conclusion of the proceedings leading to vesting).[49]

With the revolution in full swing, Mexico adopted its Constitution in 1917 to become the first to proclaim social rights. Property was included in the extensive Article 27. The starting point is that land and water belong to the nation, which can transmit it to private actors, turning it into private property. Article 27 includes a clear commitment to agrarian reform, with the promise of distributing land to communities in need. Article 27 says:

> [T]he Nation shall at all times have the right to impose on private property such limitations as the public interest may demand, as well as the right to regulate the

[45] Supreme Court of India, *Olga Tellis and Ors v. Bombay Municipal Council*, 1985 (3) SCC 545 (10 July 1985).

[46] Tom Allen, The revival of the right to property in India, 10(1) *Asian Journal of Comparative Law* 23 (2015).

[47] Supreme Court of India, *Delhi Airtech Services Pvt Ltd and Anr v. State of Uttar Pradesh*, 2011 (9) SCC 354 (Judgment 18 August 2011), para. 26.

[48] Supreme Court of India, *K.T. Plantation Pvt. Ltd and Anr v. State of Karnataka*, 2011 (9) SCC 1 (Judgment of 9 August 2011), para. 121.

[49] Supreme Court of India, *Kolkata Municipal Corporation and Anr v. Bimal Kumar Shah and Ors*, 2024 INSC 435 (Judgment of 16 May 2024), para. 27.

> utilization of natural resources which are susceptible of appropriation, in order to ensure a more equitable distribution of public wealth…[50]

While not explicit in the Constitution, the social function permeated the civil code of 1928, a 'social private code' ('*código privado social*') to harmonise individual and social interests.[51] However, Azuela laments that in the neoliberal 'post-post-revolutionary' era of recent decades, the Mexican state largely did not live up to the spirit of 1917–1928, with a diminishing scope and intensity of state power in relation to eminent domain and regulation of land, and ineffective or non-existent public ownership of natural resources and archaeological sites, among other reasons.[52]

Colombia is the Latin American country that took the original conception of social function, as coined by Léon Duguit in 1911, most seriously (we shall return to Duguit in Chapter 4, section 4.4). The social function has been part of the Colombian legal culture at least since the 1930s.[53] Under Title II, Chapter 2, on economic, social and cultural rights, Article 58 of the 1991 Constitution seeks to make compatible the recognition of property as a right and as a social function with an inherent ecological function. Note that the 1991 Constitution does not say that ownership *has* a social function, but that it *is* a social function, a language also used in the 1936 Constitution.[54] Citing Duguit, in 1999, the Constitutional Court acknowledged that there is a contradiction between the sociological positivism of property as a social function and the deontological principle that property is part of a bill of rights. The Constitutional Court squared this circle by concluding that the social function is a rejection of the extreme individualism of property, meaning that the owner has obligations to the community, which the social state and the rule of law ('*Estado Social de Derecho*') ought to enforce.[55] Elsewhere the Constitutional Court declared that

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[50] Constitution of Mexico 1917, Article 27. Translation from Comparative Constitutions Project: https://constituteproject.org/

[51] M. C. Mirow, The Mexican Civil Code of 1928 and the social function of property in Mexico and Latin America, 37(3) *Emory International Law Review* 365 (2023), at 379.

[52] Antonio Azuela, Property in the post-post-revolution: notes on the crisis of the constitutional idea of property in contemporary Mexico, 89(7) *Texas Law Review* 1915 (2011), at 1941.

[53] Daniel Bonilla, Liberalism and property in Colombia: property as a right and property as a social function, 80(3) *Fordham Law Review* 1135 (2011).

[54] Constitution of Colombia, 1991, Article 58. The original text of the second paragraph reads as follows: *'La propiedad es una función social que implica obligaciones. Como tal, le es inherente una función ecológica.'* Property as a social function was proclaimed in Article 10 of the 1936 Constitution.

[55] Constitutional Court of Colombia, Judgment C-595/99 (18 August 1999).

the right to property is not only a subjective and exclusive right, but also an instrument to satisfy the community's interests.[56] In relation to the ecological function, the Constitutional Court as early as 1992 and 1993 recognised the ecological nature of the Constitution, the fundamental character of the right to a healthy environment and its interdependence with the right to life and the right to health.[57]

The United States, Canada, Ireland, Germany, Scotland, India, Mexico and Colombia are mere examples to show that, in spite of the convergence in comparative constitutional law, each country puts in its own subtleties. The rest of this chapter is devoted to a more careful analysis of three country studies to examine the particularities of property on the ground. The three cases are South Africa, Spain and Chile. A few-country or small-N analysis offers the framework for a thicker form of comparison to pay attention to the broader legal, political and institutional culture and context, interrogating causal inference inasmuch as possible.[58] Despite their historical, social and geographical disparities, South Africa, Spain and Chile provide most valuable insights in relation to historical legacies, land distribution, the use of international accountability mechanisms, and judicial restraint and overreach. The three countries belong to the civil law tradition; South Africa's legal system is considered mixed, but where private law is based on civil law. Chile and Spain have recognised the social function of property in their constitutions, while it can be deemed implicit in the constitutional interpretation of South Africa's bill of rights, as will be shown. They have all signed and ratified the International Covenant on Economic, Social and Cultural Rights – Chile in 1972, Spain in 1977, South Africa in 2015 – as well as equivalent treaties in their respective continents.[59]

At the same time, they have important differences. Spain was the first country in Europe, and the third one in the world, to accept the jurisdiction of the UN Committee on Economic, Social and Cultural Rights (CESCR) for alleged

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[56] Constitutional Court of Colombia, Judgment C-020/23 (9 February 2023), para. 24.

[57] Constitutional Court of Colombia, Judgments T-411/92 (17 June 1992), and T-092/93 (19 February 1993).

[58] Rosalind Dixon, Comparative constitutional modalities: towards a rigorous but realistic comparative constitutional studies, 2(1) *Comparative Constitutional Studies* 60 (2024), at 67–68; Ran Hirschl, The question of case selection in comparative constitutional law, 53(1) *American Journal of Comparative Law* 124 (2005), at 132–133; Todd Landman, Comparative politics and human rights, 24(4) *Human Rights Quarterly* 890 (2002), at 904–908.

[59] UN Treaty Collection, Status of Ratification of ICESCR: https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-3&chapter=4

violations of social rights. This mechanism has been used extensively in the last decade, to the point that more than 90% of cases submitted to the attention of the UN Committee from all countries that have accepted the Committee's jurisdiction concern Spain and the right to adequate housing.[60] Neither Chile nor South Africa is bound by the individual complaint procedure under the CESCR. As we will see, particularly since 2013 at the regional level, and since 2023 at the national level, Spain has adopted laws that proclaim the right to housing, including creating different levels of obligations for large and small landlords. Chile went through a process of constitutional reform or replacement between 2019 and 2023, with two drafts, the first one aiming to protect social rights and limit property slightly, the second one seeking to do exactly the opposite, superimposing property rights over the state's duties in relation to social rights. None of the two drafts received the support of the majority of the population in two referenda in 2021 and 2023. For now, the country keeps a constitution that was originally adopted under Pinochet in 1980, which provides one of the most maximalist protections of the right to property in comparative constitutionalism, despite the said reference to the principle of social function. Finally, the 1996 South African Constitution intended to leave apartheid behind and transform South Africa into a fully democratic country. According to Section 26 of the South African Constitution, the state is required to adopt reasonable legislative and other measures to give effect to the right to housing on a progressive basis within available resources. The qualified nature of the state's housing obligation has had a significant impact on how courts approach the enforcement of this right. The right to property is proclaimed in Section 25, which includes a mandate for land reform. However, three decades after Mandela's first presidential election, South Africa remains a profoundly unequal society in terms of income, wealth and access to land.

Sections 3.2, 3.3 and 3.4 below look at the case studies of South Africa, Spain and Chile, respectively. We will look at the recognition of property in the constitutional bills of rights and the extent of domestication of international human rights law. We will follow by exploring constitutional and legal limitations of property, including the meaning of social function and equivalent formulations in legislation and/or case law. The chapter will also pay attention to particular features in each jurisdiction: land reform and the legacy of apartheid in South Africa, decentralisation and regulation of the private rented sector in Spain, and the *propietarización* or proprietarian ideology of rights in Chile.

[60] Global Initiative for Economic, Social and Cultural Rights, *Yearbook of the Committee on Economic, Social and Cultural Rights 2023* (GI-ESCR, 2024), 22.

3.2 SOUTH AFRICA AND THE PROMISE OF TRANSFORMATION

3.2.1 Constitutional Transformation between Social Rights and Property

The commitment 'to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order', expressed the South African Constitutional Court with confidence in 1997.[61] The promise of transformation is at the core of scholarly analysis of South Africa's constitutional order post-apartheid.[62] With its 1996 Constitution, South Africa became the prime model of how social rights could be constitutionalised and enforced, and this happened in the most difficult circumstances of profound racialised inequalities after decades of institutionalised discrimination.

A demand from civil society and the liberation movements,[63] some social rights were formally proclaimed in the interim Constitution of 1993, such as those pertaining to prison conditions, children's rights, the right to a basic education, labour rights, and the right to an environment that is not detrimental to health.[64] It was the legislative chamber resulting from the first free and democratic elections in 1994 which consolidated the constitutional recognition of social rights, primarily in Sections 24 to 29, devoted to the environment, property, housing, health, food, water, social security, children's rights

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[61] *Soobramoney v. Minister of Health (Kwazulu-Natal)* (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997), para. 8. The principle of transformation had been appreciated by the Court even earlier in light of the 1993 Interim Constitution: *Du Plessis and Others v. De Klerk and Another* (CCT8/95) [1996] ZACC 10; 1996 (3) SA 850; 1996 (5) BCLR 658 (15 May 1996), para. 157; *S v. Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 (6 June 1995), para. 261.

[62] Karl E. Klare, Legal culture and transformative constitutionalism, 14(1) *South African Journal on Human Rights* 146 (1998); Marius Pieterse, What do we mean when we talk about transformative constitutionalism?, 20(1) *South African Public Law* 155 (2005); Sandra Liebenberg, *Socio-Economic Rights Adjudication under a Transformative Constitution* (Juta, 2010); Stuart Wilson, *Human Rights and the Transformation of Property* (Juta, 2021).

[63] Albie Sachs, South Africa's unconstitutional constitution: the transition from power to lawful power, 41(4) *Saint Louis University Law Journal* 1249 (1997).

[64] Sandra Liebenberg, *Socio-Economic Rights Adjudication under a Transformative Constitution* (Juta, 2010), 17.

and education.[65] Even though South Africa only ratified the ICESCR in 2015, having signed the treaty in 1994, its influence on the Constitution is palpable. For example, Section 26(2) reads, 'The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation' of adequate housing, which goes hand in hand with Article 2(1) ICESCR.[66] The influence also permeated the jurisprudence of the Constitutional Court. For example, in *Grootboom* (2000), the standard-setting case on housing, the Court interpreted the principle of progressive realisation broadly in line with the UN CESCR, and endorsed the Committee's presumption of non-retrogression derived from progressive realisation.[67] The influence between the CESCR and the South African Constitutional Court has been bidirectional, for example, with the inclusion of the reasonableness test – enshrined in the Constitution and developed in *Grootboom* and other cases – in the Optional Protocol to the ICESCR.[68]

Public authorities must respect, protect, promote and fulfil the bill of rights, which is binding on all organs of the state, including the legislature, the executive and the judiciary.[69] The Constitution recognises customary law insofar as it is not contrary to the Constitution itself.[70] The general constitutional rule is that international treaties will be binding once they have been approved by the two chambers of parliament, the National Assembly and the National Council of Provinces.[71] This applies to the ICESCR, the African Charter on Human and Peoples' Rights, and other treaties pertaining to social rights and human rights in general. However, since international human rights treaties are not considered self-executing, they would become domestic law only when

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65 Constitution of South Africa, 1996, Sections 24–29.

66 General Assembly Resolution 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, Article 2(1) (16 December 1966).

67 *Government of the Republic of South Africa and Others v. Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000), para. 45.

68 General Assembly Resolution A/RES/63/117, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Article 8(4) (10 December 2008); Sandra Liebenberg, Reasonableness Review, in *The Oxford Handbook of Economic and Social Rights* (Malcolm Langford and Katharine G. Young, eds, Oxford University Press, 2022). For an excellent analysis of the contributions and limitations of the reasonableness test, see: Sandra Liebenberg, *Socio-Economic Rights Adjudication under a Transformative Constitution* (Juta, 2010), chapter 4 and 484–485.

69 Constitution of South Africa, 1996, Sections 7(2) and 8(1).

70 Ibid, Section 211.

71 Ibid, Section 231(2).

they are enacted as such by national legislation.[72] International conventions are becoming increasingly embedded in South Africa's jurisprudence, and, with varying degrees of detail, judges sometimes have regard to UN Treaty Body decisions.[73] Customary international law is directly enforceable unless it is deemed contrary to the Constitution or the law.[74] Judges are expected to interpret legislation in the most consistent way with the letter and spirit of the bill of rights and with international obligations, including international human rights law.[75]

In line with the declared transformational spirit of the Constitution, substantive equality underpins the bill of rights. Section 9(2) makes clear that equality before the law is necessary but not sufficient: 'Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.'[76] The Constitutional Court has recognised the interrelationship between substantive equality and social rights: 'When determining the scope of socio-economic rights, it is important to recall the transformative purpose of the Constitution which seeks to heal the injustices of the past and address the contemporary effects of apartheid and colonialism.'[77] Developing Section 9, the Prevention of Unfair Discrimination Act 2000 applies to the state and to private actors; it includes a mandate for socioeconomic status to be considered a prohibited ground of discrimination.[78]

A constitutional right can be considered binding on natural or legal persons (corporations) 'if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right'; to apply the bill of rights horizontally, the Constitution mandates judges to apply and

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[72] Ibid, Section 231(4).

[73] Andreas Coutsoudis, Treaties apply in South African law – now what? Analysing the courts' interpretation of treaties over the last half-decade, 141(4) *South African Law Journal* 703 (2024).

[74] Constitution of South Africa, 1996, Section 232.

[75] Ibid, Sections 39(1), 39(2) and 233.

[76] Ibid, Section 9(2).

[77] *Mahlangu and Another v. Minister of Labour and Others* (CCT306/19) [2020] ZACC 24; 2021 (1) BCLR 1 (CC); [2021] 2 BLLR 123 (CC); (2021) 42 ILJ 269 (CC); 2021 (2) SA 54 (CC) (19 November 2020), para. 55; see, also, *Khosa and Others v. Minister of Social Development and Others, Mahlaule and Another v. Minister of Social Development* (CCT 13/03, CCT 12/03) [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) (4 March 2004), para. 40, 42 and 44.

[78] Promotion of Equality and Prevention of Unfair Discrimination Act 2000, Sections 5(1) and 34.

develop common law, including the possibility of limiting rights.[79] Limitations of rights would only be compatible with the Constitution when they are necessary, proportionate, reasonable and justifiable in an open and democratic society based on the principles of dignity, equality and freedom.[80] The Constitution mandates an interpretation of legislation and the common law in line with the bill of rights, including in relation to property.[81] However, despite the promise of substantive equality and the potential application to private persons, some have criticised the limited power of the Constitution and the Constitutional Court to address and reverse the material inequalities inherited from the apartheid era.[82] Liebenberg in particular has lamented South African courts' insufficient engagement with the implications of social rights in relation to contract law and other areas conventionally labelled as private law.[83]

Having said that, eviction procedures initiated by the state or by private actors are one of the areas where the South African Constitution made the most significant inroads in bringing to the fore the tension between property rights and housing rights. Section 26(3) makes clear that 'no one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.'[84] The Prevention of Illegal Eviction from and Unlawful

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79 Constitution of South Africa, 1996, Sections 8(2) and 8(3).

80 Ibid, Section 36.

81 A. J. Van der Walt, *Property and Constitution* (Pretoria University Law Press, 2012).

82 Tshepo Madlingozi, Social justice in a time of neo-apartheid constitutionalism: critiquing the anti-black economy of recognition, incorporation and distribution, 28(1) *Stellenbosch Law Review* 123 (2017); Joel M. Modiri, Conquest and constitutionalism: first thoughts on an alternative jurisprudence, 34(3) *South African Journal on Human Rights* 300 (2018); Mbuyiseli Madlanga, The human rights duties of companies and other private actors in South Africa, 29(3) *Stellenbosch Law Review* 359 (2018).

83 Sandra Liebenberg, *Socio-Economic Rights Adjudication under a Transformative Constitution* (Juta, 2010), 374–376; Sandra Liebenberg, Direct Constitutional Protection of Economic, Social and Cultural Rights in South Africa, in *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* 305 (Danwood Mzikenge Chirwa and Lilian Chenwi, eds, Cambridge University Press, 2016), at 325–330; Sandra Liebenberg, Socio-Economic Rights in South Africa's Constitution: Aspirations, Achievements, Disappointments and Lessons, in *Social Rights and the Constitutional Moment: Learning from Chile and International Experiences* 61 (Koldo Casla, Magdalena Sepúlveda, Vicente Silva and Valentina Contreras, eds, Hart, 2022), at 72.

84 Constitution of South Africa, 1996, Section 26(3).

Occupation of Land Act 1998 elaborates on this constitutional provision with procedural and substantive safeguards.[85] The Act covers tenants who fail to pay their rents for whatever reason, and they are in fact the majority of cases of 'illegal eviction from and unlawful occupation of land' these days.[86]

A combined reading of Section 26, on housing, and Section 25, on property, entails that an owner will have to tolerate the inconvenience of an unlawful occupation of their land until a court assesses the situation independently before authorising the eviction, or not.[87] In *Blue Moonlight* (2011) – a case concerning 86 occupiers in poverty living in old and dilapidated commercial premises owned by a corporation – the Constitutional Court ruled that, while an occupation is a form of deprivation of property, the involvement of the courts, as mandated by the Constitution and the Prevention of Illegal Eviction Act 1998, makes the occupation non-arbitrary: 'Of course a property owner cannot be expected to provide free housing for the homeless on its property for an indefinite period. But in certain circumstances an owner may have to be somewhat patient, and accept that the right to occupation may be temporarily restricted.'[88]

The Natives Land Act of 1913, in force until 1991, prohibited ownership by black South Africans – roughly 80% of the population – in 87% of the land.[89] In that context, Liebenberg observes, 'with the memory and legacy of apartheid-era large-scale dispossessions of property and forced evictions of people from their homes, still fresh, it is not surprising that the legislature and courts have sought to construct a more humane [and] context-sensitive' set of rules for eviction procedures.[90] In general, South African courts have

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[85] Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

[86] Socio-Economic Rights Institute, *Just and Equitable: An analysis of eviction cases in the Johannesburg Central Magistrate's Court and their compliance with the law* (SERI, 2022).

[87] Stuart Wilson, *Human Rights and the Transformation of Property* (Juta, 2021), 60.

[88] *City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties 39 (Pty) Ltd and Another* (CC) [2011] ZACC 33; 2012 (2) BCLR 150 (CC); 2012 (2) SA 104 (CC) (1 December 2011), para. 37 and 40.

[89] Stuart Wilson, *Human Rights and the Transformation of Property* (Juta, 2021), xiii and 34; Tembeka Ngcukaitobi, *Land Matters: South Africa's Failed Land Reforms and the Road Ahead* (Penguin, 2021), 62–63.

[90] Sandra Liebenberg, Direct Constitutional Protection of Economic, Social and Cultural Rights in South Africa, in *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* 305 (Danwood Mzikenge Chirwa and Lilian Chenwi, eds, Cambridge University Press, 2016), at 325–326.

established three fundamental principles to ascertain whether an eviction can indeed go ahead.[91]

The first principle is that evictions, even those prompted by private owners, are not merely a matter of private law. They affect public law, constitutional law and human rights law as well. In *Grootboom* (2000) – a community of some 900 people, including 510 children, in an informal settlement – the Constitutional Court established that both the state and private actors have an obligation 'to desist from preventing or impairing the right of access to adequate housing', which includes the prohibition of arbitrary evictions.[92] Despite the structural and systemic constraints in the form of bureaucratic delays, limited public resources and persistent inequalities, *Grootboom* had important material, political and symbolic effects both for the local community and for the country as a whole: it contributed to improve basic services, prevent large-scale evictions, and establish the foundations of social rights case law.[93] In *Daniels v. Scribante* (2017), the Constitutional Court expanded on the horizontality of the right to housing by establishing that tenants and occupiers do not need the owner's consent to make improvements to the dwelling to ensure the place is habitable; habitability is therefore a positive obligation for owners: 'By its very nature, the duty imposed by the right to security of tenure, in both the negative and positive form, does rest on private persons.'[94] In *Baron v. Claytile Limited* (2017) – a case concerning six individuals living on land owned by a company they worked for – the Constitutional Court opened the door to the possibility that a landowner may be required to provide alternative accommodation to evictees directly. The Court ruled that a private landlord may be expected 'to assist with the finding of, or, failing that, in truly exceptional circumstances, to provide suitable alternative accommodation. This must be a contextual enquiry, having due regard to all relevant circumstances.'[95] In line

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[91] Ibid, 327–328.

[92] *Government of the Republic of South Africa and Others v. Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000), para. 34.

[93] Malcolm Langford, Housing Rights Litigation: Grootboom and Beyond, in *Socio-Economic Rights in South Africa: Symbols or Substance?* 187 (Malcolm Langford, Ben Cousins, Jackie Dugard and Tshepo Madlingozi, eds, Cambridge University Press, 2013).

[94] *Daniels v. Scribante and Another* (CCT50/16) [2017] ZACC 13; 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC) (11 May 2017), para. 49.

[95] *Baron and others v. Claytile (Pty) Limited and Another* (CCT241/16) [2017] ZACC 24; 2017 (10) BCLR 1225 (CC); 2017 (5) SA 329 (CC) (13 July 2017), para. 37; Elsabe van der Sijde, Tenure security for ESTA occupiers: Building on

with the constitutional requirement to consider all the relevant circumstances of an eviction (Section 26(3)), the Constitutional Court has also ordered that there must be a proportionality test in executions derived from foreclosures: 'Due regard should be taken of the impact that this may have on judgment debtors who are poor and at risk of losing their homes. If the judgment debt can be satisfied in a reasonable manner without involving those drastic consequences that alternative course should be judicially considered before granting execution orders' (*Gundwana v. Steko Development*, 2011).[96] In the proportionality test of foreclosures, courts may consider the amount of debt owed, whether the debtor tried to pay it off, the circumstances in which the debt was incurred, and the financial situation of both parties.[97]

The second case law principle is that tenants or occupiers should not be rendered homeless as a result of an eviction, which means that the availability and suitability of alternative accommodation will be a determining factor in the admissibility of the eviction request. Whether the eviction is instigated by a private actor or a public one is 'of little relevance' (*Blue Moonlight Properties*, 2011).[98] In *Port Elizabeth Municipality* (2004) – a case concerning 68 people, including 23 children, who had been unlawfully living on vacant, unused private land for between two and eight years – the Constitutional Court said that, as a general rule, 'a court should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending ultimate access to housing in the formal housing programme' managed by the state.[99]

The third principle is that people at risk of eviction should be listened to and have the opportunity to participate actively in the resolution of a dispute that affects them. This is what the Constitutional Court calls 'meaningful

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the *obiter* remarks in *Baron v. Claytile Limited,* 36(1) *South African Journal on Human Rights* 74 (2020).

[96] *Gundwana v. Steko Development CC and Others* (CCT 44/10) [2011] ZACC 14; 2011 (3) SA 608 (CC); 2011 (8) BCLR 792 (CC) (11 April 2011), para. 53.

[97] *Jaftha v. Schoeman and Others, Van Rooyen v. Stoltz and Others* (CCT74/03) [2004] ZACC 25; 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC) (8 October 2004), para. 56 and 60.

[98] *City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties 39 (Pty) Ltd and Another* (CC) [2011] ZACC 33; 2012 (2) BCLR 150 (CC); 2012 (2) SA 104 (CC) (1 December 2011), para. 95.

[99] *Port Elizabeth Municipality v. Various Occupiers* (CCT 53/03) [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) (1 October 2004), para. 28.

engagement' (*Olivia Road*, 2008).[100] For Liebenberg, the meaningful engagement is a 'modest, but nevertheless significant, turn towards experimenting with participatory adjudicatory strategies in social rights cases'.[101] Wilson is more critical: while meaningful engagement might work in certain circumstances – he mentions the negotiation of debt restructuring as an example – in general, since the engagement begins with a blank slate, a normatively empty form of engagement, with no set direction of travel, cannot really transform the underlying profound structural inequalities between the parties.[102] These observations are, in any case, not necessarily incompatible with one another: meaningful engagement can be modestly significant but not radically transformative at the same time.

The South African Constitution is a progressive declaration of human rights, and a collection of constitutional judgments has proved that social rights can indeed be justiciable. The constitutional recognition of social rights, such as housing, inspired willing courts to demand certain measures from the state and to apply a human rights test in some relations between private actors, as just seen in relation to evictions.

However, the Constitution also proclaimed the right to property in Section 25. Furthermore, in principle, all laws adopted under apartheid remained in force, unless expressly amended or repealed, or unless they were deemed inconsistent with the Constitution.[103] There was no empty canvas in 1996. 'No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property,' reads Section 25(1).[104] Departing from the common usage of the word, 'deprivation' in Section 25(1) refers merely to forms of regulation and public control of the use, enjoyment and exploitation of property, normally without compensation.[105] The way the Constitutional Court put it in *FNB* (2002) – a case concerning the collection of

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[100] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v. City of Johannesburg and Others* (24/07) [2008] ZACC 1; 2008 (3) SA 208 (CC); 2008 (5) BCLR 475 (CC) (19 February 2008), para. 9–23.

[101] Sandra Liebenberg, The Participatory Democratic Turn in South Africa's Social Rights Jurisprudence, in *The Future of Economic and Social Rights* 187 (Katharine G. Young, ed., Cambridge University Press, 2019), at 206.

[102] Stuart Wilson, *Human Rights and the Transformation of Property* (Juta, 2021), 63 and 122–123.

[103] Constitution of South Africa, 1996, Schedule 6, Section 2.

[104] Ibid, Section 25(1).

[105] *First National Bank of SA Limited t/a Wesbank v. Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v. Minister of Finance* (CCT19/01) [2002] ZACC 5; 2002 (4) SA 768; 2002 (7) BCLR 702 (16 May 2002), para. 57.

debts owed to the state – deprivation would only be 'arbitrary' when the relevant legal instrument 'does not provide sufficient reason for the particular deprivation in question or is procedurally unfair'; the assessment of the sufficiency of the reason entails looking, among other things, at the end or purpose of the deprivation, the chosen means, and the proportionality between the means and the end.[106] In *Mkontwana* (2004), the Constitutional Court added that the state interference would need to amount to a 'substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society'.[107] Along these lines, in *Offit* (2010), the Court said that, 'whilst direct or physical interference is not necessary, the impact must be of sufficient magnitude to warrant constitutional engagement. A court must give consideration to the extent to which the use and enjoyment of the land has been diminished.'[108]

Compensation is generally assumed to follow an 'expropriation' in the public interest (Section 25(2)). Section 25(4)(a) establishes that 'the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources'. Access could be secured through customary forms of communal property.[109] In addition, in line with Section 25(3):

> The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including— (a) the current use of the property; (b) the history of the acquisition and use of the property; (c) the market value of the property; (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and (e) the purpose of the expropriation.[110]

While not protected by the property clause as such, in addition to private property, in South Africa there is both public property – held by the state – and

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106 Ibid, para. 100.

107 *Mkontwana v. Nelson Mandela Metropolitan Municipality* (CCT 57/03) [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) (6 October 2004), para 32.

108 *Offit Enterprises (Pty) Ltd and Another v. Coega Development Corporation (Pty) Ltd and Others* (CCT 15/10) [2010] ZACC 20; 2011 (1) SA 293 (CC); 2011 (2) BCLR 189 (CC) (18 November 2010), para. 41.

109 Juanita Pienaar, Customary Law and Communal Property in South Africa: Challenges and Opportunities, in *Legal Strategies for the Development and Protection of Communal Property* 127 (Ting Xu and Alison Clarke, eds, British Academy, 2018).

110 Constitution of South Africa, 1996, Section 25(2), (3), (4)(a) and (5).

common property. Public property, in fact, is essential for the satisfaction of the constitutional mandate of ensuring adequate housing and implementing a redistributive land reform.[111] In particular, Viljoen argues, a human rights approach to public property should require at least that the application of anti-public nuisance laws does not lead to the persecution and criminalisation of homeless people in common spaces when they have nowhere else to go to sleep, eat, socialise and perform private actions.[112]

As summarised by Jeewa, during the drafting process, numerous arguments were given in favour of the property clause: security against arbitrary deprivation and inadequate compensation in the case of expropriation, enhancing investors' confidence, promoting growth and stability in a free-market economy, proclaiming property as a human right, curbing squatting and illegal occupations, protecting the propertyless, etc.[113] There were, needless to say, just as many arguments against the inclusion of property in the bill of rights, with concerns being raised about how it would cement the legacy of the systemic exclusion of the majority of South Africans from land ownership, scepticism about the virtues of the free market, and apprehension about how a justiciable right to property could restrict the policy room for manoeuvre of a democratically elected government.[114] The property clause was, at the end of the day, the expression of a political compromise. As observed insightfully by Jeewa, some might try to give it 'some semblance of legal credence', when in fact the property clause ought to be addressed 'for what it truly is – politics'.[115] The recognition of property in the bill of rights of this particular Constitution called on courts and the legislature to meet the extremely difficult task of overcoming the 'tug of war' between the vested property interests from before the democratic era, on the one hand, and the transformative constitutional mandate for land reform and social rights on the other hand.[116] This is how Justice Albie Sachs summarised the challenge in *Port Elizabeth* (2004):

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[111] Sue-Mari Viljoen, Public property in South Africa: A human rights perspective, 24(1) *African Human Rights Law Journal* 77 (2024), at 93 and 97.

[112] Sue-Mari Viljoen, Regulating public property: the account of the homeless, 34(3) *Social & Legal Studies* 439 (2025).

[113] Tanveer Rashid Jeewa, Yes, there is a right to property – just not for everybody: an audit of the legitimacy of the current South African property system thirty years down the line, 8 *Journal of Law, Property, and Society* 49 (2024), at 55–57.

[114] Ibid.

[115] Ibid, 71.

[116] A. J. Van der Walt, *Property and Constitution* (Pretoria University Law Press, 2012), 4.

> The Constitution imposes new obligations on the courts concerning rights relating to property not previously recognised by the common law. It counterposes to the normal ownership rights of possession, use and occupation, a new and equally relevant right not arbitrarily to be deprived of a home. The expectations that ordinarily go with title could clash head-on with the genuine despair of people in dire need of accommodation. The judicial function in these circumstances is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. Rather it is to balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each particular case.[117]

Months before the Constitutional Court's ruling in *Port Elizabeth,* the Supreme Court of Appeal sought to strike a tricky balance between property and social rights with a creative solution in *Modderklip* (2004). The case affected some 40,000 people living with no legal title to a piece of land owned by a corporation. The Supreme Court of Appeal reached the conclusion that the eviction could not be ordered unless the state facilitated alternative land for relocation. Their right to access housing would be breached if such an order was executed in those circumstances. At the same time, however, the Court appreciated that the company's property rights were at stake. The only possible way out, in the Supreme Court of Appeal's view, was to allow the occupiers to remain on the land, while compensating the company for the state's failure to provide a solution for the occupiers.[118] In 2005, the Constitutional Court confirmed the Supreme Court of Appeal's ruling and said: 'To execute this particular court order and evict tens of thousands of people with nowhere to go would cause unimaginable social chaos and misery and untold disruption. In the circumstances of this case, it would also not be consistent with the rule of law.'[119] For Liebenberg, *Modderklip* could 'provide a catalyst' for meaningful engagement between residents, owners and the state.[120] For Wilson, the case showed how the right to adequate housing can limit the owner's exclusive possession,

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[117] *Port Elizabeth Municipality v. Various Occupiers* (CCT 53/03) [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) (1 October 2004), para. 23.

[118] *Modder East Squatters and Another v. Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa and Others v. Modderklip Boerdery (Pty) Ltd* (187/03, 213/03) [2004] ZASCA 47; [2004] 3 All SA 169 (SCA); 2004 (8) BCLR 821 (SCA); 2004 (6) SA 40 (SCA) (27 May 2004), para. 26, 28, 43–44.

[119] *President of the Republic of South Africa and Another v. Modderklip Boerdery (Pty) Ltd* (CCT20/04) [2005] ZACC 5; 2005 (5) SA 3 (CC); 2005 (8) BCLR 786 (CC) (13 May 2005), para. 46.

[120] Sandra Liebenberg, *Socio-Economic Rights Adjudication under a Transformative Constitution* (Juta, 2010), 442.

insofar as it weakens the general private law principle that the owner can claim the restitution of property *erga omnes* – anywhere, against anyone.[121] For Jeewa, however, *Modderklip* is yet another expression of the lack of a radical redistributive agenda in the Constitution; after all, the state bore all of the financial costs: 'Even when the courts allow occupation to be ongoing at the expense of the property owner, it is usually on the condition that the occupiers be rehoused and that the owner be paid constitutional damages.'[122] Against the limitations of *Modderklip*, *Fischer* (2017) – a case concerning the potential eviction of 60,000 people living on the Marikana settlement on privately owned land – potentially opened the door to a more transformative interpretation of the property clause.[123] In *Fischer*, the Western Cape High Court ordered the local authorities in Cape Town to expropriate the property as an effective remedy because an eviction would have been incompatible with the constitutional requirements as regards access to housing.[124]

The social function of property is not explicitly proclaimed in the 1996 Constitution. However, both the wording and the location of property in the bill of rights – surrounded by environmental and social rights – indicate that ownership is meant to satisfy private interests but also the general interests of the community. In Viljoen's opinion, the social function of property is most definitively acknowledged in South African legal debates.[125] Mostert and Young write that, in academic circles, 'the incorporation and prevalence of the social norm in South African property law is practically taken for granted'.[126] For Shandu and Clark, the transformative ambition of the Constitution 'not

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121 Stuart Wilson, *Human Rights and the Transformation of Property* (Juta, 2021), 70.

122 Tanveer Rashid Jeewa, Yes, there is a right to property – just not for everybody: an audit of the legitimacy of the current South African property system thirty years down the line, 8 *Journal of Law, Property, and Society* 49 (2024), at 77.

123 Jackie Dugard, Modderklip revisited: can courts compel the state to expropriate property where the eviction of unlawful occupiers is not just and equitable?, 21 *Potchefstroom Electronic Law Journal* 1 (2018). I am grateful to Sue-Mari Viljoen for bringing the significance of this case to my attention.

124 *Fischer v. Persons Listed on Annexure X and Others* (9443/14; 11705/15; 14422/14) [2017] ZAWCHC 99; 2018 (2) SA 228 (WCC) (30 August 2017).

125 Sue-Mari Viljoen, Wasting land amid landlessness: the expropriation (without compensation) response in South Africa, 7 *Journal of Law, Property, and Society* 1 (2022), at 39.

126 Hanri Mostert and Cheri-Leigh Young, Between Custom and Colony: Social-Norm Based Property Law in South Africa's Post-constitutional "no-Man's Land", in *Léon Duguit and the Social Obligation Norm of Property* 371 (Paul Babie and Jessica Viven-Wilksch, eds, Springer, 2019), at 373.

only accommodates, but also mandates considerations about the social function of land as a property object'.[127] For Coggin, the Constitutional Court's jurisprudence in relation to access to housing 'reveals a social function of property', even if this is largely implicit.[128] The principle of the social function has been embraced by the Constitutional Court as well. In *FNB* (2002), the Court stressed that 'under the 1996 Constitution the protection of property as an individual right is not absolute but subject to societal considerations'.[129] Acknowledging the inherent 'tension between individual rights and social responsibilities', the Court established that 'the purpose of section 25 has to be seen both as protecting existing private property rights as well as serving the public interest, mainly in the sphere of land reform but not limited thereto, and also as striking a proportionate balance between these two functions'.[130] It was in *Shoprite* (2015) – a case concerning the termination of a licence to trade commercially – when the Constitutional Court articulated the constitutional significance of the social function – to which it referred as 'social obligation' – through the prism of the bill of rights:

> The fundamental values of dignity, equality and freedom necessitate a conception of property that allows, on the one hand, for individual self-fulfilment in the holding of property, and, on the other, the recognition that the holding of property also carries with it a social obligation not to harm the public good. The function that the protection of holding property must thus, broadly, serve is the attainment of this socially-situated individual self-fulfilment. The function of personal self-fulfilment in this sense is not primarily to advance economic wealth maximisation or the satisfaction of individual preferences, but to secure living a life of dignity in recognition of the dignity of others. And where the holding of property is related to the exercise, protection or advancement of particular individual rights under the Bill of Rights, the level of the protection afforded to that holding will be stronger than where no relation of that kind exists.[131]

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[127] Mandisa Shandu and Michael Clark, Rethinking property: towards a values-based approach to property relations in South Africa, 11(1) *Constitutional Court Review* 39 (2021), at 65.

[128] Thomas Coggin, There is no right to property: clarifying the purpose of the property clause, 11(1) *Constitutional Court Review* 1 (2021), 2.

[129] *First National Bank of SA Limited t/a Wesbank v. Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v. Minister of Finance* (CCT19/01) [2002] ZACC 5; 2002 (4) SA 768; 2002 (7) BCLR 702 (16 May 2002), para. 49.

[130] Ibid, para. 50.

[131] *Shoprite Checkers (Pty) Limited v. Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* (CCT 216/14) [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC) (30 June 2015), para. 50. The concepts of 'social obligation' and

In sum, the 1996 Constitution included a progressive bill of rights to transform the country after a long history of institutionalised racism in the form of colonialism and apartheid. Since 2000, the Constitutional Court has developed a creative jurisprudence to hold public authorities to account in relation to social rights. While private actors generally do not have a positive obligation to fulfil social rights (notwithstanding *Baron v. Claytile*, 2017), the constitutionalisation of social rights in South Africa has notable implications for private property. Even in situations of unlawful occupations, landowners are expected to endure the inconvenience until a court orders the eviction if it meets a proportionality test, seeking to ensure that nobody is rendered homeless as a result of an eviction, and that alternative accommodation is made available for people in need. The state is required to adopt reasonable measures to protect housing rights and other social rights. If there is no alternative accommodation, the eviction may be refused, and the landowners compensated. In some other respects, significant progress has been made. Dugard shows that, when mining companies and local communities have clashed in court, 'judges have regularly upheld the claims of relatively disempowered groups against more established interests thereby disrupting status quo power, whether racial, economic or socio-ecological'.[132] The Constitutional Court has also shown its predisposition to address systemic discrimination against black women. Relevant to the question of property, in *Rahube v. Rahube* (2018), the Constitutional Court sought to remedy the gendered and stereotypical attitudes based on which black women had been systematically excluded from regulations ('proclamations') that had granted land property rights to the head of the family, nearly always men, in the 1990s:

> A reasonable step to ensure equitable access to land must do something to counteract pre existing inequitable access. Otherwise, as in this case, it leaves intact inequity. The automatic upgrading of land tenure rights does not achieve this purpose because it excludes African women from the benefit of legal protection. If anything, entrenching an apartheid position would be the exact opposite of what the legislature sought to achieve with the Act rendering it an unreasonable legislative measure in terms of section 9(2).[133]

'self-fulfilment' are inspired by Alexander and the progressive property theory in general (see Chapter 4, section 4.3): Gregory S. Alexander, *Property and Human Flourishing* (Oxford University Press, 2018).

[132] Jackie Dugard, Evaluating transformative constitutionalism in South Africa: a view from the mineral rights adjudication looking glass, 39(3) *Nordic Journal of Human Rights* 373 (2021), at 389.

[133] *Rahube v. Rahube and Others* (CCT319/17) [2018] ZACC 42; 2019 (1) BCLR 125 (CC); 2019 (2) SA 54 (CC) (30 October 2018); Meghan Campbell and Ben T.

At the same time, and despite the distributive claims of social rights, the Constitution did not shake the sturdy foundations of property in capitalism. There is no constitutional and justiciable right to acquire property either. In South Africa, like elsewhere, social rights have not challenged the fundamental logic of a property-driven market society. However, the South African Constitution has provided a framework to break away from the idea of maximalist dominium and to reassess the balance between private and public interests, between property-insiders and property-outsiders, and between ownership and (other) social rights.[134]

3.2.2 The Politics of Land Reform and the Legacy of Apartheid

> Despite the fact that many of the apartheid laws were removed from the statute books, the social and economic consequences of these laws and policies continue to define the current South African landscape. Apartheid has left South Africa with high levels of inequality, unemployment and poverty. Consequently, our Gini coefficient is among the highest in the world.[135]

That was the appraisal of the South African Government in their first country report to the UN Committee on Economic, Social and Cultural Rights in 2017. Despite the egalitarian spirit of the Constitution and the transformational mandate of land reform, South Africa remains profoundly unequal. At 67% in the Gini coefficient, South Africa had the highest rate of income inequality in 2018, and inequality has only increased since 1994.[136] Wealth inequality has remained extreme, even higher than income inequality. The significant economic growth since the end of apartheid has materialised in wealth concentration in the form of immovable property, pension funds and financial assets.[137]

The 1996 Constitution contains a direct mandate for public authorities to reverse the consequences of decades of institutionalised discrimination that prevented the majority of South Africans from land ownership, through land redistribution, restitution and tenure reform. According to the Constitution,

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C. Warwick, Temporality and the construction of women's structural inequality, 14(1) *Constitutional Court Review* 115 (2024), at 131–132.

[134] A. J. Van der Walt, *Property in the Margins* (Hart, 2009); Stuart Wilson, *Human Rights and the Transformation of Property* (Juta, 2021), 7, 11, 38, 73–74.

[135] South Africa, Initial report under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/C.12/ZAF/1 (7 June 2017), para. 12.

[136] World Bank, *Inequality in Southern Africa: An Assessment of the Southern African Customs Union* (World Bank, 2022), 11.

[137] Aroop Chatterjee, Léo Czajka and Amory Gethin, Wealth inequality in South Africa, 1993–2017, 36(1) *The World Bank Economic Review* 19 (2022).

the state must 'take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis'; people whose tenure was insecure as a result of discriminatory laws are meant to be entitled to either legal security or 'comparable redress'; those dispossessed after the entry into force of the segregationist Natives Land Act of 1913 are also entitled to restitution or 'equitable redress'; the state can also limit the right to property to implement further land reforms.[138]

However, there is no right to acquire and dispose of property in the South African Constitution; redistribution of land is an aspiration, not a guarantee.[139] And three decades after the establishment of democracy, the redistributive aspiration of Section 25 remains largely unfulfilled. Only a relatively small percentage of the farmland has been redistributed, and the legacy of insecure land tenure remains the norm.[140] Viljoen writes that 'the land restitution programme – intended to promote a vibrant rural economy, create jobs, alleviate poverty and consolidate food security – has failed on many counts, mainly to foster active, sustainable and productive use of land'.[141] With some 9% of the population, 72% of the farmland and 49% of urban freehold land remain in white people's hands, according to the Government's land audit of 2017.[142] In September 2024, it was reported that, despite having spent at least 58 billion rand (approximately US$3.28 billion, in September 2025) in public money to compensate and restore ownership of dispossessed black communities, many of these farm projects have collapsed, and the communities have not seen the benefit, as a result of poor planning and lack of understanding of local needs.[143]

In recent years, two intriguing initiatives have walked in parallel in South African politics. First, an amendment was proposed to revise Section 25 of

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[138] Constitution of South Africa, 1996, Section 25(5), (6), (7) and (8).

[139] *Certification of the Constitution of the Republic of South Africa*, 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996), para. 72.

[140] Ben Cousins and Ruth Hall, Rural Land Tenure: The Potential and Limits of Rights-Based Approaches, in *Socio-Economic Rights in South Africa: Symbols or Substance?* 157 (Malcolm Langford, Ben Cousins, Jackie Dugard and Tshepo Madlingozi, eds, Cambridge University Press, 2013), at 157.

[141] Sue-Mari Viljoen, Resistance to reform property: a 'resilient property' perspective, 38(1–2) *South African Journal on Human Rights* 24 (2022), 30.

[142] Department of Rural Development and Land Reform, *Land Audit Report* (Government of South Africa, 2017), 7 and 12.

[143] Tony Carnie and Naledi Sikhakhane, '"We don't have jobs": Post-1996 farmland restitution projects sow a costly legacy of failure', *Daily Maverick* (1 September 2024).

the Constitution to make clear that, under certain circumstances, expropriations could occur with no need for compensation. While a specific amendment was drafted, published and consulted on, no further action was taken after 2021.[144] Second, an Expropriation Bill was tabled in 2020 to replace the pre-constitutional Expropriation Act 63 of 1975. The Bill passed in both houses of Parliament in March 2024, and was signed into law by President Cyril Ramaphosa in January 2025, becoming Expropriation Act 13 of 2024.[145] Section 12(3) of the said Act specified four situations where it would be justifiable to expropriate with nil compensation: (1) where the land is not being used and it has no value other than a speculative one; (2) where an organ of the state holds land that it is not using for its core functions and is not reasonably likely to require the land for its future activities, and the organ of state acquired the land for no consideration – generally seen as money worth given for the land transaction; (3) where the land has been abandoned; and (4) where the value of the state's direct investment or subsidy is equivalent or greater than the value of the land.

The future of the Expropriation Act 2024 is up in the air considering the frictions within the coalition government, and it remains to be seen whether the expropriation with nil compensation will be applied at all given the likelihood of it being challenged in court, successfully or not. That aside, for Viljoen, 'the logic of the bill [now Act] is sound', considering the 'social-obligation norm' and the social function of property.[146] One must bear in mind that nil or symbolic compensation is a possibility under the Constitution in its current form. That is why, leaving politics out for a moment, it seemed unnecessary to seek to amend the Constitution in the first place. Along these lines, Dugard has argued that the constitutional property clause 'provides a permissive – and even mandatory – template to pursue transformative land reform',[147] even if courts could still do more to pave the way towards substantive transformation before land reform takes place.[148] According to Section 25(3), the market value

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[144] Parliament of South Africa, Ad Hoc Committee on Amending Section 25 of the Constitution. https://www.parliament.gov.za/project-event-details/285

[145] Parliamentary Monitoring Group, Expropriation Bill (B23-2020). https://pmg.org.za/bill/973/

[146] Sue-Mari Viljoen, Wasting land amid landlessness: the expropriation (without compensation) response in South Africa, 7 *Journal of Law, Property, and Society* 1 (2022), at 4 and 10.

[147] Jackie Dugard, Unpacking Section 25: what, if any, are the legal barriers to transformative land reform?, 9(1) *Constitutional Court Review* 135 (2019), at 158.

[148] Jackie Dugard and Nompumelelo Seme, Property rights in court: an examination of judicial attempts to settle section 25's balancing act re restitution and expropriation, 34(1) *South African Journal on Human Rights* 33 (2018).

value is only one of the criteria when determining the extent of the 'just and equitable' compensation.[149] Other relevant factors are the current use of the property, how land was acquired in the first place, the extent to which public investment and subsidies could have increased the market value of the asset, and the purpose of the expropriation itself.[150] The Constitutional Court has made clear that general interests may trump private interests in the sense that the determination of the compensation is not a precondition for a valid expropriation, which means that a fair and equitable compensation may take place after the fact.[151] The utility of property, including a situational analysis of the social value of the private investment in the local community, ought to be taken into account to ascertain the value of the compensation. In addition to the social value of property in this day and age, history matters greatly as well. Racialised capitalism during apartheid made some people rich, a handful of them extremely so, through the deprivation of land, exploitative wages akin to forced labour, discriminatory state subsidies, displacement of people on account of their constructed race, and restriction of property rights of black people. It is only fair and equitable for private actors who took advantage of those privileges for so long to pay their fair share, including in the form of a diminution in the value of compensation for expropriation.

In socioeconomic terms, leaving apartheid behind would have required a degree of radical transformation that has not materialised yet. As appreciated by Van der Walt, 'property was at the heart of the economic and social divisions created and upheld by the apartheid state', and therefore, achieving substantive justice in a democratic South Africa would be an impossibility 'without a knock-on effect for those who enjoyed the benefits of the apartheid economy'.[152] The Constitutional Court itself has been aware and critical of the limited extent to which public authorities have lived up to the transformational promise of the Constitution. Respectively, in *Herbert N.O.* (2019) and *Mwelase* (2019), both issued in August 2019, the Constitutional Court expressed its dismay as follows:

> Millions of black people in this country continue to live in the 13% of the land that was reserved for Africans under the 1913 Land Act. This is because the former homelands to which they were forcibly removed were located on that 13% of the

149 W. J. du Plessis, Valuation in the constitutional era, 18(5) *Potchefstroom Electronic Law Journal* 1276 (2015).

150 Constitution of South Africa, 1996, Section 25(3).

151 *Haffejee NO and Others v. eThekwini Municipality and Others* (CCT 110/10) [2011] ZACC 28; 2011 (6) SA 134 (CC); 2011 (12) BCLR 1225 (CC) (25 August 2011), para. 42–43.

152 A. J. Van der Walt, *Property in the Margins* (Hart, 2009), 3.

> land. To this day those millions continue to have insecure land rights which were afforded to them during apartheid. To date many of them may access and occupy land through the means of a permit to occupy issued by authorities. This is not in line with the Constitution which imposes upon the State the obligation to "respect, protect, promote and fulfil the rights in the Bill of Rights".[153]
>
> South Africans have been waiting for more than 25 years for equitable land reform. More accurately, they have been waiting for centuries before. The Department's [Department of Rural Development] failure to practically manage and expedite land reform measures in accordance with constitutional and statutory promises has profoundly exacerbated the intensity and bitterness of our national debate about land reform. It is not the Constitution, nor the courts, nor the laws of the country that are at fault in this. It is the institutional incapacity of the Department to do what the statute and the Constitution require of it that lies at the heart of this colossal crisis.[154]

Whether the cost of compensation explains the non-fulfilment of the transformational promise is a different question, though. It has probably been politically convenient for some parties to convey the idea that expropriations have been too expensive these last three decades. However, one should not forget to put the finger on the blinding influence of neoliberal ideology on economic policy-making and the large-scale governmental resistance to conform to the constitutional mandate.

3.3 SPAIN AND THE SOCIAL FUNCTION OF RESIDENTIAL PROPERTY AFTER THE FINANCIAL CRISIS

3.3.1 Social Rights and the Social Function of Property in the Spanish Constitution

As opposed to the promise of *transformation* in South Africa, the Spanish Constitution of 1978 is the byproduct of a carefully managed *transition* from a 40-year dictatorship to a European-style democracy. The right to private property is proclaimed in Article 33:

> 1. The right to private property and inheritance is recognised. 2. The content of these rights shall be determined by the social function which they fulfil, in accordance

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153 *Herbert N.O. and Others v. Senqu Municipality and Others* (CCT 308/18) [2019] ZACC 31; 2019 (11) BCLR 1343 (CC); 2019 (6) SA 231 (CC) (22 August 2019), para. 47.

154 *Mwelase and Others v. Director-General for the Department of Rural Development and Land Reform and Another* (CCT 232/18) [2019] ZACC 30; 2019 (11) BCLR 1358 (CC); 2019 (6) SA 597 (CC) (20 August 2019), para. 41.

> with the law. 3. No one may be deprived of his or her property and rights, except on justified grounds of public utility or social interest and with a proper compensation in accordance with the provisions of the law.[155]

In addition, the Constitution declares that 'the entire wealth of the country in its different forms, irrespective of its ownership, is subordinate to the general interest'.[156] The right to property is part of Chapter II of Title or Part I (Articles 14–38), on 'rights and liberties', but it is not a fundamental right in the strictest sense, as those rights are contained in Articles 15 to 29: life, physical and moral integrity, freedom of conscience and religion, personal freedom and security, private and family life, freedom of movement, freedom of expression, right to peaceful assembly, right to association, right to participate in public affairs, fair trial, principle of criminal legality, right to education, right to form and join unions, right to strike, and right to petition. Not being a fundamental right *stricto sensu* means that the right is to be regulated through ordinary laws, which shall respect its 'essential content', but not through organic laws, which require an overwhelming majority – half of the seats plus one – in the Spanish Parliament. Another effect of the exclusion of property from the special category of fundamental rights is that individuals cannot claim this right directly in the preferential and summary procedure in ordinary courts or with a direct appeal for protection in front of the Constitutional Court ('*amparo*').[157]

While the right to education (Article 27), the right to form and join unions, and to take part in strikes (Article 28), and the right – and duty – to work (Article 35) are in Chapter II of Part I, on 'rights and liberties', most economic, social and cultural rights (ESCR), or social rights, are in Chapter III of Part I (Articles 39–52), on 'governing principles of economic and social policy': protection of the family and children, the call for redistributive policies towards full employment, professional training and the right to rest, social security, protection of emigrants (Spaniards abroad), right to health, access to culture, protection of the environment, right to housing, youth participation, disability rights, protection of the elderly, and consumers' rights. These principles, or rights of secondary importance, can only be invoked in court if and when they have been recognised in legislation, and only to the extent that they have been developed in the law.[158]

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155 Constitution of Spain, 1978, Article 33. (Source of the translation: Congreso .es)

156 Ibid, Article 128(1).

157 Ibid, Articles 53(1), 53(2), and 81(1).

158 Ibid, Article 53(3).

The Constitution establishes that essential resources and services *may* be reserved by law to the public sector.[159] In addition, under the Constitution, certain assets belong to the public domain. This includes, at least, the 'coastal area, beaches, territorial waters and natural resources of the economic zone and the continental shelf'; the regulation of the public domain shall respect the principle that public property and communal property are 'inalienable and imprescriptible and not subject to attachment or encumbrance'.[160] Property destined for public use ('*dominio público*') is listed in the Civil Code as 'roads, canals, torrents, ports and bridges built by the state, riverbanks, shores, bays and other analogous property'.[161]

In a nutshell, both property and most social rights – with the mentioned exception of education, and the right to form and join unions and to strike, which enjoy high constitutional protection – are rights that need to be regulated and developed in ordinary legislation. In the case of property and other rights in Chapter II of Part I, the law needs to respect the essential content of the right. Whether the laws ought to emerge from the Spanish Parliament or from the devolved, decentralised or regional parliaments will depend on the distribution of competences or powers, based on Articles 148 and 149 of the Constitution and the regional statutes of self-government ('*estatutos de autonomía*').[162] We shall return to the question of power distribution between centre and periphery later in this section, as it lies at the core of the legal and political debate about housing in the 2010s, at least until the adoption of the Spanish Law on the Right to Housing in 2023. The Constitution also establishes that all rights and liberties, fundamental or not, shall be interpreted in conformity with the Universal Declaration of Human Rights and with international human rights treaties signed and ratified by Spain.[163]

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159 Ibid, Article 128(2).

160 Ibid, Article 132.

161 Civil Code of Spain, Royal Decree of 24 July 1889 (official gazette 25 July 1889), Article 339(1). Translation commissioned by the Ministry of Justice in 2013.

162 I use the word 'region' to refer to the 17 self-governing structures known as '*comunidades autónomas*' in the complex model of decentralisation in Spain. I am well aware of the sensitivities and the profoundly controversial nature of the word in Spanish politics. In fact, most statutes of self-government do not use the word 'region' to refer to their own self-governing structure. For the purposes of this section, however, I am consciously avoiding the debate about the nation and nations in Spain. I cover this issue extensively in a previous book of mine: *Spain and Its Achilles' Heels: The Strong Foundations of a Country's Weaknesses* (Rowman & Littlefield, 2021), 23–66.

163 Constitution of Spain, 1978, Article 10(2).

By embedding the social function in the definition of the right to property, the 1978 Constitution altered substantially the traditional liberal conception of private property, epitomised in Article 348 of the 1889 Civil Code: 'Ownership is the right to enjoy and dispose of a thing, without greater limitations than those set forth in the laws.'[164] While adopted nearly 90 years before, as an infra-constitutional norm, the Civil Code must comply with the norm supreme, the Constitution. The Constitutional Court is competent to hear appeals regarding the alleged unconstitutionality of laws and regulations having the force of law.[165] Therefore, one must consider carefully how the Constitutional Court has interpreted the constitutional right to property, and its relationship with the Civil Code and other relevant laws.

As indicated earlier, the Constitution requires that the legal regulation of property ought to respect the 'essential content' of the right.[166] In the early years of the return of democracy, in 1981, the Constitutional Court established that the essential content of a right would be breached when restrictions are imposed to such an extent that the enjoyment of the right is made impracticable or unreasonably difficult, depriving it of the necessary protection.[167] In other words, the essential content would be that which is absolutely necessary so that the legal interests protected by the right remain real, concrete and effectively protected.[168] In relation to property specifically, in a critically important judgment about the Andalusian agrarian reform, dating from 1987 and cited abundantly ever since, the Constitutional Court ruled that the social function is not an external limitation to the right to property, but an integral part of its essential content.[169] The right to property, as proclaimed in the Constitution and interpreted by the Constitutional Court, entails both individual entitlements and a set of obligations in light of the values and interests of the collective, that is, in light of the social function. Therefore, the Constitutional Court continued, the right to property can no longer be interpreted in the abstract or generic terms of Article 348 of the Civil Code; from the continual recognition of public or social goals derives a more flexible and plural conception of private property depending on the nature and purpose of the assets.[170]

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164 Civil Code of Spain, Royal Decree of 24 July 1889 (official gazette 25 July 1889), Article 348.

165 Constitution of Spain, 1978, Article 161(1)(a).

166 Ibid, Article 53(2).

167 Constitutional Court of Spain, Judgment 11/1981 (8 April 1981), Legal Foundation No. 10.

168 Ibid, Legal Foundation No. 8.

169 Constitutional Court of Spain, Judgment 37/1987 (26 March 1987), Legal Foundation No. 2.

170 Ibid.

A 'proper compensation' ('*correspondiente indemnización*') is constitutionally required in the case of deprivation amounting to expropriation, which should always be justified in the name of public utility and social interest.[171] In practice, Montoya Martín observes, generic and implicit declarations of public utility and social interest have become the rule.[172] In line with the Constitutional Court's case law, compensation may be due when there is a subtraction or removal ('*ablación*') of a right or legitimate interest, but not when public authorities simply delineate the general content of the right through legal means.[173] Therefore, regulation of property in application of the principle of social function does not constitute a form of deprivation. However, when the interference exceeds that threshold, violating the essential content of the right, it will amount to expropriation and merit compensation.[174] That threshold is set at a rather high level by the Constitutional Court: the essential content of the right to property is breached when some degree of profitability is not safeguarded,[175] or when the asset is depleted of economic utility ('*pérdida o vaciamiento de utilidad económica*').[176] There must be a 'proportional equilibrium' between the value of the expropriated asset and the quantity of the fair compensation; this means an expropriatory norm would only be considered unconstitutional if it is 'manifestly devoid of a reasonable foundation'.[177] Speaking possibly for many private law scholars in the country, Simón Moreno is very critical of what he sees as an expansive constitutional interpretation of the social function at the expense of property rights as conventionally treated in private law: in his view, the essential content has been relativised to the extreme, provided an economically sufficient but 'hazy' individual interest is preserved, which offers the legislator an excessively wide wiggle room to

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171 Constitution of Spain, 1978, Article 33(3).

172 Encarnación Montoya Martín, Private Property and Forced Expropriation: Current Challenges in Spanish Law, in *Property and Contract: Comparative Reflections on English Law and Spanish Law* 207 (John Cartwright and Ángel M. López y López, eds, Hart, 2021), at 222.

173 Constitutional Court of Spain, Judgment 204/2004 (18 November 2004), Legal Foundation No. 5.

174 Encarnación Montoya Martín, Private Property and Forced Expropriation: Current Challenges in Spanish Law, in *Property and Contract: Comparative Reflections on English Law and Spanish Law* 207 (John Cartwright and Ángel M. López y López, eds, Hart, 2021), at 208–209.

175 Constitutional Court of Spain, Judgment 37/1987 (26 March 1987), Legal Foundation No. 2.

176 Constitutional Court of Spain, Judgment 89/1994 (17 March 1994), Legal Foundation No. 5.

177 Constitutional Court of Spain, Judgment 149/1991 (4 July 1991), Legal Foundation No. 8.

regulate property matters in ordinary legislation.[178] By now the reader will not be surprised to read that in this book I follow a much more supporting line in favour of the social function as a lever of legislative action in relation to private property.

It is worth noting, before we move on with other issues, that, to this day, the general law on expropriation dates from Franco's dictatorship: in fact, the Preamble of the 1954 Law of Forced Expropriation justified expropriations in the public interest on the basis of the social function implicit in ownership relations, having 'overcome the bitter individualism of the legal system of private ownership under liberal economy'.[179] The dictatorship weaponised the social function as an external limit to liberal property, not as part of the core content of the right, as would be the case upon the restoration of democracy in the late 1970s.

3.3.2 Decentralisation, Property and the Late Regulation of the Right to Housing

The authors of the 1978 Constitution declared in Article 47 that 'all Spaniards are entitled to enjoy decent and adequate housing', and that 'public authorities shall promote the conditions and shall establish appropriate standards in order to make this right effective'.[180] Housing is one of the policy areas about which the regions took on responsibility in their respective statutes of self-government. However, the central or quasi-federal authorities of the Spanish Government and Parliament hold exclusive competence over the regulation of the 'basic conditions' of equality of Spaniards in relation to rights and duties, civil or private law issues – except when the regions have their own historical legislation on the matter – and the 'basis and coordination of general planning of economic activity'.[181] By and large, with the exception of the 2007 Catalan Law on the Right to Housing, legislators both at a quasi-federal level in Madrid

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178 Héctor Simón Moreno, La evolución constitucional de la función social de la propiedad y el nuevo régimen del derecho de propiedad sobre una vivienda en la Ley por el derecho a la vivienda, 42 *Derecho Privado y Constitución* 139 (2023), at 150.

179 Law of Forced Expropriation of 16 December 1954 (BOE official gazette No. 351/1954), Preamble. *'Al consagrar la expropiación por interés social, la Ley fundamental viene a incorporar jurídicamente una concepción que, habiendo superado el agrio individualismo del sistema jurídico de la propiedad privada de la economía liberal, viene a entender implícita, tras toda relación de dominio, una función social de la propiedad.'*

180 Constitution of Spain, 1978, Article 47.

181 Ibid, Articles 148(1)(3), 149(1)(1), 149(1)(8) and 149(1)(13).

and in the regions did not carry forward substantive legislative initiatives on the right to housing until the early 2010s.[182] The legal and political scenario changed drastically with the financial and socioeconomic crisis, when a good number of regions began to adopt laws about housing, as we shall see. For about a decade, legislators and the Constitutional Court would navigate choppy waters to calibrate the extent to which regions could legislate about housing on the basis of the social function of property but bearing in mind that the coordination and general planning of the economy and much of private law remain centralised, non-devolved.

To make sense of the right to property in Spain, we must talk about the politics of decentralisation in relation to housing and property since the financial crisis and the austerity that followed, approximately the period from 2008 to 2015. However, first, it is necessary to look in the rear mirror to trace the trajectory and evolution of homeownership and public policy in relation to housing.[183]

Up to the financial crisis, Spain was a country of homeowners, but it had not always been this way. Homeownership was the goal of decades of public policies that began during the dictatorship and remained largely unquestioned when democracy was restored in the 1970s. 'We do not want a proletarian country, but a country of homeowners,' announced José Luis Arrese, Spain's first housing minister, in 1959.[184] It was a rhyming play on words: say no to '*proletario*', yes to '*propietario*'. In the 1950s, Spain was a country of renters. By the 2000s, Spain had become one of the European countries with the highest rates of households living in dwellings they owned. Following the same trend as other countries on the continent, the proportion of homeowners went down during the crisis, returning in 2020 to levels slightly below those of 1991,

[182] Galicia adopted a law declaring the social function of housing in 2008, and in 2011 Castilla La Mancha attempted to create a system to make the right to housing justiciable following the French *droit au logement opposable* of 2007. However, both laws were derogated after regional elections with no time for their implementation.

[183] I cover this in greater detail in: Koldo Casla, *Spain and Its Achilles' Heels: The Strong Foundations of a Country's Weaknesses* (Rowman & Littlefield, 2021), 115–122.

[184] José Luis Arrese, 'No queremos una España de proletarios, sino de propietarios', *ABC* (2 May 1959), 41–42.

76.9% in 2019 and 77.8% in 1991.[185] In the deepest moments of the real estate dream, around 2001, 82.2% of families were homeowners.[186]

The immovable property market grew at a breakneck speed in the three decades prior to the economic crisis. The price of housing doubled in real terms between 1976 and 2002,[187] and again between 2002 and 2008, entirely decoupled from the evolution of wages.[188] Between 1997 and 2004, in Europe, only Ireland experienced a housing price upsurge greater than Spain's.[189] After his official mission to the country, in 2008, then UN Special Rapporteur on Adequate Housing, Miloon Kothari, expressed his concerns about the affordability of housing: 'Among developed countries, Spain has experienced one of the highest increases in housing prices in recent years. During the last five years, housing prices have increased in real terms at an average annual rate of almost 10 per cent.'[190] Spain built as though there were no tomorrow. In 2005, the country built as many residential units as the United Kingdom, France and Germany put together.[191] According to the official National Statistics Institute, in 2011, 3.68 million houses (14.6% of all) were second residences or were used only during vacation; 3.44 million (13.7%) were considered simply empty.[192] Either because of the location or because of stage of completion, not all empty properties were suitable and ready to accommodate people in need of accommodation. However, the extraordinarily high number of unoccupied spaces is an indication that many houses were being built for the mere purpose of investing, buying, selling and owning them, not to create a place to live in. The methodology got more sophisticated in the 2021 census of population and housing, and the finding was that even more dwellings were actually empty:

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185 Instituto Nacional de Estadística, 'Encuesta Continua de Hogares 2020. Nota de prensa' (7 April 2021), 5.

186 Observatorio de Vivienda y Suelo, *Boletín especial: Alquiler residencial* (Madrid: Ministerio de Fomento 2017), 5.

187 Jorge Martínez Pagés and Luis Ángel Maza, *Análisis del precio de la vivienda en España, Documento de Trabajo No. 0307* (Banco de España, 2003), 7.

188 Ministerio de Fomento, *El ajuste del sector inmobiliario español* (Ministerio de Fomento, 2012).

189 Sebastian Dellepiane, Niamh Hardiman and Jon Las Heras, *Building on easy money: The political economy of housing bubbles in Ireland and Spain. Paper presented at the 7th ECPR General Conference* (2013).

190 Special rapporteur on adequate housing, Report: Mission to Spain, UN Doc. A/HRC/7/16/Add.2 (7 February 2008), para. 14.

191 Observatorio Estatal de la Sostenibilidad, *Cambios de ocupación del suelo en España: Implicaciones para la sostenibilidad* (Universidad de Alcalá de Henares, 2006), 15.

192 Instituto Nacional de Estadística, 'Censo de población y viviendas 2011. Nota de prensa' (18 April 2013).

3.84 million dwellings (14.4% of all), by which the National Statistics Institute meant that the level of electricity consumption was no more than an average home in the same municipality if it were occupied for 15 days or less in a whole year. Nearly half (45%) of all these empty dwellings were in areas of relatively low demand, in towns with less than 10,000 inhabitants. However, the data showed a good number of empty properties in large cities, for example, 5% in Palma de Mallorca, 6.3% in Madrid, 7.5% in Seville, 9.3% in Barcelona, and 17.3% in Santa Cruz de Tenerife.[193]

Spain has not always been a country of homeowners. More than four in ten families rented their homes in 1960, a similar proportion to that of the Netherlands, France, the UK and Sweden at the time, and not far off the proportion in West Germany.[194] Unlike those countries, however, Spain lacked policies to ensure a minimally adequate standard of living for the working class and to advance towards a more egalitarian society. Capital accumulation of the post-war era resulted in wider inequalities of income and wealth.[195] In the 1950s, out of a confluence of interests, the immovable property sector and the industrial sector jointly demanded cheap accommodation for the hundreds of thousands of internal migrants who moved from rural areas to the more prosperous cities.[196] Businesses' concurring interests required new policies to favour homeownership.

The privatisation of public housing was one of those policies. With less than 3.5%, Spain has one of the lowest social housing rates in Europe, compared with 29% in the Netherlands, 24% in Austria, and 17% in France, for example.[197] These striking differences, however, are not indicative of lack of public spending in Spain; instead, they shed light on the way those resources, as limited as they were, have been spent. In fact, a report commissioned by the Spanish Government showed that of all the houses built between 1951 and 2015, more than a third (6.3 million, 36.8%) were or had been at some point

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193 Instituto Nacional de Estadística, 'Population and Housing Censuses 2021. Press Release' (30 June 2023).

194 Carme Trilla, *La política de vivienda en una perspectiva europea comparada* (Fundación La Caixa, 2001), 58.

195 Leandro Prados de la Escosura, Inequality, poverty and the Kuznets curve in Spain, 1850–2000, 12(3) *European Review of Economic History* 287 (2008), at 301.

196 Aitana Alguacil et al, *La vivienda en España en el siglo XXI: Diagnóstico del modelo residencial y propuestas para otra política de vivienda* (Foessa, 2013), 11.

197 Housing Europe, *The State of Housing in Europe 2023* (Housing Europe, 2023).

'protected housing units' ('*viviendas protegidas*').[198] In administrative parlance, protected housing means that property developers received financial incentives to sell them at a more affordable price to first buyers, keeping the price fixed and relatively low for a limited period of time – until no longer classified as protected, '*descalificación*'.[199] Spain's peculiar public housing model, created during the dictatorship and retained in the democratic era, was defined by two unique features. First, in most cases people enjoyed the legal title of leasehold property over their homes – not in the form of long-term rental tenure, but as nearly full property rights, only limited *for some time* by the impossibility of transferring the property for more than a set price. And that was indeed the second abnormal feature: the set price of these privately owned but publicly protected housing units was automatically lifted after a few years, when the house could be sold and purchased freely.[200] This in effect meant that developers could offer the property, and the buyer could have the most reasonable expectation of selling it at a higher free market price sometime later. Only a small number of the protected housing units, built with a public or social purpose and given an affordable price tag, remain social and publicly owned. The Government's data shows that, between 1981 and 2019, more than 2.36 million protected houses were completed, which equates to 21.6% of all houses built in that time. However, in 2019, the total social housing stock was only 290,000 units, three-fifths of which were owned by regional governments and the other two-fifths by local authorities.[201] Developers of social or publicly protected homes could be public or private companies, and in the latter case they could be charities, or they could act for profit. Often these residential units were built on publicly owned land, resulting in an even coarser manifestation of the denationalisation of public resources. Property developers were financially compensated by the state for the construction and sale of housing that was affordable at first but bound to become far less so in time. For more than a century, Spain's public housing construction strategy resulted in the

198 Dirección General de Arquitectura, Vivienda y Suelo, *Agenda Urbana Española 2019* (Ministerio de Fomento, 2018), 33.

199 '*Descalificación*' was eliminated in the Basque Country in 2003, which meant that all protected housing built after that year has a price cap with no end term.

200 Joris Hoekstra, Iñaki Heras Saizarbitoria and Aitziber Etxezarreta Etxarri, Recent changes in Spanish housing policies: subsidized owner-occupancy dwellings as a new tenure sector?, 25(1) *Journal of Housing and the Built Environment* 125 (2010).

201 Ministerio de Transportes, Movilidad y Agenda Urbana, *Observatorio de Vivienda y Suelo. Boletín especial vivienda social 2020* (Ministerio de Transporte, Movilidad y Agenda Urbana, 2020), 4–5.

progressive privatisation of a resource that otherwise could have served a public purpose, namely, the purpose of housing those who could not afford it on their own in the private sector.

Alongside the peculiar public housing model, the regulatory framework of the residential rented sector also contributed significantly to the general shift towards the homeownership paradigm. The 1964 Urban Rental Act established the principle of the indefinite nature of rental contracts and allowed closest relatives – children, mostly – to inherit the tenancy in the same conditions as those of the deceased tenant. Rent increases were practically impossible, which meant that the passing of time and inflation made rents obsolete. This very protectionist legislation was deemed to demotivate landlords from making their properties available in the rental market. A law in 1985 put an end to the automatic renewal of leases, giving landlords and tenants nearly absolute freedom to set the conditions of their contractual relationship. In many cases, tenants were left unprotected vis-à-vis the generally more powerful other side. A 1994 reform tempered some of the defencelessness tenants found themselves in, establishing a general five-year rule, mandatory for the landlord, but with an exit clause for the tenant. This five-year term, as well as court deadlines for evictions, was shortened in 2011 and 2013, diminishing security of tenure. Before the economic crisis, the 2005–2008 Housing Plan sought to give a boost to the rented sector. But there was virtually no time for the plan to unfold before the crash.

Until the financial slump, wealth concentration had remained more or less stable since the mid-1980s.[202] Research for the World Inequality Database estimates that 85% of Spain's capital gains between 1950 and 2010 were linked to housing.[203] Since homeownership began to be actively promoted as a public policy in the 1950s, Spain's wealth concentrated on capital gains derived from blind faith in the unlimited growth of immovable property value. Upper and middle classes, as well as working-class families trying to climb up the ladder, invested unwaveringly in private property when the economy was doing well.[204] When it stopped going so well, the wind of the financial meltdown did not blow away all those investments equally. The Bank of Spain's data shows that wealth inequality kept going up during the economic crisis. The amount of wealth of the richest decile was 16 times greater than that of the poorest half

[202] Facundo Alvaredo and Emmanuel Sáez, Income and wealth concentration in Spain from a historical and fiscal perspective, 7(5) *Journal of European Economic Association* 1140 (2009), at 1156–1157.

[203] Miguel Artola Blanco et al., Wealth in Spain, 1900–2014: A Country of Two Lands, *WID.world Working Paper Series* No. 5 (2018), 4.

[204] World Inequality Lab, *World Inequality Report 2018* (Paris School of Economics 2017), 230.

in 2002, but the ratio increased to 21 times in 2011, and 38 times in 2017.[205] In other words, the wealth gap between the top 10% and the bottom 50% more than doubled in 15 years, before, during and after the financial crisis.

It is in this political and economic context when real estate investment trusts – *SOCIMI* in Spanish law – made their entrance in 2013. At first, they did not make much noise; in fact, the first such companies were set up four years after the regulatory framework had been put in place with a law dating from 2009. In time, however, corporate landlords would play a central role in the story. In the summer of 2013, the regional and local authorities of Madrid sold approximately 4,800 apartments and other immovable property assets to investment companies, thus reducing the available public housing stock. This was despite the small size of Spain's and particularly Madrid's public housing stock – compared with other European countries and cities – and the fact that this happened at a time of socioeconomic crisis and growing demand for state support. For the UN Committee on Economic, Social and Cultural Rights, the sale constituted an unjustified and deliberate retrogressive measure in the protection of the right to adequate housing and other social rights.[206] The growing presence of corporate landlords in the private sector has been noticeable. By the end of 2022, approximately a quarter of all properties in the private sector in the Region of Madrid (approximately 118,900 units) were owned by corporate landlords, real estate investment trusts or not.[207] For Spain as a whole, it is estimated that corporate landlords, with 50 or more properties each, own together 10% of all residential properties for rent.[208]

What about non-corporate landlords? Despite the myth portraying landlords as people of modest means who need the income from rent to get by, the evidence indicates the reality is substantially different. An investigation by the Barcelona Institute of Urban Research shows that homeowners renting out residential properties are a minority: only somewhere between 3% and 9% of the population, for more than 20% of people who are tenants. In the case of

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[205] Banco de España, *Encuesta Financiera de las Familias 2017: Métodos, Resultados y Cambios desde 2014* (BDE, 2020), 8; Banco de España, *Encuesta Financiera de las Familias: Descripción, Métodos y Resultados Preliminares* (BDE, 2004), 67.

[206] CESCR, *Ben Djazia and Bellili v. Spain*, Communication No. 5/2015, UN Doc. E/C.12/61/D/5/2015 (2017), para. 17.5 and 17.6.

[207] Ter García, Carmen Torrecillas and Adrián Maqueda, 'Diez empresas concentran el 12% de los inmuebles alquilados en toda la Comunidad de Madrid', *Civio* (21 June 2023).

[208] Ter García, Carmen Torrecillas and Adrián Maqueda, 'CaixaBank y Blackstone, los dos mayores caseros del país, suman cerca de 41.400 viviendas alquiladas', *Civio* (2 April 2024).

Barcelona, 60% of the rental market is captured by landlords with more than one property to rent out. While a minority in number, landlords owning many properties have a lot of sway: 1.2% of Barcelona's landlords have 15 or more properties and control 24.1% of the market.[209] The number of large property holders – 10 properties or more – went up by 20% between 2014 and 2024 in Spain as a whole.[210] These figures shed light on the extent to which the private rental market funnels wealth from mostly young and economically insecure tenants to affluent individuals, corporate landlords and a rentier class.[211]

Summing up, for about five decades, between the late 1950s and the late 2000s, public authorities of different political colours aligned themselves in their reliance on homeownership as the ideal residential model. Construction contributed significantly to boosting the economy. However, the house of cards collapsed with the financial crisis, which led to a general questioning of brick and mortar as pillars of the economy. Tens of thousands of evictions ensued in the early 2010s, first primarily following foreclosures, then mostly in the private rented sector. Mortgages became inaccessible, while renting privately was unaffordable, which rendered many homeless. The stock of public housing felt minuscule in front of the challenge. For much of the 2010s, social unrest was palpable against evictions and in defence of Article 47, in reference to the constitutional provision on the right to adequate housing.[212] It is in this context, from 2013 onwards, that regional executives and legislators started to put flesh on the bones of their statutory powers to intervene in the private residential market.

Eleven of the 17 Spanish regions adopted laws on adequate housing between 2013 and 2020, some of these laws explicitly referring to the international framework of human rights.[213] Several of these laws established that

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[209] Javier Gil, Lorenzo Vidal and Miguel A. Martínez, *¿Cómo afectará el control de precio de los alquileres a los caseros?* (IDRA, 2023).

[210] Dani Domínguez, 'El número de grandes propietarios aumenta un 20% en la última década', *La Marea* (16 September 2024).

[211] Pablo Pérez Ruiz, Jaime Palomera Zaidel and Marta Ill Raga, *De propietarios a inquilinos: Informe sobre la creciente desigualdad en el acceso a la propiedad* (IDRA, 2024); Pablo Pérez Ruiz, Jaime Palomera Zaidel and Marta Ill Raga, *Vivir de alquiler: inseguridad garantizada por ley* (IDRA, 2024).

[212] About the political context of public austerity and social outrage: Koldo Casla, *Spain and Its Achilles' Heels: The Strong Foundations of a Country's Weaknesses* (Rowman & Littlefield, 2021), 108–115.

[213] Natalia Paleo Mosquera and Andrei Quintiá Pastrana, Las políticas de vivienda desde una perspectiva multinivel: un análisis comparado de la legislación autonómica, in *Políticas y derecho a la vivienda. Gente sin casa y casas sin gente* 309 (Natalia Paleo Mosquera, ed. Tirant lo Blanch, 2020), at 329.

residential ownership ought to be exercised in line with the social function of housing. Given the small size of Spain's public housing stock, regional authorities resorted to tax incentives, but also penalties and other coercive measures to intervene in the private sector. After years of evolution, amendments and in some cases derogations, at the time of this writing (September 2025), the laws in force in the Balearic Islands, the Basque Country, Navarre, the Region of Valencia and Catalonia stipulate that residential properties kept deliberately empty and out of the market do not meet the social function of housing ownership.[214] Paleo Mosquera and Quintiá Pastrana use 14 indicators to assess the strength of the regions' legislative and policy initiatives: a first cluster of regions – Catalonia, the Region of Valencia, Basque Country, Balearic Islands, Extremadura and Navarre – adopted a 'holistic' approach, formally proclaiming the right to housing in law, with broad material development, provision of resources, and addressing issues such as fuel poverty and over-occupation; a second group – Canary Islands, Andalusia, Castile and León, Aragón, Rioja, Murcia and Galicia – followed a more 'aid-oriented' line, with targeted interventions for specific groups in situations of emergency; a third category – Cantabria, Madrid, Castile La Mancha and Asturias – adopted a 'residual' perspective, with mere implementation of the state housing plans, and no formal recognition of rights.[215]

Up until June 2018, the conservative Partido Popular was the ruling party in central government in Madrid. They did not approve of most of the above noted regional laws on the right to housing and the social function of property adopted in regions where Partido Popular was not in power. The central government's opposition was twofold: they considered, first, that the regional authorities had overstepped the bounds of their constitutional and statutory powers, and second, that the regional laws infringed upon the right to private property. The central government and conservative MPs in the Spanish Parliament brought their concerns to the attention of the Constitutional Court, which issued various judgments as regards both sorts of claims, the public law question of the distribution of powers and the normative question of the scope of property and its limits.

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[214] Law 5/2018, on Housing of the Balearic Islands, Article 5; Law 3/2015 on Housing of the Basque Country, Article 4; Law 10/2010 (amended multiple times since 2013) on the Right to Housing of Navarre, Article 52; Law 2/2017 on the Social Function of Housing of the Region of Valencia, Article 5; Law 18/2007 (amended multiple times since 2011) on the Right to Housing of Catalonia, Article 5.

[215] Natalia Paleo Mosquera and Andrei Quintiá Pastrana, The regionalisation of housing policies in Spain: an analysis of territorial differences, 39(7) *Housing Studies* 1763 (2024), at 1769–1772.

In its standard-setting 1987 judgment on the Andalusian agrarian reform, the Constitutional Court had established the principle that, when a region has exclusive competence over a certain area – agriculture back then, but it *could have* applied to housing – it follows that the regional authorities ought to have the legal instruments to develop policies in relation to that area. The regulation of the social function of housing, said the Constitutional Court in 1987, 'cannot be separated from the regulation of the concrete general interests of that who has been conferred the guardianship of those interests'.[216] In application of that principle, and considering the constitutional flexibility regarding property and its social function, one could have reasonably expected that the regions would be constitutionally empowered to legislate on the right to adequate housing the way they did.

However, the Constitutional Court ruled otherwise in the 2010s. Or, technically, the Court considered that the question at hand was different from that of 1987. The 2013 reform to the Andalusian law on the right to housing, and other regions that followed suit, established the possibility of a temporary 'expropriation of use' ('*expropiación de uso*'), applicable in cases of foreclosure involving corporate landlords and vulnerable residents. Under legally defined conditions, owners would be required to use the residential property in a certain way, and they would not be able to evict residents at risk of social exclusion, for which they would be entitled to compensation. The compensation would necessarily be lower than that for conventional expropriations, because in the case of expropriation of use, the owner would not lose the legal title. In 2015, the Constitutional Court ruled that the Andalusian expropriation of use was incompatible with less intrusive Spanish legislation adopted also in 2013, since the then conservative-ruled Spanish Government was keen not to disrupt the Spanish internal mortgage market. Therefore, in the view of the Constitutional Court, the Andalusian law would breach the Spanish authorities' constitutional power to set the 'basis and coordination of general planning of economic activity'.[217] In a nutshell, if the central/quasi-federal authorities had decided to regulate the matter, or a related matter, in a given way, regions would be prevented from developing law or policy that could be deemed contrary to it. In 2018, the Constitutional Court restated this position in relation to the Navarrese expropriation of use, which was similar to the Andalusian one.[218] However, the Court also reiterated the 1987 principle that, since the region had

[216] Constitutional Court of Spain, Judgment 37/1987 (26 March 1987), Legal Foundation No. 9.

[217] Constitution of Spain, 1978, Article 149(1)(13); Constitutional Court of Spain, Judgment 93/2015 (14 May 2015), Legal Foundation No. 18.

[218] Constitutional Court of Spain, Judgment 16/2018 (22 February 2018), Legal Foundations No. 12 and 13.

the powers to legislate about housing, it followed that it could delimit the right to property, including the definition of its social function.[219] The Navarrese law imposed additional obligations – and consequently envisioned the possibility of penalties – to corporate actors that kept their residential properties empty, obligations and penalties that did not apply in the case of natural persons who were landlords. The Constitutional Court concluded that this was within the region's competence, and that the obligations and penalties were not a disproportionate interference with private property rights.[220] The position was upheld, for example, in relation to Andalusia, the Canary Islands, the Region of Valencia and the Basque Country.[221]

In sum, the standing constitutional case law is that regions, which are competent in relation to housing, are also constitutionally empowered to delimit the social function of immovable property to live in. Public authorities, in general, enjoy a wide margin of appreciation to delineate private property rights in light of the social function of property. A few examples are noteworthy from recent years. For instance, since 2012 and at least until 2028, all mortgage repossession orders affecting economically vulnerable families – defined by certain income and wealth brackets in the law – are put on hold. The suspension began with the economic and financial crisis in 2012, and it was extended in response to the COVID-19 pandemic in 2020, and again with the rampant cost-of-living emergency in 2022.[222] The mortgagees are corporate actors, which connects with the principle underpinning regional laws on adequate housing according to which large and small landlords ought to be treated differently. In response to COVID-19, the Spanish Government suspended evictions affecting economically vulnerable families also in cases of illegal occupation or squatting, for which landlords would be compensated.[223] The Constitutional Court ruled this measure did not violate the essential content of the right to property, as it had 'minimal and temporary impact on possession or the ability to dispose' of property.[224] Evictions affecting legally defined economically vulnerable

[219] Ibid, Legal Foundation No. 7.

[220] Ibid, Legal Foundations No. 8 and 17.

[221] Constitutional Court of Spain, Judgment 32/2018 (12 April 2018), in relation to Andalusia; Judgment 43/2018 (26 April 2018) in relation to the Canary Islands; Judgment 80/2018 (5 July 2018), in relation to the Region of Valencia; Judgment 97/2018 (19 September 2018), in relation to the Basque Country.

[222] Royal Decree-law 1/2024, of 14 May, to extend the suspension of evictions affecting the main residence to protect vulnerable groups.

[223] Royal Decree-law 1/2021, of 19 January, to protect consumers in situations of socioeconomic vulnerability.

[224] Constitutional Court of Spain, Judgment 9/2023 (22 February 2023), Legal Foundation No. 4.

families are on hold at least until December 2025, and landlords are entitled to compensation.[225] By March 2025, it was reported that only approximately 10% of affected landlords had sought compensation, but experts estimated that most corporate landlords were accumulating their claims to present them altogether closer to the deadline.[226] Since 2023, the Catalan Law on the Right to Housing includes in the list of forms of non-fulfilment of the social function of property over residential units the refusal by landlords owning multiple properties – five or more in urban settings – to seek the eviction of squatters who show anti-social behaviour or damage the estate with the purpose of forcing true tenants to vacate the premises.[227] On occasion, the highest courts appreciate the need to recalibrate the balance between private property interests and other socially relevant general interests. In a case between an eviction-seeking corporation and a family with children, including one with a severe disability, the Constitutional Court ruled that the eviction could not be allowed without an assessment of proportionality considering the best interests of the child, and the high risk that the family would be rendered homeless.[228] In the same spirit of proportionality, the Supreme Court has made clear that one month's worth of outstanding payment of rent is not sufficient justification to terminate a contract and begin eviction proceedings.[229] Relying on the social function of property, the Supreme Court has also recognised that in the case of multi-unit properties or condominiums, neighbours can set rules and limits to the use of individual apartments for touristic purposes, which are considered to potentially cause inconveniences to the community.[230]

A change in the Spanish Government in June 2018 brought the left back to power, with support from nationalist and regionalist parties from the Basque Country and Catalonia primarily. At first, the Spanish Government appeared to refrain from bringing new appeals against regional laws on the right to

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225 Royal-Decree laws 11/2020, of 31 March, and 37/2020, of 22 December, as amended by Royal Decree-laws 8/2023, of 27 December, and 1/2025, of 28 January.

226 David Noriega, 'Menos de un 10% de propietarios han pedido la compensación por la moratoria antidesahucios: "Las cifras no hablan de una alarma"', *Eldiario.es* (9 March 2025).

227 Law 18/2007 (as amended by Law 1/2023) on the Right to Housing of Catalonia, Article 5(2)(g).

228 Constitutional Court of Spain, Judgment 113/2021 (31 May 2021), Legal Foundation No. 3.

229 Supreme Court of Spain, Private Law Division, Judgment 1065/2024 (29 July 2024).

230 Supreme Court of Spain, Private Law Division, Judgment 4790/2024 (3 October 2024), Legal Foundation No. 6.

adequate housing. However, legal reforms in relation to the right to housing in Catalonia were brought to the attention of the Constitutional Court both by the Spanish Government and by conservative MPs in the Spanish Parliament. In 2022, the Constitutional Court ruled that the Catalan authorities had overstepped their powers by seeking to impose rent controls, and in 2024, the same Court struck out an obligation imposed by Catalan law on landlords owning multiple residential properties to offer an affordable 'social' rent to vulnerable tenants before initiating proceedings that could result in an eviction.[231] On both occasions, the Constitutional Court established that such matters ought to be regulated by law at the general/quasi-federal level. Again, the Court's resistance had to do with the interinstitutional balance of power. The core content of property was not at risk for 7 of the 12 members of the Constitutional Court, but 5 judges issued dissenting opinions, among other reasons, because they considered that the lack of compensation in compulsory ceding of empty residential properties owned by corporations was a breach of the constitutional right to property.[232]

It was in May 2023 when the Spanish Parliament adopted the first ever Spanish law on the right to adequate housing.[233] Referring not only to Article 47 of the Constitution, but also to international human rights obligations, the preamble of Law 12/2023 anchored the protection of the right to adequate housing on the social function of land and of economically productive private property. The law includes a series of measures to promote the construction and preservation of public housing. It also formalises the proportionality test, including the suspension of evictions and a conciliation procedure between landlords and tenants, and urging judges to call for the involvement of social services to prevent situations where vulnerable families can become homeless. The law also includes a rent cap, which is stricter for owners of ten or more properties. However, the rent cap only applies in areas considered 'strained' or of high demand ('*zonas tensionadas*'), and only regional authorities can pronounce areas as such. By July 2025, 300 local authorities (271 cities and towns in Catalonia, 21 in Navarra, 7 in the Basque Country, and one in Galicia) had

[231] Constitutional Court of Spain, Judgment 37/2022 (10 March 2022), Legal Foundation No. 4; Constitutional Court of Spain, Judgment 120/2024 (8 October 2024), Legal Foundation No. 5; María Remedios Guilabert Vidal, La inconstitucionalidad de la normativa catalana sobre el control de precios en el arrendamiento: SSTC 37/2022, 57/2022, 118/2022 y 150/2022, 42 *Derecho Privado y Constitución* 179 (2023).

[232] Constitutional Court of Spain, Judgment 120/2024 (8 October 2024), Dissenting votes.

[233] Law 12/2023, of 24 May, on the Right to Housing (BOE official gazette No. 124/2023).

been formally declared as strained areas of high demand.[234] There are some 8,000 local authorities in Spain, but the list of strained areas covers approximately one-sixth of the country's population. The law was strongly criticised by right-wing parties and commentators, as well as by a sizeable mass of the private law scholarship in Spain, for whom it amounts to a disproportionate transgression of private property.[235] Controversially, the then conservative majority of the General Council of the Judiciary also forcefully criticised the then Bill for what they saw as the stripping of the right to property of any significant constitutional content, subject to the legislator's analysis of the present moment.[236] In a judgment issued in May 2024, a majority of the Constitutional Court concluded that the Spanish Parliament was within its constitutional powers to legislate on the right to adequate housing the way it did in Law 12/2023, both in terms of power distribution between the quasi-federal level and the regions,[237] and in terms of the equilibrium between housing and property rights.[238] The Constitutional Court proclaimed in so many words, for the first time:

> Spain's international commitments in the area of human rights confirm the existence of a right to housing, which is also recognized in various regional statutes of

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[234] Resolutions of the Secretary of State of Housing of 28 July 2025 (BOE official gazette No. 181/2025), 29 April 2025 (BOE official gazette No. 104/2025), 28 January 2025 (BOE official gazette No. 26/2025), 8 October 2024 (BOE official gazette No. 244/2024), and 14 March 2024 (BOE official gazette No. 55/2024).

[235] For example: Sergio Nasarre Aznar, 'El Proyecto de Ley de vivienda 2022', *Fedea* (April 2022); Héctor Simón Moreno, La evolución constitucional de la función social de la propiedad y el nuevo régimen del derecho de propiedad sobre una vivienda en la Ley por el derecho a la vivienda, 42 *Derecho Privado y Constitución* 139 (2023); Matilde Cuena Casas, 'La devaluación constitucional de la propiedad privada', *Hay Derecho* (29 May 2025). Various non-government organisations and other analysts considered it insufficiently protective of people at risk of harm and disadvantage, while others deemed it generally proportionate and suitable. See, for example, Miryam Rodríguez-Izquierdo Serrano, La vulnerabilidad frente a los desalojos forzosos de vivienda como tendencia constitucional, 130 *Revista Española de Derecho Constitucional* 49 (2024).

[236] General Council of the Judiciary ('*Consejo General del Poder Judicial*'), *Informe sobre el Proyecto de Ley del Derecho a la Vivienda* (27 January 2022), 30.

[237] This point has been strongly criticised by nationalist and regionalist parties in the periphery, but the issue, while important in Spanish politics, exceeds the parameters of this book.

[238] Constitutional Court of Spain, Judgment 79/2024 (21 May 2024), Legal Foundation No. 3. The Court reiterated its position in Judgment 26/2025 (29 January 2025).

> self-government and whose effectiveness is precisely what is entrusted to all public authorities in Article 47 of the Constitution.[239]

In conclusion, by conceptualising the social function as inherent to the right to property, and not as a limit to it, Spain's Constitutional Court has granted public authorities considerable room for manoeuvre. In relation to housing, however, for a long time, legislators were reluctant to make use of their legislative powers to intervene in the private sector. Beginning in the mid-twentieth century, public authorities showed blind faith in the market and facilitated the effective privatisation of housing built with public resources. The intricate decentralisation settlement complicated matters more, because housing is a devolved issue, but central authorities retain powers over private law in general, as well as in relation to basic equality and the basis and coordination of economic activity. Public attitudes changed drastically in the aftermath of the financial crisis, with important legislative initiatives at the regional level in the 2010s, and with the first ever Spanish Law on the Right to Adequate Housing adopted in 2023. For Nic Shuibhne and Quintiá Pastrana, these legal reforms are evidence of the influence of international human rights law in relation to the right to housing 'as conscious or unconscious source of inspiration' for domestic powers.[240]

3.4 CHILE AND THE PROPRIETARIAN IDEOLOGY OF RIGHTS

3.4.1 Proprietarianism and the Social Function in the Chilean Constitution

The Chilean Constitution was adopted in October 1980, during Augusto Pinochet's military dictatorship. In the words of Undurraga and Cortés, Pinochet's text 'was conceived by its framers as a mechanism to neutralize the agency of political majorities if democracy was restored'.[241] The

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[239] Constitutional Court of Spain, Judgment 79/2024 (21 May 2024), Legal Foundation No. 3(B)(a)(ii).

[240] Emma N. Nic Shuibhne and Andrei Quintiá-Pastrana, The influence of the international right to adequate housing in Ireland and Spain: aspirations, indicators and realities, 11(4) *European Journal of Comparative Law and Governance* 415 (2024), at 468.

[241] Verónica Undurraga and Pascual Cortés, Proportionality in the Case Law of the Chilean Constitutional Court, in *Proportionality and Transformation: Theory and Practice from Latin America* 110 (Francisca Pou-Giménez, Laura Clérico and Esteban Restrepo-Saldarriaga, eds, Cambridge University Press, 2022), at 111.

1980 Constitution responded to a certain neoliberal constitutional culture that endured upon the return of democracy in the 1990s, obstructing the adoption of transformative and progressive policies.[242] This is despite the fact that the Constitution itself has been amended more than 60 times in the democratic era, removing most if not all the authoritarian provisions of the original text, particularly during Ricardo Lagos's presidency (2000–2006). However, Chile to this day is the only country in Latin America that retains a fundamental text that was adopted in origin under an anti-democratic regime.

In the current form, the Constitution is now clear that it is the duty of public authorities to respect and promote the rights proclaimed in the bill of rights and in international human rights treaties signed and ratified by Chile.[243] This includes the International Covenant on Economic, Social and Cultural Rights (ICESCR). In fact, between 2015 and 2021, the Supreme Court cited and relied partly on this treaty at least on 90 occasions in relation to a wide range of topics, particularly the protection of women at work during and after pregnancy.[244] Having said that, alongside the United States, whose Constitution is silent about them, Chile is the country in the Americas that has so far most resisted the constitutionalisation of social rights.[245] The right to housing is nowhere to be found, and other social rights whose satisfaction is dependent upon the state's economic resources – like health, education or social security – are not directly justiciable through the appeal of protection ('*recurso de protección*').[246] There is a right to choose between different healthcare providers, but not a right to claim a certain standard or quality of healthcare.[247] In his 2016 report, the UN Special Rapporteur on Extreme Poverty and Human Rights concluded that the formulations of rights in Chile's Constitution 'does not generally conform to international standards and are not firmly anchored

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[242] Javier Couso, Trying democracy in the shadow of an authoritarian legality: Chile's transition to democracy and Pinochet's Constitution of 1980, 29(2) *Wisconsin International Law Journal* 393 (2011).

[243] Constitution of Chile, 1980, Article 5. Translation from Comparative Constitutions Project: https://constituteproject.org/

[244] Dirección de Estudios de la Corte Suprema, *El Pacto Internacional de derechos económicos, sociales y culturales en la jurisprudencia de la Corte Suprema (2015–2021)* (DECS, 2021).

[245] Roberto Gargarella, *Latin American Constitutionalism, 1810–2020: The Engine Room of the Constitution* (Oxford University Press, 2013), 145.

[246] Constitution of Chile, 1980, Articles 19 and 20.

[247] Enrique Navarro Beltrán, 35 años del recurso de protección: Notas sobre su alcance y regulación normativa, 10(2) *Estudios Constitucionales* 617 (2012), 629–634; Luz Bulnes Aldunate, El derecho a la protección de la salud en la Constitución de 1980, 4 *Revista Actualidad Jurídica* 131 (2001).

in the language of rights and obligations. The methods of implementation envisaged are relatively open-ended and non-empowering and do not explicitly include judicial action' in relation to social rights.[248]

Compared with other rights, ownership enjoys an extraordinary level of protection in the Chilean legal framework. Article 19(23) of the Constitution recognises the 'freedom to acquire property over all kinds of goods', except for communal property and public property to be declared so by law, while the first paragraph of Article 19(24) proclaims 'the right of ownership in its diverse species of all kinds of tangible or intangible goods'. Relevant for the public–private property divide, and an expression of Pinochet's neoliberalism, Article 19(21) leaves a residual space for state-owned companies, which would only be allowed to operate when approved by a qualified absolute majority in parliament, meaning, more than half of its members. Article 19(26) makes clear that the regulation of rights 'shall not affect the rights in their essence, nor impose conditions, taxes or requirements which may prevent their free exercise'.[249] This provision is particularly relevant for private property, because it embodies perfectly the conceptualisation of taxes, not as enabling the satisfaction of rights, but as a potential threat to them. These provisions need to be read alongside Andrés Bello's Civil Code, adopted in 1855. In the spirit of the nineteenth-century liberalism, Article 582 of the Civil Code defines ownership as the right to enjoy and dispose of a thing 'arbitrarily', or freely, as long as it is not contrary to the law and the rights of others; Article 583 adds that ownership can be held over 'incorporeal things' as well as corporeal ones.[250] Together, the expansive conception of ownership in the 1855 Civil Code and the strong protection of the right to property in the 1980 Constitution led to what came to be known as the 'proprietarisation of rights', that is, the reification of rights in such a way that other rights can be protected insofar as they can be linked to property.[251] Under the proprietarian ideology, rights – other than the right to property – are not recognised as independent claims, but as private interests one can own and presumably dispose of. The right to property is generally the most frequently claimed right in appeals of protection under Article 20 of the Constitution, and a wide range of grievances have found their way onto the right to property through case law, such as claims over employment, public licences, urban planning permits, property over certain incorporeal rights derived from the condition of being a university student, property

248 Special Rapporteur on Extreme Poverty and Human Rights, Report: Mission to Chile, UN Doc. A/HRC/32/31/Add.1 (8 April 2016), para. 25.

249 Constitution of Chile, 1980, Articles 19(23), 19(24), 19(21) and 19(26).

250 Civil Code of Chile, 1855, Articles 582 and 583.

251 Alejandro Vergara Blanco, La propietarización de los derechos, 14 *Revista de Derecho de la Universidad Católica de Valparaíso* 281 (1991–1992), at 281.

over subletting, property over membership of an association or a trade union, or being a civil servant, etc.[252] This constitutional device has also been successfully used by tenants suffering harassment from landlords: on occasion, courts have stopped landlords from expelling tenants and from taking their notion of justice into their own hands.[253]

The second paragraph of Article 19(24) of the Constitution proclaims the social function of property:

> Only the law can set forth the mode of acquiring property, of using, enjoying and disposing of it as well as the limitations and obligations that derive from its social function. This includes all that the general interests of the Nation, national security, the public utilities and health and the preservation of the environment, require.[254]

While included in Pinochet's text in 1980, the social function has a much longer history in Chile, preceding any attempts at political instrumentalisation by the regime. Inspired by the social justice preaching of the Catholic Church in the late nineteenth century, and by Léon Duguit's writing in the early twentieth century (to whom we shall return in Chapter 4, section 4.4), the social function introduced some nuance to the absolutism of the nineteenth century's conception of ownership.[255] Article 10 of the original text of the 1925 Constitution incorporated the doctrine of the social function, not explicitly as such, but by subjecting the exercise of property rights to the limitations and rules required by 'the maintenance and progress of the social order'.[256] Implicit at first, after decades of political debate, by the 1960s, the social function of property

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[252] Alejandro Vergara Blanco, La propietarización de los derechos, 14 *Revista de Derecho de la Universidad Católica de Valparaíso* 281 (1991–1992), 289–290; Enrique Navarro Beltrán, 35 años del recurso de protección: Notas sobre su alcance y regulación normativa, 10(2) *Estudios Constitucionales* 617 (2012), 625–628.

[253] Supreme Court of Chile, Appeal of Protection No. 21072–2019, Judgment of 8 August 2019; Court of Appeals of Santiago Chile, Appeal of Protection No. 637462–2019, Judgment of 25 September 2019; Koldo Casla and Verónica Valenzuela, Taking the Right to Adequate Housing Seriously in Chile's Next Constitution: Building from Scratch, in *Social Rights and the Constitutional Moment: Learning from Chile and International Experiences* 165 (Koldo Casla, Magdalena Sepúlveda, Vicente Silva and Valentina Contreras eds, Hart, 2022), at 176.

[254] Constitution of Chile, 1980, Articles 19(24).

[255] Eduardo Cordero Quinzacara and Eduardo Aldunate Lizana, Evolución histórica del concepto de propiedad, 30 *Revista de Estudios Histórico-Jurídicos* 345 (2008).

[256] M. C. Mirow, Origins of the Social Function of Property in Chile, 80(3) *Fordham Law Review* 1183 (2011), at 1214–1215.

became widely accepted in the Chilean legal and policy framework. The 1960s was the time of a major agrarian reform that was intended to redistribute land ownership. Mirow writes that 'the theoretical underpinning for agrarian reform was the social function of property, the social function of land, and the social obligation that property carried with it'.[257] The 1967 Law of Agrarian Reform was preceded by an amendment to Article 10 of the 1925 Constitution. The revised text urged the legislator to regulate ownership in accordance with the social function to 'make it accessible to all', language taken from the 1947 Italian Constitution.[258] Article 10 went on to define the social function as inclusive of everything required by the general interests of the state, public utility and public health, the best use of energy and productive sources, and the improvement of the living conditions of the common people.[259] A new constitutional reform in 1971 established that, in addition to preserving certain means of production and natural resources as public property, the state could also nationalise those that it did not own, subject to compensation, minus the 'excessive returns' those companies might have enjoyed up to that point.[260] The 1967 and the 1971 amendments provided a constitutional foundation to the socialist reforms that favoured public ownership during Allende's government (1970–1973), which was ended abruptly by the coup staged by Pinochet on 11 September 1973.

Pinochet's regime introduced a series of measures to dismantle and reverse the land distribution of the 1960s. The consequences are noticeable to this day. Villavicencio Pinto traces the process from Pinochet's neoliberal policies to the high levels of today's land concentration in Chilean agriculture: the increase in the average size of the top 1% of the largest farms 'suggests that land concentration has not only intensified in terms of the proportion controlled by this group but also in the scale of individual properties within this segment'.[261] Pinochet ended the democratic administration, and he broke away from the constitutional framework that had facilitated the land distribution of the 1960s and Allende's nationalisations in the early 1970s. However, as said earlier, despite the neoliberal bedrock of his regime, the social function was formally proclaimed in the 1980 Constitution. Christian-Democrats involved

257 Ibid, 1210.

258 Constitution of Italy, 1947, Article 42. Translation from Comparative Constitutions Project: https://constituteproject.org/

259 Law 16615, of reform of the Constitution (18 January 1967).

260 Law 17450, of reform of the Constitution (15 July 1971).

261 Eduardo Villavicencio Pinto, Beyond private property: rediscussing neoliberal land narratives in Chile, 8 *Journal of Law, Property, and Society* 80 (2024), at 115.

in the drafting, while supporting Pinochet, were reluctant to openly oppose a concept rooted in the social preaching of the Catholic Church.

In the democratic era, the Constitutional Court has generally seen the social function as integral to the right to property, not a limit to it. The Court has established, for example, that the right to property 'has an individual and a social value, so it must be at the service of the person and of the society… The rights and responsibilities of the owner, which harmonize the interests of the owner and of the society, can be considered the social function of property.'[262] In another case, the Constitutional Court stressed that the 'social side' ('*faz social*') of ownership is not alien or contrary to property, but an integral part of this right.[263]

Article 10 of the 1925 Constitution, as amended in 1967, adopted a broad interpretation of the grounds of application of the social function: as shown earlier, the social function was inclusive of everything required by the general interests of the state, public utility and public health, the best use of energy and productive sources and the improvement of the living conditions of the common people. By contrast, Article 19(24) of the 1980 Constitution appears to be narrower, as the social function can delimit property rights only when it is required by the general interests of the nation, national security, the public utilities and health, and the preservation of the environment. Nevertheless, it is also true that the Constitution does not define the contour of the social function, deferring to legislation for the actual configuration of the right to property.[264] Moreover, the terms used in Article 19(24) are sufficiently broad to cover a wide range of options if there is political appetite for it.[265] This is despite the due acknowledgement that the constitutional wording would always impose some restrictions. For example, in case 334-01 (2001), the Constitutional Court said that the measures adopted in the name of the social function must benefit the whole society, not a particular social, economic or other category of group.[266] Whenever regulation is required to operationalise the constitutional

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[262] Constitutional Court of Chile, Judgment 245–96 (5 September 1996), Legal Foundation No. 25.

[263] Constitutional Court of Chile, Judgment 3086-16-INA (18 July 2017), Legal Foundation No. 27.

[264] Ximena Peralta Fierro and Isabel Yáñez Morales, La función social de la propiedad en la jurisprudencia del Tribunal Constitucional chileno, 91 *Revista de Derecho Público* 35 (2019), at 45, 53.

[265] Enrique Petar Rajevic Mosler, Limitaciones, reserva legal y contenido esencial de la propiedad privada, 23(1) *Revista Chilena de Derecho* 23 (1996), at 89.

[266] Constitutional Court of Chile, Judgment 334-01 (21 August 2001), Legal Foundations No. 21 and 22.

bill of rights, the legislator must respect the essential content of the right.[267] In principle, the Constitutional Court says, the essence of the right is breached when the right is stripped of content that is 'consubstantial', in such a way that the right is no longer recognisable as such and it cannot be exercised freely.[268] Limitations can establish certain burdens in the exercise of the right, but the 'essential faculties' must subsist.[269] Unlike expropriations in the name of the public interest – envisioned under certain conditions in the third paragraph of Article 19(24) of the Constitution – where the owner no longer holds the legal title, limitations in the name of the social function do not merit compensation, since the social function is consubstantial to the right to property.[270] Unfortunately, beyond these general principles, the Constitutional Court does not appear to oblige with a consistent position as per the powers of the legislator and the essential content of the right to property. For example, in 2010, the Court refused to provide a veneer of constitutionality to the liberal definition of ownership in the Civil Code, establishing instead that the Constitution was neutral as regards the scope of the right to property.[271] In 2020, however, the same Court ruled that granting too much leeway to the legislator risks 'blurring' the essential content of this right, which would break away from the private law tradition of ownership, a tradition that would be important to preserve, in the Court's opinion.[272] Undurraga and Cortés concur that 'the

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267 Constitution of Chile, 1980, Article 19(26).

268 Constitutional Court of Chile, Judgment 43 (24 February 1987), Legal Foundation No. 21.

269 Constitutional Court of Chile, Judgment 245-96 (5 September 1996), Legal Foundation No. 22; Constitutional Court of Chile, Judgment 334-01 (21 August 2001), Legal Foundation No. 19; Constitutional Court of Chile, Judgment 505-06 (6 March 2007), Legal Foundation No. 22.

270 Constitutional Court of Chile, Judgment 2296-12-INA (29 January 2014), Legal Foundations No. 7 and 8; Constitutional Court of Chile, Judgment 1576-09-INA (16 December 2010), Legal Foundations No. 5-15; Eduardo Aldunate Lizana, Limitación y expropiación: Scilla y Caribdis de la domática constitucional de la propiedad, 33(2) *Revista Chilena de Derecho* 285 (2006); Eduardo Aldunate Lizana and Jessica Fuentes Olmos, El concepto del derecho de propiedad en la jurisprudencia constitucional chilena y la teoría de las garantías de instituto, 18 *Revista De Derecho de la Universidad Católica de Valparaíso* 195 (1997), 219–220.

271 Constitutional Court of Chile, Judgment 1298-09-INA (3 March 2010), Legal Foundation No. 44.

272 Constitutional Court of Chile, Judgment 7264-19-INA (19 March 2020), Legal Foundations 14, 17 and 18. Sergio Fuenzalida Bascuñán, La función social y la concepción relacional de la propiedad privada, 29(1) *Anuario Iberoamericano de Justicia Constitucional* 49 (2025), at 59.

composition of the court at the time of the decision is a key element to explain the outcomes'.[273]

In sum, the social function has been part of Chile's legal culture for much of the twentieth century, implicitly recognised in the 1925 Constitution, explicitly since 1967. Initially used to provide legal justification for ambitious agrarian reforms and nationalisations, Pinochet retained the concept in the 1980 Constitution, which is currently in force after many substantial amendments. While the grounds of application of the principle of the social function are formally narrower in the 1980 text than in the 1967 one, the Constitution does not define the contour of the right to property and its social function. Formally written as a limitation to the right to property, the Constitutional Court has nonetheless considered the social function as consubstantial to the right. However, the Court's case law to this day leaves much room for interpretation about the scope of the social function in relation to the essential content of the constitutional right to property. Chilean legislators have not regulated the right to adequate housing the way the Spanish legislators did, first regionally and then centrally/federally, in the 2010s and early 2020s, such as expropriations of use, penalties for empty properties, and additional legal obligations for owners of multiple properties (see section 3.3 above). It is anybody's guess whether the Chilean Constitutional Court would consider these policies compatible with the essential content of the right to property. Considering the ambiguous and volatile jurisprudence, it is reasonable to assume that at least some of them would have been deemed excessively intrusive in the private sphere due to the limits they impose on the free use and disposition of property. Social rights are generally not considered justiciable under the Constitution, and given the expansive interpretation of property and property rights, certain claims that otherwise might have been considered elements of social rights – in relation to work, trade unions, health and social security, for example – have been advocated in court indirectly through the prism of ownership. Social unrest in late 2019 gave way to a new constitutional moment and the beginning of a process aiming to constitutionalise social and environmental rights. That is what we will cover next.

[273] Verónica Undurraga and Pascual Cortés, Proportionality in the Case Law of the Chilean Constitutional Court, in *Proportionality and Transformation: Theory and Practice from Latin America* 110 (Francisca Pou-Giménez, Laura Clérico and Esteban Restrepo-Saldarriaga, eds, Cambridge University Press, 2022), at 134.

3.4.2 The Failed Process to Come Up With a New Constitution (2019–2023)

In the 1990s, Ackerman defined 'constitutional moments' as historic milestones of intense deliberation and change in a country's politics, change that reflects in the country's constitutional settlement.[274] Between October 2019 and December 2023, Chile went through its own constitutional moment, a moment with two neatly separated phases: one progressive and comparatively socialist or social-democratic, and another one conservative and libertarian or anti-statist.

The first phase began with popular resistance against rising public transport fees in the capital, Santiago. The uprising went on for weeks and was initially answered by force. A research team from the UN High Commissioner for Human Rights spent three weeks in the country in November 2019, and they detailed extensive allegations of torture and ill treatment by police against detainees, as well as cases of arbitrary detention; official figures reported more than 28,000 people apprehended within weeks and no fewer than 26 deaths during the protests.[275] The turbulent unrest only ended with an agreement between the Government, the majority of political parties – except the Communist Party and the far-right Republicans – and civil society groups to channel social demands through a participatory process to produce a new constitution. The issues brought to the fore by the mobilisation included the increasing cost of living, low wages and pensions, lack of quality education, and a poor public health system,[276] in other words, social rights.

As said earlier, the 1980 Constitution, despite the multiple amendments after 1990, does not recognise social rights as self-standing justiciable rights or as strong drivers of public policy towards more egalitarian public services. Access to adequate housing, healthcare and education are unevenly distributed as a result of high levels of inequality. In 2019, at the start of the constitutional moment, the UN Economic Commission for Latin America and the Caribbean reported that wealth in Chile was highly concentrated, with the poorest 50% of households owning just 2.1% of the country's net wealth, while the richest 10% held 66.5%, and the richest 1% accounted for 26.5%.[277] The gap between the average income of the richest 10% and the poorest 10% of the population was

[274] Bruce Ackerman, *We The People: Transformations* (Harvard University Press, 1998) 93–94.

[275] UN Office of the High Commissioner for Human Rights, Report: Mission to Chile: 30 October – 22 November 2019 (OHCHR, 2019).

[276] Centro de Estudios Políticos, *Estudio Nacional de Opinión Pública No 84* (December 2019).

[277] ECLAC, *Social Panorama of Latin America 2018* (ECLAC, 2019), 58.

20 to 1, one of the highest rates in the OECD region.[278] Chile had the second highest Gini coefficient of income inequality in the OECD in 2019,[279] and the second lowest rate of public spending in relation to gross domestic product (GDP).[280] At the same time, a growing number of voices urged a moral and political reckoning with the way the neoliberal policies implemented during the dictatorship had reconfigured Chile's political economy, paving the way for the high levels of inequality in the democratic era.[281]

Chile's constitutional moment unfolded in these socioeconomic and political conditions. The first phase of the constitutional moment was institutionalised through a constitutional convention in a process agreed upon by the then right-wing Government and most of the opposition on the left and centre-left, with support from civil society. For Verdugo and Prieto, this first phase of the Chilean constitution-making process was unique in the sense that it was 'both a bottom-up process pushed by groups favoring a constitutional replacement and an elite-driven bargain that includes rules designed in a top-down way by political parties, which tried to channel the social demands via representative institutions'.[282] However, as we will see later, in time there would be an estrangement between the political class and the constitutional moment.

A plebiscite was held in October 2020, where 51% of citizens voted, of whom 78% confirmed their support for the launch of the process to reform the Constitution, and 79% favoured the creation of an ad hoc constitutional convention to that end.[283] Following the mandate of this plebiscite, the

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[278] OECD, *Society at a Glance 2019: OECD Social Indicators* (OECD Publishing, 2019), 98.

[279] 'Income inequality' OECD Data: https://data.oecd.org/inequality/income-inequality.htm

[280] 'Government spending' OECD Data: https://data.oecd.org/gga/general-government-spending.htm

[281] Juan Pablo Bohoslavsky, Karinna Fernández and Sebastián Smart, Yesterday's Accomplices, Beneficiaries of Today: The Knots of Inequality Tied by the Dictatorship, in *Social Rights and the Constitutional Moment: Learning from Chile and International Experiences* 13 (Koldo Casla, Magdalena Sepúlveda, Vicente Silva and Valentina Contreras eds, Hart, 2022); Koldo Casla, Magdalena Sepúlveda, Vicente Silva and Valentina Contreras, Introduction: Social Rights and the Constitutional Moment, in *Social Rights and the Constitutional Moment: Learning from Chile and International Experiences* 1 (Koldo Casla, Magdalena Sepúlveda, Vicente Silva and Valentina Contreras eds, Hart, 2022), at 1–3.

[282] Sergio Verdugo and Marcela Prieto, The dual aversion of Chile's constitution-making process, 19(1) *International Journal of Constitutional Law* 149 (2021), at 150–51.

[283] Servicio Electoral de Chile, 'Plebiscito Nacional 2020 fue la mayor votación de la historia de Chile' (26 October 2020).

constitutional convention was set up ad hoc, called to coexist with Parliament (National Congress), which continued with its own business while the convention focused on the drafting of the future constitution. The 155 members of the constitutional convention, 17 seats of which were reserved for indigenous people, were elected in May 2021. Chile's became the first constituent assembly with guaranteed parity between men and women.[284] The result of the election of the convention surprised many, and it 'felt like an "earthquake" for the right-wing coalition', as Couso put it.[285] Two-thirds of the seats went to independent candidates, formally not affiliated with any party, although most of them aligned with the progressive side, and the right, the centre-right and the far-right obtained less than a quarter of the votes, which meant they could not form a blocking minority, set at one-third. The constitutional convention began its proceedings in July 2021 and presented a proposal in July 2022. Meanwhile, Gabriel Boric was elected President of the Republic in November 2021. Boric was a left-leaning candidate who had been active in student protests in the early 2010s; he defeated a far-right contender in the second round of the presidential election.

The contrast between the 2022 draft and the 1980 Constitution was glaring. Article 1(1) of the draft declared Chile as a 'social and democratic state based on the rule of law', with a formal recognition of indigenous peoples, absent in the 1980 text, by adding that Chile would be a 'plurinational, intercultural, regional and ecological' state.[286] Article 1(2) added that Chile is a 'solidarity republic', committed, among other things, to 'substantive equality' and to humans' 'indissoluble relationship with nature'. Article 5 proclaimed the indigenous peoples' collective right to culture, autonomy and self-government, and the right to participate in the structures of power of the state. Article 8 embraced the concept of *buen vivir* ('good [way of] living'), borrowed from the 2008 Ecuadorian Constitution,[287] another reference to indigeneity and harmony between people, nature and the state. The draft listed a series of 'natural common goods': the territorial sea and its seabed, the beaches, waters, glaciers, wetlands, geothermal fields, the air and the atmosphere, the high mountains, protected areas and native forests, and the subsoil (Article

[284] Verónica Undurraga, Engendering a constitutional moment: the quest for parity in the Chilean constitutional convention, 18(2) *International Journal of Constitutional Law* 466 (2020).

[285] Javier Couso, Chile's 'Procedurally Regulated' Constitution-Making Process, 13(2–3) *Hague Journal on the Rule of Law* 235 (2021), at 247.

[286] Translation of the 2022 draft from Comparative Constitutions Project: https://constituteproject.org/

[287] Constitution of Ecuador, 2008, Title II, Chapter 2. Translation from Comparative Constitutions Project: https://constituteproject.org/

134(2)). Some natural common goods would be non-appropriable – such as water, air, territorial sea and beaches – while for others the state could grant administrative licences to manage them temporarily in the general interest and in the interest of nature (Article 134(3), (4) and (5)). In the chapter devoted to fundamental rights, the 2022 draft declared the rights of nature (Article 103), inspired again by Ecuador.[288] It also proclaimed the right to property, including compensation in case of expropriation for the general interest, and following the 1991 Colombian example,[289] the draft said that the legal regulation of the right to property ought to consider 'its social and ecological function' (Article 78). In relation to women's rights, among other things, the 2022 draft established the principle of gender equality at all levels of government (Article 6), and recognised sexual and reproductive rights, including the right to decide freely, autonomously and in an informed way about one's own body (Article 61). The draft also proclaimed social rights in line with international human rights standards, such as the right to education (Article 35), health (Article 44), social security (Article 45), water and sanitation (Article 57), and the right to housing (Article 51), which was not even mentioned in the 1980 Constitution. It also included rights that are still novelties in comparative constitutionalism, such as the right to care (Article 50), and the right to the city, explicitly connected to the social and ecological function of property (Article 52). The proposed constitution created a new remedy for violations of any fundamental right, including social rights, which would apply if no other judicial appeal was available, except for urgent and particularly serious situations, presumably to be determined by judges themselves (Article 119). The text also established that universal and good-quality public services would be a responsibility of the state (Article 176), recognising that the state would have a role to play in the economy, directly, not on a subsidiary basis, alongside private actors (Article 182). The 2022 draft sought to keep a delicate balance between the 'principles of sustainability and fiscal responsibility' in public finance (Article 183), on the one hand, and the social rights principles of progressive realisation and non-retrogression (Article 20), on the other hand.

The 2022 draft could hardly have been more ambitious in its human rights goals and progressivism.[290] And yet, it was rejected unequivocally, with some 62% of the people voting against it in a referendum held in September 2022, with a remarkable 86% turnout as a result of compulsory voting. Thereby ended the first phase of the process of the constitutional replacement. Why did this happen?

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288 Ibid, Articles 71–74.

289 Constitution of Colombia, 1991, Article 58.

290 See the very positive reviews by Chilean civil society groups: https://laconstitucionesnuestra.cl/evaluaciones/verevaluaciones/

Chilean scholars and commentators have provided various hypotheses. The most popular immediately after the emphatic result was to point the finger at the campaign of disinformation orchestrated by powerful conglomerates and political forces on the right. Without underestimating the threat that the concentration of media ownership and fake news pose to democracy, these did not seem to be unique features of this particular plebiscite.[291] One should also bear in mind that, in spite of the fragmentation in the legislative chamber, at the time of the vote the left held the presidency of the Republic in the person of Gabriel Boric. Beyond potential operations to distort the facts, it remains shocking that more than three in five people rejected a proposal supported by the president and written by a convention that had been democratically elected with a strong majority only two years before. Other explanations must be dug out.

With 388 articles and 57 transitory provisions in 178 pages, the 2022 draft was very long and thorough, even in the context of Latin American constitutionalism, where extensive texts are the norm. For Issacharoff and Verdugo, the level of detail and the aspirational language were expressions of the mistrust in the ordinary representative institutions that would have been called to apply and interpret the document if it had been approved.[292] Gil also writes that, while the draft presented important improvements in relation to social rights, it was excessively meticulous, for example in relation to a public health system and free tertiary education, all of which antagonised influential voices against the reform.[293] At the same time, despite its length and the attempted thoroughness, the draft often mandated the legislator to regulate the specifics in due course ('to be determined by law'). In the opinion of Landau and Dixon, instead of helping to reach consensus by kicking the can down the road of policy-making, these legislative referrals were either ignored or weaponised by the conservative opposition, which systematically claimed that the proposal set rigid, maximum and unacceptable standards.[294]

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[291] Samuel Issacharoff and Sergio Verdugo, Populismo constituyente, democracia y promesas incumplidas: el caso de la Convención Constitucional Chilena (2021–2022), 21(5) *International Journal of Constitutional Law* 1517 (2023), at 1546.

[292] Ibid, 1537.

[293] Diego Gil, La reformulación constitucional de los derechos sociales, in *El dilema constitucional. Una aproximación institucional al proceso constituyente* 182 (Diego Gil, Guillermo Jiménez and Pablo Marshall, eds, Fondo de Cultura Económica, 2023), at 192–193 and 202–203.

[294] David Landau and Rosalind Dixon, Sobre fracaso constitucional, constitucionalismo transformador y utopismo, 21(5) *International Journal of Constitutional Law* 1549 (2023), at 1557.

In hindsight, analysts also find that the rift between the political establishment and the constitutional process was a deciding factor in the rejection of the draft in the 2022 plebiscite. As said earlier, in May 2021 a very high number of non-party political yet ideologically progressive candidates were elected to the constitutional convention. The nearly tokenistic position that the democratic elections reserved for the right and the far-right meant that, at the end of the day, there was little incentive for political parties to invest in the process and try to find compromising positions. While civil society groups and social movements played a leading role in the early years of the process, Landau and Dixon write, by September 2022, the time of the referendum, traditional parties had regained much of their protagonism,[295] with a left-leaning president, a fragmented Congress, and a right and a far-right on the rise in the polls. In this regard, after ten years of non-compulsory votes, mandatory voting was reinstated in 2022. Millions of people voted in that year's plebiscite who had not expressed themselves in 2020; it has been estimated that many of those new voters had non-formal education and were politically more moderate than 2020 electors.[296] For Henríquez Viñas and García, the exclusion of political elites and the lack of trust and agreement among political parties had also been key reasons why President Michelle Bachelet's efforts to produce a new constitution had been unsuccessful in the previous attempt in 2015–2018.[297] Issacharoff and Verdugo argue that the Chilean example shows that scepticism towards the political class can result in situations where a constitutional moment is unable to benefit from parties' mediation and potential formulation of creative solutions.[298] For Landau and Dixon, the recent Chilean experience is an example of 'utopian constitutionalism' in a double sense.[299] First, it placed a lot of hope on the transformational potential of a long and detailed bill of rights, when in fact the supposed causation or even correlation between the constitutionalisation of social rights and a general improvement

[295] Ibid, 1556.

[296] Ariadna Chuaqui R., Carmen Le Foulon M. and Tomás Olguín, Quién vota en Chile: primeros análisis después del voto obligatorio, *Centro de Estudios Públicos No. 668* (2023).

[297] Miriam Henríquez Viñas and José Francisco García, El proceso constituyente de Bachelet en Chile (2015–2018): razones de un fracaso (previsible), 21(5) *International Journal of Constitutional Law* 1496 (2023), at 1507–1514.

[298] Samuel Issacharoff and Sergio Verdugo, Populismo constituyente, democracia y promesas incumplidas: el caso de la Convención Constitucional Chilena (2021–2022), 21(5) *International Journal of Constitutional Law* 1517 (2023), at 1520.

[299] David Landau and Rosalind Dixon, Utopian constitutionalism in Chile, 13(1) *Global Constitutionalism* 228 (2024), at 230–231.

in socioeconomic conditions should not be taken for granted.[300] And second, the Chilean process was premised on continuous support from organised civil society: 'If those (s)elected to draft a constitution are independent actors without significant institutional experience or know-how, they may downplay the importance of structures and institutions to realizing political aspirations or rights-based goals.'[301]

While the draft was categorically rejected in the plebiscite of September 2022, that need not have been the end of the constitutional process. After all, only two years prior, a four-in-five strong majority had endorsed the call for a new constitution. President Boric was also keen to keep the process alive. A proposed constitution had been rejected, but not the whole process, or not inevitably. This was the start of the second phase. Days after the plebiscite, institutions and political parties agreed to pursue a new course of action, with a smaller constitutional council (50 members for the 155 of the constitutional convention of phase one), accompanied by a committee of experts, whose members were elected by both chambers of Congress; these experts put together a first draft the constitutional council could embrace or depart from. This time the procedure would be much more tightly controlled by the parties. In an election in May 2023, the far-right and the right together amassed two-thirds of the seats in yet another 'political earthquake' but of a totally different colour from that of 2021.[302] This time, the far-right Republicans obtained 22 of the 50 constitutional councillors, who were called to complete a process that they had not wanted to initiate in the first place. Just like the left and the independents had had little incentive to seek compromise in 2021–2022, the right and the far-right would have no reason to do so in 2023. They had *carte blanche* to write whatever text they wanted; if it passed, it would be an extraordinary triumph for them, but if it did not, the 1980 Constitution would remain in place, and they had never seen a reason to substitute it anyway. They could not lose.

After five to six months of work, the constitutional council completed its draft in November 2023. Unlike the 2022 draft, that of 2023 did not talk about the rights of nature or about plurinationality in relation to indigenous peoples, and did not recognise access to abortion as a right: 'The law protects the life of who is unborn' (Article 16(1), using language similar to that of the

300 Adam Chilton, Cristián Eyzaguirre and Mila Versteeg, Social rights scapegoating, 13(1) *Global Constitutionalism* 220 (2024).

301 David Landau and Rosalind Dixon, Utopian constitutionalism in Chile, 13(1) *Global Constitutionalism* 228 (2024), at 231.

302 Javier Couso, Chile's failed attempt to get a new constitution: or the challenges of democratic constitution making in a polarized era, 30(1) *Southwestern Journal of International Law* 1 (2024), at 24.

1980 Constitution).[303] As recommended by the committee of experts, the 2023 draft established that Chile would be a 'social and democratic state' and included a commitment to the progressive realisation of social rights, but subject to the principle of fiscal responsibility (Articles 1 and 24). The 2023 draft recognised the rights to health, housing, water and sanitation, social security and education; however, it made clear that these rights would only be justiciable, not as constitutional fundamental rights, but only to the extent that the law provided for certain benefits (Article 26(2)), toning down the experts' recommendation to constitutionalise at least the prohibition of discrimination in relation to social rights. The committee of experts recommended preserving a provision from the 1980 Constitution that represents the conception of the state, not as an enabler, but as a potential threat to fundamental rights: 'In no case may a fundamental right be affected in its essence, nor may conditions, taxes or requirements be imposed that prevent its free exercise' (Article 23(3)).[304] In relation to the right to property, the 2023 draft echoed the text of the 1980 Constitution, including the reference to the social function, but with a potentially significant addition: 'Waters, in any of their states and in natural sources or state works for the development of the resource, are national assets for public use. Consequently, their dominion and use belong to the whole Nation', notwithstanding which the law could constitute or recognise the right to use, enjoy, arrange, transmit and transfer water (Article 16(35)); the committee of experts had phrased access to water as a public licence, but the constitutional convention opted for a private law title.

In sum, the 2023 draft was far less protective of social rights and more protective of property rights than the one from 2022. The principle of the progressive realisation of social rights found its way onto the 2023 draft, as recommended by the committee of experts. All in all, however, the 2023 draft was more aligned with the spirit of 1980. This second draft was put to the people in another plebiscite in December 2023: with a turnout of 85%, more than 55% of Chileans voted against it. Anticipating the result, Hilbink observed:

> The fact that the second attempt at constitution writing in Chile, led and controlled by political elites, [ended] in a similar defeat at the polls as the first attempt in which parties were marginalized, suggests that pinning the blame on "participatory processes" in general may be unfair, for in a context of a representational crisis,

[303] Full text of the 2023 text in Spanish, including the report of the committee of experts: https://www.procesoconstitucional.cl/ Translation from Comparative Constitutions Project: https://constituteproject.org/

[304] Constitution of Chile, 1980, Article 19(26).

even delegates elected on political party lists may have "constitutional preferences [that are] in sharp contrast with that of electorate's majority".[305]

This takes us back to square one. Chile's constitutional moment ended with, not one, but two rejections. With the far-right on the rise, in 2024, there was no appetite for a third attempt. The majority of the Chilean people agreed that they did not want the 1980 Constitution, but they could not agree on what they wanted to replace it with. Put differently, the Chilean people had expressed their desire for a new constitution, but its representatives had failed twice to present them with a suitable alternative. Be that as it may, Chile for now is still bound by a text whose origins go back to Pinochet, but which has also been amended more than 60 times by democratically elected legislators. For the moment, there is no change in sight. When the time comes, Chile has ample room for improvement to enhance the constitutional status of social rights and to define the social function of property and homeownership accordingly.[306] Such a time does not seem to be imminent, though.

3.5 FROM STATE PRACTICE TO A GLOBAL RIGHT TO PROPERTY

The right to property can be found in 97% of the world's constitutions, according to Law and Versteeg, and 73% of them explicitly recognise some form of limitation to it.[307] Approximately one-sixth of the member states of the United Nations qualify the constitutional right to property either with the social function (23 states) or with a similar formulation (11 states). Other countries introduce nuance to ownership with some sort of social norm developed by legislators and/or judges.

The social function is directly or indirectly recognised in the three jurisdictions examined in this chapter: South Africa, Spain and Chile. South Africa's 1996 Constitution is an ambitious and potentially transformative text, rich in social rights. The Constitutional Court has made hugely important

[305] Lisa Hilbink, Building a ship in troubled and uncharted waters: reflections on the Chilean constitution-making process, 2019–2023, 30(1) *Southwestern Journal of International Law* 29 (2024), at 38.

[306] Koldo Casla and Verónica Valenzuela, Taking the Right to Adequate Housing Seriously in Chile's Next Constitution: Building from Scratch, in *Social Rights and the Constitutional Moment: Learning from Chile and International Experiences* 165 (Koldo Casla, Magdalena Sepúlveda, Vicente Silva and Valentina Contreras eds, Hart, 2022).

[307] David Law and Mila Versteeg, The evolution and ideology of global constitutionalism, 99(5) *California Law Review* 1163 (2011).

contributions, widely respected worldwide, to advance in the justiciability of social rights. The Constitution has also provided a framework to depart from the old maximalism and individualism of ownership as dominium. At the same time, however, one cannot expect the Constitution to shake the pillars of capitalism, and, in fact, the country remains profoundly unequal in socioeconomic terms, and the promise of land redistribution remains largely unmet three decades after the end of apartheid. Spain's 1978 Constitution also recognises the right to property, but social rights are formulated as guiding principles of public policy whose justiciability is made dependent upon legal development. The Constitutional Court has been reluctant to identify an essential content of ownership, granting instead a rather broad margin to legislators and policy-makers. Like so many advanced economies, Spain has experienced a housing affordability crisis for a number of years. By and large, however, public authorities only began to make use of their prerogatives in relation to housing and residential property in the 2010s and 2020s, first at the regional level, and then centrally/quasi-federally. The social function has been part of Chile's legal culture for at least a century, explicitly at the constitutional level since 1967. While the social function provided a normative foundation to radical policies of nationalisation and agrarian reform in the late 1960s and early 1970s, Pinochet's 1980 Constitution retained the concept but largely hollowed it out of substance. In the democratic era, since the 1990s, the Constitutional Court has not been consistent in its interpretation of the meaning of the social function. While amended multiple times, Chile still has a Constitution inherited from the dictatorship. A recent attempt to come up with a new constitutional settlement ended up in two blatantly different proposals, one led by the left, the other one by the right, both of which were rejected by the people.

Despite the geographical and economic differences, one significant element in common is that all three societies lived under authoritarian regimes in what is living memory for many: Spain until the late 1970s, and Chile and South Africa until the early 1990s. The respective dictatorships cast a shadow over the present time, albeit in different ways. Reckoning with the past has been a salient issue in democratic South Africa, including in relation to the understanding of property rights and social rights. After decades of systemic racism, land restitution and security of tenure can be seen as essential to reconciliation.[308] During Chile's latest failed process to produce a new constitution, some progressive voices denounced the links between the neoliberal policies

[308] Tembeka Ngcukaitobi, *Land Matters: South Africa's Failed Land Reforms and the Road Ahead* (Penguin, 2021), 113–114; Theunis Roux, Land Restitution and Reconciliation in South Africa, in *Justice and Reconciliation in Post-Apartheid South Africa* 144 (François du Bois and Antje du Bois-Pedain, eds, Cambridge University Press, 2009).

under Pinochet, crony capitalism and material inequalities in the democratic era.[309] This socioeconomic transitional justice angle has been largely absent in Spain thus far. While South Africa's constitutional goal of land reform remains largely unfulfilled, neither the Spanish nor the Chilean text contains comparable aspirations.

As covered in Chapter 2, property is a living part of international law, including international human rights law. International treaties can provide strong evidence of states' deliberative and moral consensus in relation to rights.[310] Chapter 3 has shown that property is a core component of virtually every domestic legal system as well. Together, these international and comparative observations would point to the conclusions that the right to property may be considered a general principle of international law, and that property has crystallised in customary international law.[311] As such, this right would be a source of international law, not only as a matter of treaty law for countries that have signed and ratified the relevant conventions, but also as a matter of custom and general principles of international law for international society in general.[312] There seems to be a general agreement about the existence of a right to property, but debates persist about the scope and limitations of the right, that is, about when and how it is legitimate, reasonable and proportionate to control and to deprive of property.[313] Having said that, the reason why states include property in their domestic legal systems has probably little to do with international law. In other words, in relation to property, international law is probably largely epiphenomenal, reflecting and following state practice rather than defining it. Exceptions must be noted, though, because international investment law can in fact act as a straitjacket for states seeking to nationalise industries (more on this in Chapter 7). Whatever the motive for the existence of property in domestic legal frameworks, pervasive recognition of property

[309] Juan Pablo Bohoslavsky, Karinna Fernández and Sebastián Smart, Yesterday's Accomplices, Beneficiaries of Today: The Knots of Inequality Tied by the Dictatorship, in *Social Rights and the Constitutional Moment: Learning from Chile and International Experiences* 13 (Koldo Casla, Magdalena Sepúlveda, Vicente Silva and Valentina Contreras eds, Hart, 2022).

[310] Rosalind Dixon, Comparative constitutional modalities: towards a rigorous but realistic comparative constitutional studies, 2(1) *Comparative Constitutional Studies* 60 (2024), at 69.

[311] John G. Sprankling, *The International Law of Property* (Oxford University Press, 2014), 215, 219.

[312] Statute of the International Court of Justice, Article 38 (18 April 1946) 33 UNTS 993.

[313] William Schabas, Omission of the right to property in the international covenants, 4 *The Hague Yearbook of International Law* 135 (1991), at 169–170.

in domestic law and in IHRL points towards a sort of 'deliberative consensus' among states,[314] a general acceptance of property as a right.

Despite the absence of agreement about the limits and scope of the right, including its social function, as observed by Sprankling, the historical and juridical omnipresence of property points towards the benefits of a holistic ideal of a global right to property.[315] A holistic approach can indeed contribute to a 'systemic integration' of various strands of law to harmonise the fragmented international law.[316] It could supply a rule of interpretation of property and ownership in light of the whole *corpus juris* of IHRL, including environmental rights and ESCR, beyond the relatively narrow perspective of Protocol 1 of the ECHR. That is precisely what I intend to do in Chapter 5. But, first, we must spend some time on the philosophical underpinning of the institution of property – Chapter 4.

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[314] Rosalind Dixon, Comparative constitutional modalities: towards a rigorous but realistic comparative constitutional studies, 2(1) *Comparative Constitutional Studies* 60 (2024), at 69.

[315] John G. Sprankling, *The International Law of Property* (Oxford University Press, 2014), 350–351.

[316] Campbell McLachlan, *The Principle of Systemic Integration in International Law* (Oxford University Press, 2024); Study Group of International Law Commission (Martti Koskenniemi), Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc. A/CN.4/L.682 (13 April 2006); Vienna Convention on the Law of Treaties, Article 31(3)(c) (23 May 1969), UNTS 1155.

4. Property as ideology and as institution: reconciling social rights and property through social function

Property is recognised as a right in both international and national law. But property is more than a right. It also represents a foundational ideology and serves as an institution that supports the functioning of the state and human interactions within society.[1] While Chapters 2 and 3 focused on property as a legally recognised right, Chapter 4 shifts to examining property as ideology and as an institution. The chapter begins by reviewing the prominent role that property has played in Western political theory, from Ancient Rome and Thomas Aquinas to Locke, Rousseau, Kant, utilitarians – and 'Law and Economics' – and Marxists. This is followed by an assessment of various critiques regarding property's role as a major contributor to colonialism, inequality, neoliberal capitalism, and Western-centric epistemology. The chapter then introduces progressive property theory, a school of thought that emerged in the 2000s, influenced by several modern Western philosophers. We will end with the social function of property, as devised by Léon Duguit in the early twentieth century, but adjusted to the challenges of our times. This discussion will set the stage for the following chapter, where I will present my proposal to reconcile property with social rights based on the idea of the social function.

But first I must explain why I begin to tell this story from the West. There is nothing capricious about the choice of frame and one ought to be transparent about this sort of decision. The reason why this chapter begins with Western political thought is because, through colonialism and capitalism, property has been at the centre of the global expansion of the Eurocentric international society since the late eighteenth and nineteenth centuries.[2] This international society was a members' club, with some in and others out. The criterion to determine acceptance in the ever-expanding society was a certain 'standard

[1] Rachael Walsh, *Property Rights and Social Justice: Progressive Property in Action* (Cambridge University Press, 2021), chapter 3.

[2] Hedley Bull and Adam Watson (eds), *The Expansion of International Society* (Clarendon Press, 1984).

of civilization' established in the West.[3] The idea of the standard of civilisation was popularised in the nineteenth century and applied retroactively. It was constructed as the self-image of the West in opposition to the rest. The standard of civilisation was not predesigned in the West and imposed later on the periphery. On the contrary, it developed out of the interaction of Western countries with other cultures and peoples. While the centre of the international society remained in Europe, the features of this society were the product of Europeans' engagement with the rest of the world. The standard of civilisation, the expansion of the European society and the idea of international law with a potentially global remit are products of the same era, the long century between the French Revolution and the First World War, a time of modernity and liberalism, belief in progress and the construction of the nation-state.[4] Through international law, European nations developed a shared identity and a common understanding of international order based on the principle of sovereign equality. This idea of international order had a universal vocation, but it also drew a line between civilised and non-civilised nations, in a sort of 'civilizational hierarchy' with Europe – or the West – and its institutions on top.[5] Interaction between the core and so-called non-civilised peoples was not meant to be guided by the same parameters of gentlemanliness. International order was not a neutral concept; it was a legal and a political construct that intended to institutionalise and enlarge a type of international society in light of Europe's perceived image of the self. As such, the international law of the twentieth century is the heir of the international order of the nineteenth century, a Eurocentric, inherently unequal, and colonial order[6] – an order sustained by private property.

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[3] John Hobson, *The Eurocentric Conception of World Politics* (Cambridge University Press, 2012), 231.

[4] Gerritt Gong, *The Standard of 'Civilization' in International Society* (Clarendon Press, 1984); Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press, 2001), 99–116; Mark Mazower, *Governing the World: The History of an Idea* (Allan Lane, 2012).

[5] Jens T. Theilen, Civilizational Hierarchies and the Notion of 'Europe' in the European Convention on Human Rights, 36(1) *European Journal of International Law* 113 (2025).

[6] Antony Anghie, Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law, 40(1) *Harvard International Law Journal* 1 (1999), at 60; Edward Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (Cambridge University Press, 2002).

4.1 ORIGIN AND FOUNDATION OF PROPERTY IN WESTERN POLITICAL THEORY

4.1.1 Rome, Aquinas, Locke's Property-Preserving Society, and the General Interest

It all began in Rome. The nineteenth-century German legal theorist Rudolf von Jhering wrote that 'ancient Rome had conquered the world three times: the first time through its armies, the second through its religion, the third through its laws'.[7] Roman law bequeathed an enduring legacy all over the world, a legacy that persists and remains present to this very day. Across the world, but particularly in countries of civil law tradition, doctrinal constructions of private law, including property law, have been in fact reconstructions or adaptations of Roman law,[8] or in other words, appropriations and reinventions of ancient principles as overall frames of reference.[9]

Roman law characterised property as a power of an individual over a thing. This power or dominium was known as *jus ad rem*, or a right to a thing, a real right. A first conceptual hurdle, as will become apparent in the history of Western philosophy and in contemporary scholarship, is that the idea of humans having any sort of relationship with inanimate items is far from intuitive, let alone a relationship from which profound legal consequences stem. What would come to define property as a legal construct is not really the relation between humans and the external world. Instead, the institution of property makes most sense as a relationship between an individual, the owner, and other individuals, indeed, potentially all other individuals. Property is a social institution to the extent that the rest of the world is willing to respect one's claim over a thing. At the risk of anticipating ideas that belong in a latter segment (section 4.4 below and Chapter 5), at this point it is sufficient to announce that a relational understanding of property would show greater awareness of the milieu where social interactions unfold; in other words, it would foster an idea of property grounded on the centrality of the relationships between people themselves and between people and the physical space.[10]

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[7] David Graeber, *Debt: The First 5,000 Years* (Melville House, 2011), 198.

[8] Sief Van Erp, Comparative Property Law, in *The Oxford Handbook of Comparative Law* 1031 (Mathias Reimann and Reinhard Zimmermann, eds, Oxford University Press, 2019), at 1045.

[9] Anna di Robilant, *The Making of Modern Property: Reinventing Roman Law in Europe and its Peripheries 1789–1950* (Cambridge University Press, 2023).

[10] Nicholas Blomley, Performing Property: Making the World, 26(1) *Canadian Journal of Law and Jurisprudence* 23 (2013); Sarah Blandy, Sarah Nield and Susan

A fundamental distinction between personal rights in private law, such as those derived from tort or contractual obligations, and real rights, such as property, is that the latter protects the individual from everyone, against incursions from anyone, *erga omnes*.[11] The legal construct coined in Rome, and preserved and cherished by scholars, lawyers and political actors over the centuries, is that the institution of property bestows owners, or various co-owners, with a universal – though not absolute, as shall be seen – shield against all human beings, near and far. In Robé's critique, 'property is not a right over things. Property is a right of legal persons (of "owners") against all other persons in connection with the object of property.'[12]

Property could be said to be absolute in the sense that it was exclusive and *erga omnes*, towards everyone. However, the content of Roman property was not at all absolute, but subject to substantive regulatory limits. Roman law managed to make possible the cohabitation between the owner's *dominium* and the ruler's sovereign and technically superior *imperium*. The concept of property was capable of restriction, for instance, in the form of servitudes and other compromises in the vicinity. Roman law also envisioned compulsory acquisition of property to facilitate development projects, like roads or aqueducts. Owners were not free to do as they pleased with their property, for example, if such hypothetical use could result in personal or material damage to other free citizens – not to slaves.[13] In a nutshell, property was conceptually absolute, but the practice of the institution of property was not so.

Before our Common Era, Cicero grounded property in natural law, 'not by any civil bond, but by the common right of nature'.[14] The first all-inclusive code of Roman law, the Justinian Institutes of the sixth century, did not define property, but adopted a more pragmatic approach: 'Things become the private property of individuals in many ways; for the titles by which we acquire ownership in them are some of them titles of natural law, … the law of nations,

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Bright, Real property on the ground: the law of people and place, in *Research Handbook on Private Law Theory* 237 (Hanoch Dagan and Benjamin Zipursky, eds, Edward Elgar, 2020).

[11] Sief Van Erp, Comparative Property Law, in *The Oxford Handbook of Comparative Law* 1031 (Mathias Reimann and Reinhard Zimmermann, eds, Oxford University Press, 2019), at 1041.

[12] Jean-Philippe Robé, *Property, Power and Politics: Why We Need to Rethink the World Power System* (Bristol University Press, 2020), 39.

[13] Peter Birks, The Roman Law Concept of Dominium and the Idea of Absolute Ownership, 1985 *Acta Juridica* 1 (1985).

[14] Cicero, *Tusculan Disputations; also, Treatises on The Nature of the Gods, and On The Commonwealth* (C. D. Yonge, translator. Harper and Brothers, 1877), 374. (Via Gutenberg.org).

while some of them are titles of civil law.'[15] Romans had a notion of property as a right, but not as a subjective right in the modern sense of the word, and they did not elaborate the content, nor did they provide a theoretical foundation for the right to property.[16] Instead, Roman law focused on acknowledging the existence of property as an institution that regulated the power relations between individuals, and between individuals and things.[17] In this regard, Patterson writes that the real purpose of the Roman idea of property was to justify and regulate enslavement as a form of dominion by a human over a human *res*, a human thing: 'The slave was a slave not because he was the *object* of property, but because he could not be the *subject* of property' (italics in the original).[18] We live in a very different world today, one where slavery is unequivocally prohibited in international law. Irrespective of whether Patterson is right, slavery and violent punishments were central features of Roman society. It is worth reflecting on the irony of trusting the wisdom of long-gone Roman lawyers when it comes to private law, while thinking of slavery as a morally repugnant anachronism. How could they hit the target right in the centre in relation to property, and yet get it so wrong in other important domains of ethics and law?

The Roman dominium referred to the social and legal recognition of domestic authority above things and above slaves – humans as things. Property, in this sense, was a form of freedom, a liberty to do as owners pleased within the confines of the law. Crucially, those confines were broad. Over time, medieval jurists would come to define property as a tripod of entitlements: *usus* – the right to use the thing; *fructus* – the right to enjoy the products that derive from it; and *abusus* – the right to dispose of it, including the right to destroy it.[19] Graeber appreciated an intriguing thread between that Roman liberty and the Western tradition where rights came to be thought of as things to be owned: *my* property, *my* right to life, *my* freedom of expression, etc.[20]

In the thirteenth century, Thomas Aquinas treated humans' claim of possession over the external world as a natural right. However, individual *private* property as such was not a natural right, but a conventional right and a social

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15 The Institutes of Justinian (J. B. Moyle, translator, 1913), II.I.11. (Via Gutenberg.org).

16 Peter Garnsey, *Thinking about Property: From Antiquity to the Age of Revolution* (Cambridge University Press, 2007), chapter 7.

17 Peter Birks, The Roman Law Concept of Dominium and the Idea of Absolute Ownership, 1985 *Acta Juridica* 1 (1985), at 2–3.

18 Orlando Patterson, *Slavery and Social Death* (Harvard University Press, 1982), 29.

19 David Graeber, *Debt: The First 5,000 Years* (Melville House, 2011), 199.

20 Ibid, 205.

convention subject to limitations to ensure the satisfaction of basic material needs for fellow beings in a community. As an institution, property imposes obligations on the possessor vis-à-vis the non-possessor. Aquinas was explicit in drawing a dividing line between the level of property needed to satisfy one's adequate living conditions, and superfluous or superabundant property that does not really fulfil such an essential function. For Aquinas, resources that are unnecessary for the individual need to be mobilised to satisfy the needs of the poor.[21]

Despite Aquinas, to this day there is a general tendency to conflate the idea of property with exclusive and private ownership. This tendency is, in Olsen's view, 'the residual effect of a theoretical project in early modern European thought that sought to establish presumptively exclusive private ownership of material things by individuals as the essential nature of property'.[22] For Olsen, property, as we have come to know it, is a 'reductive and totalizing structure', a socially constructed category developed by Western philosophers of the classical modern and liberal paradigm on the basis of four foundational axioms.[23] First, property is a possessive relationship that prioritises the link between the owner and the thing over social relations between individuals themselves. Second, property deals with matter. Incorporeal things were covered in the Institutes of Justinian as rights and obligations – inheritance, servitudes, usufruct, etc. However, the core of property is about owning the thing, physical or not, not about what one does with it. In the original modern conception, nature is gifted to humans by God; nature exists so it can be had. Third, private property is the quintessential form of property, going back to Roman law, and the system of rules of property – *dominium* – is compatible and indeed codependent with the system of rules of government and sovereignty – *imperium*. Writing in the early seventeenth century, the Dutch philosopher Hugo Grotius pronounced: 'Sovereignty… belongs to Princes and property to individuals.'[24] Olsen's fourth axiom of property in European modernity is exclusivity. Property is constructed to entail the power to exclude others, all others, *erga omnes*, trumping any other consideration, such as use or needs, The exclusivist axiom is famously represented in the words of the eighteenth-century

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[21] Rachael Walsh, Specifying Interpersonal Responsibilities in Private Law: Property Perspectives, 68(2) *The American Journal of Jurisprudence* 141 (2023), at 145–146.

[22] Erik Olsen, The early modern "creation" of property and its enduring influence, 21(1) *European Journal of Political Theory* 111 (2022), at 112.

[23] Ibid, 130, 116–126.

[24] Hugo Grotius, *The Rights of War and Peace, including the Law of Nature and of Nations* (A. C. Campbell, translator. Walter Dunne, 1901), chapter III.II. (Via Online Library of Liberty).

English jurist William Blackstone, for whom private property was the 'sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe'.[25]

If God gave the Earth to humankind in common, how should anyone ever come to own a thing in private? In *Two Treatises of Government* (1689), John Locke attempted to square this circle:[26] 'For this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for others.'[27] Taking an object laboured on from the labourer's hands without their consent would amount to a violation of the labourer's individual freedom; the labourer herself is somehow reflected in the object, which would thereby become her property.[28] Ownership is central to Locke's very idea of government, as the preservation of life, liberty and property – 'estates' – is the reason why men would be 'willing to quit a condition' of natural freedom and 'join in society with others'.[29] Property and workmanship go hand in hand: 'God, by commanding to subdue, gave authority so far to appropriate: and the condition of humane life, which requires labour and materials to work on, necessarily introduces private possessions.'[30] Nozick famously reduced Locke's argument to the absurd, asking provocatively whether pouring one's can of juice in the sea would make one – or at a minimum the first person trying this trick – automatically the owner of all oceans.[31] Leaving that aside, the key in Locke's justification of property is the creation of value through the transformation or supposed improvement of the thing.[32] Locke's theory is a capitalist one, or at least it provides a theoretical underpinning to the development of capitalism. He is not advocating for a landless revolution. When he talks of labour, he includes under that category 'the grass my horse has bit' and 'the turfs my

[25] William Blackstone, *Commentaries on the Laws of England in Four Books* (J. B. Lippincott, 1893), Book II, Chapter I. (Via Online Library of Liberty).

[26] John Locke, *Two Treatises of Government and A Letter Concerning Toleration* (Yale University Press, 2003), 111 (II.25).

[27] Ibid, 112 (II.27).

[28] Jeremy Waldron, *The Right to Private Property* (Oxford University Press, 1990), 185.

[29] John Locke, *Two Treatises of Government and A Letter Concerning Toleration* (Yale University Press, 2003), 154 (II.123).

[30] Ibid, 114 (II.35).

[31] Robert Nozick, *Anarchy, State, and Utopia* (Basic Books, 1974), 174–175.

[32] Ellen Meiksins Wood, *Liberty and Property: A Social History of Western Political Thought from Renaissance to Enlightenment* (Verso, 2012), 277.

servant has cut'.[33] For Locke, one's command and control over animals and workers provides normative legitimacy to one's claim over land, not to theirs. As observed by Clarke, the capitalist logic of the Lockean justification of property is instrumental on the basis of a dual assumption: property would give the individual owner an incentive to improve and invest in their property, and this would supposedly result in a collective benefit derived from the encouragement of entrepreneurialism.[34]

Locke – and others that followed him – were troubled by the observation that the Earth, in its natural yet raw form, would not satisfy human needs unless humans intervened with their work, creativity and investment.[35] For Samuel von Pufendorf, a German contemporary of Locke's, property was 'introduced by the will of God, with consent among men'.[36] For him, land property was based, not on labour or cultivation, but on occupancy.[37] For Grotius, whatever the state of nature was, the first occupant legitimately claimed exclusive ownership rights.[38] For the Scottish free-market economist Adam Smith, writing in the eighteenth century, property was built on the recognition by others of the legitimacy of one's entitlement over one's possessions.[39] The owner's position, therefore, is dependent upon acknowledgement or acceptance from others.

While property is at the core of modern Western political thought, philosophers have been anything but univocal in their endorsement of property as a maximalist, individualist and exclusivist claim over the external world. Taking distance from Locke in fundamental ways, the eighteenth-century Genevan thinker Jean-Jacques Rousseau brought humans, not God, to the centre. Under Rousseau's republicanism, property emerges as a social convention or an institution defined within the parameters of a given political community. Rousseau was profoundly concerned with inequalities, and he had faith in the ability

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[33] John Locke, *Two Treatises of Government and A Letter Concerning Toleration* (Yale University Press, 2003), 112 (II.28).

[34] Alison Clarke, Justifying property: looking beyond the Blackstonian paradigm of private ownership by a self-interested autonomous human individual, in *Research Handbook on Property, Law and Theory* 15 (Chris Bevan, ed., Edward Elgar, 2024), at 19.

[35] Alan Ryan, *Property and Political Theory* (Basil Blackwell, 1984), 7.

[36] Robert Lamb, Liberty, Equality, and the Boundaries of Ownership: Thomas Paine's Theory of Property Rights, 72(3) *The Review of Politics* 483 (2010), at 497.

[37] Jeremy Waldron, 'To Bestow Stability upon Possession': Hume's Alternative to Locke, in *Philosophical Foundations of Property Law* 1 (James Penner and Henry Smith, eds, Oxford University Press, 2013), at 3.

[38] Robert Lamb, Liberty, Equality, and the Boundaries of Ownership: Thomas Paine's Theory of Property Rights, 72(3) *The Review of Politics* 483 (2010), at 499.

[39] John Salter, Adam Smith and the Grotian Theory of Property, 12(1) *British Journal of Politics and International Relations* 3 (2010), at 12.

of humans and societies to better themselves. For him, only certain goods should be subject to private ownership, and he was fearful of the corruptive effects of the concentration of land ownership.[40] Having said that, Rousseau did not advocate for some sort of communal society. In fact, he believed that the institutions of property and work had the ability to connect humans to the society they are part of as citizens, despite not always achieving so in practice.[41] In *The Second Discourse* or *Discourse on Inequality* (1755), Rousseau was critical of the role of property in the origins of inequality: 'The first man who, having enclosed a piece of ground, bethought himself of saying *This is mine*, and found people simple enough to believe him, was the real founder of civil society' (italics in the original).[42] But in *The Social Contract* (1762), he argued that, well regulated, the institution of property can legitimise possession while preserving equality between humans, whereas outside the social contract, property would be 'usurpation'.[43]

Locke's theory is individualist, anti-statist – property precedes society; in fact, society exists to sustain property – and capitalist.[44] It also provided a normative foundation to the plundering of resources and land from indigenous peoples in North America, based on the idea that natives did not claim the land through cultivation the way Europeans did.[45] By contrast, for the eighteenth-century Scottish philosopher David Hume, there was nothing natural or pre-political about property. Property had to be a collectively beneficial convention grounded on principles of justice recognised in the laws of society.[46] As observed by Murphy and Nagel, who borrowed from Hume to develop their own theory of taxation, Hume's approach was characterised by instrumentality and consequentialism, in the sense that property rights are justified by their social utility.[47]

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40 Alan Ryan, *Property and Political Theory* (Basil Blackwell, 1984), 49.

41 Ibid, 61.

42 Jean Jacques Rousseau, *Discourse on the Origin of Inequality* (G. D. H. Cole trans., Cosimo, 2005), 61.

43 Jean Jacques Rousseau, *The Social Contract* (G. D. H. Cole trans., J. M. Dent and Sons, 1923), book I, chapter IX; Christopher Essert, *Property Law in the Society of Equals* (Oxford University Press, 2024), 4–6.

44 Jeremy Waldron, 'To Bestow Stability upon Possession': Hume's Alternative to Locke, in *Philosophical Foundations of Property Law* 1 (James Penner and Henry Smith, eds, Oxford University Press, 2013), at 2.

45 Ibid, 3.

46 David Hume, *A Treatise of Human Nature* (Clarendon Press, 1896), Book III, Part II, Section II. (Via Online Library of Liberty).

47 Liam Murphy and Thomas Nagel, *The Myth of Ownership: Taxes and Justice* (Oxford University Press, 2002), 42–45.

Hume was not alone in acknowledging society when delimiting property rights. In *Agrarian Justice* (1797), Thomas Paine wrote that 'all accumulation… of personal property, beyond what a man's own hands produce, is derived to him by living in society; and he owes on every principle of justice, of gratitude, and of civilization, a part of that accumulation back again to society from whence the whole came'.[48] For Paine, the creation of value through labour provided the foundation to ownership over the actual improvement of the good, albeit not over the land or the original asset whose value was increased by labour.[49] Taxation and redistribution would be society's fair claims, as every generation should be entitled to compensation for the accumulation of income and wealth by private property holders.[50]

For Immanuel Kant, writing also in the late eighteenth century, the justification of property derived from human agency and independence.[51] Individuals are entitled to exercise their freedom to claim control over external objects of their choice and to do so with exclusivity. However, such a unilateral declaration is only provisional. Insofar as it affects directly everybody else's interests, for the acquisition to endure, an individual declaration of intent over the external world requires the group's acquiescence. That is why the state would have a central role to play in a Kantian society.[52] Whereas private property rights must not be infringed by other private actors, the state is ultimately legitimised to intervene in the name of the general interest when there is a public necessity.[53] Penner argues that Kant's notion of human agency is supportive, not so much of property, but of usufructuary rights, that is, of the right to use and to derive profit from a thing, but without the ability to consume it entirely, to destroy it or transfer it, or to exclude others from acquiring similar and compatible rights. Having said this, Penner declares himself a 'Kantian instrumentalist' in favour of exclusive property rights, for instance, in relation

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[48] Thomas Paine, Agrarian Justice, in *The Origins of Universal Grants: An Anthology of Historical Writings on Basic Capital and Basic Income* 3 (John Cunliffe and Guido Erreygers, eds, Springer, 2004), at 13.

[49] Robert Lamb, Liberty, Equality, and the Boundaries of Ownership: Thomas Paine's Theory of Property Rights, 72(3) *Review of Politics* 483 (2010), at 495 and 511.

[50] Mark Philp, Paine and socioeconomic rights, 33(4) *French History* 554 (2019), at 568.

[51] Hanoch Dagan, *A Liberal Theory of Property* (Cambridge University Press, 2021), 115–118.

[52] Luke J. Davies, Authority and acquisition: Kant on property in the state of nature, in *Research Handbook on Property, Law and Theory* 142 (Chris Bevan, ed., Edward Elgar, 2024), at 148–154.

[53] Alan Ryan, *Property and Political Theory* (Basil Blackwell, 1984), 81–83.

to inherently consumable goods – like food – and as a means of preserving privacy – in residential settings, for example.[54]

The nineteenth century was the time when utilitarianism, embodied by Jeremy Bentham and John Stuart Mill, took root as a consequentialist moral philosophy. Generally, utilitarians look for the maximisation of pleasure or utility, using wealth as a proxy. As such, they see property, not as an end in itself, but as an instrument to maximise the benefits of wealth for society at large, prioritising the aggregate benefit over the distribution of resources. Redistribution could be consistent with utility maximisation, but it would not be desirable if it was deemed to frustrate legal and economic predictability, underscoring the tension that exists in the utilitarian outlook between equality and security.[55] Utilitarians tend to assume that individuals are rational actors with sophisticated information about the value they can derive from goods. Utilitarians also generally suppose that goods are interchangeable, in the sense that they may not have personal, cultural or symbolic value other than the monetary one. They concern themselves with the satisfaction of preferences, whichever way those preferences are formed in the first place.[56] In the utilitarian mindset, property matters because of its results. Utilitarian theorists do not take a position in principle about property. They see property as an institution. After all, Bentham wrote, 'property and law are born and must die together'.[57] As an institution, property can result in greater good through legal certainty and economic incentives, but utilitarians are generally aware of the negative consequences of property, including injustices derived from the unequal distribution of wealth. Institutions are contingent and different contexts of political economy may require different rules.[58] Utilitarians see regulation as necessary for the sake of anticipation and certainty.[59] They may even be open to communal property arrangements, provided these are regulated in such a way that they do not result in underproduction – free riders – and overconsumption.

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[54] James E. Penner, *Property Rights: A Re-Examination* (Oxford University Press, 2020), 197–199.

[55] Alan Ryan, *Property and Political Theory* (Basil Blackwell, 1984), 105.

[56] Gregory S. Alexander and Eduardo M. Peñalver, *An Introduction to Property Theory* (Cambridge University Press, 2012), chapter 1.

[57] Jeremy Bentham, Principles of the Civil Code (Dumont, trans., Bowring, 1843). (Via University of Texas CUWS), part 1, chapter 8.

[58] Manolis Manioudis and Dimitra Yiardoglou, J. S. Mill and the Indian land question: From the political economy of small proprietorship to the support of *ryots* and British Imperialism?, 26(2) *British Journal of Politics and International Relations* 408 (2024), at 408–410.

[59] Alan Ryan, *Property and Political Theory* (Basil Blackwell, 1984), 98–99.

The utilitarians of the nineteenth century were the forefathers of the 'Law and Economics' school of the twentieth century, which posits that law's primary function is to ensure the efficiency of the market to maximise wealth.[60] In this spirit, two Americans, the economist Harold Demsetz and the microbiologist Garrett Hardin, warned in the 1960s against the so-called tragedy of the commons.[61] In their view, the collective costs of communal property are too high. The commons would incentivise wastefulness and overconsumption, since the benefits are individualised while the costs are scattered around. Private property would be a cure to the tragedy of the commons, not because it is a liberty or a right, and not even because property is a perfect solution, but because it is better than the alternative. In Hardin's words, because 'injustice is preferable to total ruin'.[62] For de Soto, the power of capital is such that private property takes the form of the foundational brick of the rule of law, from which would stem effective public institutions and the reduction of poverty.[63] Defenders of this economistic view trust the market to promote growth, provide incentives and identify the most efficient allocation of resources through exchange. This is irrespective of any theory of original or primary acquisition, because 'the output mix that results when the exchange of property rights is allowed is efficient and the mix is independent of who is assigned ownership'.[64]

The most radical challenge to private property in Western political thought came from Marxism and social anarchism. For Pierre Joseph Proudhon (*What is Property?*, 1840), private property was 'theft', while for Karl Marx (*On the Jewish Question*, 1843), property was an expression of capitalist selfishness and the means by which the capitalist steals the surplus value created by workers.[65] For Marxists, capitalism is based on the commodification of land and labour. Work and workers' relations with the external world become dehumanised, alienated, as under capitalism workers are forced to see things

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[60] Richard A. Posner, Utilitarianism, Economics, and Legal Theory, 8(1) *Journal of Legal Studies* 103 (1979).

[61] Harold Demsetz, Toward a Theory of Property Rights, 57(2) *American Economic Review* 347 (1967), at 354–358; Garrett Hardin, The Tragedy of the Commons, 162(3859) *Science* 1243 (1968).

[62] Garrett Hardin, The Tragedy of the Commons, 162(3859) *Science* 1243 (1968), at 1247.

[63] Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (Basic Books, 2000).

[64] Harold Demsetz, Toward a Theory of Property Rights, 57(2) *American Economic Review* 347 (1967), at 349.

[65] Jeremy Waldron, *The Right to Private Property* (Oxford University Press, 1990), chapter 9; Karl Marx, On the Jewish Question, in *The Marx-Engels Reader* 42 (Robert Tucker, ed., W.W. Norton, 1978).

exclusively through their monetary capitalist value, while developing hostility and competition for one another.[66] From the Marxist perspective, the law is a superstructure reflective of the underlying economic dynamics that benefit a few privileged at the expense of the majority. Property would be a 'legal façade to cover a political end, in other words it is an ideology'.[67] That said, the picture that Friedrich Engels paints in *The Origins of the Family, Private Property, and the State* (1884) is one where the three are codependent, not merely reflective of one another.[68] For Marx, private property is the expropriator's tool, expropriation understood at least in three different and complementary ways: expropriation of surplus labour through coercion in feudal societies; expropriation of land from direct producers in the so-called primitive accumulation; and expropriation of unpaid labour or appropriation of surplus value from workers in capitalist societies.[69] An alternative to private property would be a system where use and possession are preserved, not as dominium, but as personal property and as guarantees of access to resources, in other words, as usufruct. In *Capital*'s Volume III (1894), Marx writes:

> From the standpoint of a higher economic form of society, private ownership of the globe by single individuals will appear quite as absurd as private ownership of one man by another. Even a whole society, a nation, or even all simultaneously existing societies taken together, are not the owners of the globe. They are only its possessors, its usufructuaries, and, like *boni patres familias,* they must hand it down to succeeding generations in an improved condition.[70]

4.1.2 A Rights-Based Justification of Property? A Recapitulation

Much of Western philosophy has provided a justification for humans' claims over things outside their own bodies. In some highly influential cases – Aquinas, Locke – as a matter of natural rights. This normative justification of humans' interests was accentuated with the development of capitalism, when it became apparent that, without exploration and exploitation, the natural world was not going to be enough to satisfy ever-growing needs, The sustainability of human production is, in historical perspective, a relatively recent concern. In

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66 Alan Ryan, *Property and Political Theory* (Basil Blackwell, 1984), 162–163.

67 Kyriaco Nikias, The concept of property in Marx, in *Research Handbook on Property, Law and Theory* 155 (Chris Bevan ed. Edward Elgar, 2024), at 160.

68 Friedrich Engels, Origin of the Family, Private Property, and the State, in *Marx/Engels Selected Works, Volume Three* (Marxists.org, 2010); Alan Ryan, *Property and Political Theory* (Basil Blackwell, 1984), 168–169.

69 Jacob Blumenfeld, Expropriation of the expropriators, 49(4) *Philosophy & Social Criticism* 431 (2023), 435.

70 Karl Marx, *Capital Volume III* (Marxist.org, 1999), Part VI, Chapter 46.

Western political thought, the natural world was essentially a resource – gifted to humans by God *himself* – that became and nurtured capital as capitalism evolved.

Western thinkers engaged richly with the concept of property, while with important nuances as regards the discretionary power of the individual vis-à-vis the community. In ancient Rome, the institution of property was directly linked to the institution of slavery, and it was understood to encompass the right to use, the right to benefit from fruits, and the right to transmit or destroy the thing, in other words, to abuse. Property was interpreted expansively – Locke, Grotius – in Western political thought coinciding with capitalist development in Europe and with European imperialism across the globe. While philosophers generally endorsed the idea of property as a right and/or as a human necessity, several authors raised concerns about human sustenance and inequality – Aquinas, Rousseau – and urged thinking of property as a social institution whose content and limits ought to be defined politically – Kant, Hume, Paine.

In the twentieth century, humanity was not short of rights-based justifications of property. Claiming inspiration from Locke, authors championed property as an individual and exclusivist entitlement indivisible from the right to life and the right to liberty. Some referred to themselves as *libertarians* – not to confuse with the anarcho-syndicalists of the 1930s, who used the same name but with a totally different agenda. The most renowned representative of this community, certainly in the English language, is Robert Nozick, author of *Anarchy, State, and Utopia* (1974).[71] Libertarianism is an individualistic philosophy intrinsically opposed to the idea that collective or social concerns could legitimise public action through taxation, public spending or any sort of redistributive policies. Property would be justified by an original possession, theoretical or real.[72] And from that point onwards, in a market economy, property ought to be preserved against interventions from third parties and, particularly, from the state.

Another rights-based justification of property is the 'bundle of rights' metaphor, attributed to the American jurist Wesley Hohfeld at the turn of the twentieth century. The 'bundle of rights' has been both popular and amply questioned in Anglo-American academic circles around property.[73] The idea

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[71] Robert Nozick, *Anarchy, State, and Utopia* (Basic Books, 1974).

[72] Richard A. Epstein, Possession as the Root of Title, 13 *Georgia Law Review* 1221 (1979); Carol Rose, Possession as the Origin of Property, 52(1) *University of Chicago Law Review* 73 (1985).

[73] James E. Penner, The "Bundle of Rights" Picture of Property, 43(3) *UCLA Law Review* 711 (1996); Jane B. Baron, Rescuing the Bundle-of-Rights Metaphor in Property Law, 82(1) *University of Cincinnati Law Review* 57 (2014); James

of the bundle is that ownership entails a multiplicity of rights, like sticks in a bundle. Honoré's classic list of 'standard incidents of ownership' covers: the right to possess; the right to use; the right to manage – or to decide over the thing; the right to the income – or to obtain fruits from it; the right to the capital – to consume, but also to waste and destroy the thing in whole or in part; the right to security – legal certainty; the incident of transmissibility; the ability to transmit the thing; the absence of term – or durability of the entitlement; the prohibition of harmful use; and the executability in the case of debt or insolvency.[74] These detachable parts of the right to property might involve multiple actors in a complex set of social and legal relationships. Scholars have debated at length the utility of the bundle of rights as an analytical framework, alluding in favour or against its degree of flexibility, pragmatism, the centrality of exclusion or lack thereof, and the role of the state as a regulator.[75] For Xu and Allain, something potentially positive of the bundle of rights is that it might allow individuals and groups without formal title, such as indigenous peoples, to claim interest akin to – a portion of – property rights.[76] Miloon Kothari took a similar approach in his role as UN Special Rapporteur on Adequate Housing between 2000 and 2008, when he argued that land ought to be seen as part of the bundle of rights that many marginalised people and communities need for their survival.[77] In any case, the metaphor of the bundle of rights did not take root in countries that follow the civil law tradition, where ownership is thought of as a unitary construct, and where real rights are *numerus clausus*, meaning, the content of these rights is meant to be set out in private law legislation.[78]

E. Penner, *Property Rights: A Re-Examination* (Oxford University Press, 2020), chapter 1; Jane B. Baron, Radical contingency and the bundle of rights, in *Research Handbook on Property, Law and Theory* 169 (Chris Bevan, ed., Edward Elgar, 2024).

[74] Antony M. Honoré, Ownership, in *Oxford Essays in Jurisprudence* 107 (A. G. Guest, ed., Oxford University Press, 1961), at 113–126.

[75] For a general discussion, read the articles by Eric R. Claeys, Robert C. Ellickson, Richard A. Epstein, Larissa Katz, Thomas W. Merrill, Adam Mossoff, Stephen R. Munzer, James E. Penner, and Henry E. Smith, in the special issue on the bundle of rights in: 8(3) *Econ Journal Watch* (2011).

[76] Ting Xu and Jean Allain, Introduction, in *Property and Human Rights in a Global Context* 1 (Ting Xu and Jean Allain, eds, Hart, 2015), at 7.

[77] Miloon Kothari, The Human Right to Adequate Housing and the New Human Right to Land: Congruent Entitlements, in *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric* 81 (Andreas von Arnauld, Kerstin von der Decken and Mart Susi, eds, Cambridge University Press, 2020), at 85.

[78] Sief Van Erp, Comparative Property Law, in *The Oxford Handbook of Comparative Law* 1031 (Mathias Reimann and Reinhard Zimmermann, eds,

To recap, what is the role of a rights-based liberal justification of property? Following Waldron, 'a right-based argument is an argument showing that an individual interest considered in itself is sufficiently important from a moral point of view to justify holding people to be under a duty to promote it'.[79]

Private property can serve many purposes for owners and for the community at large, making the economy more productive and providing revenue to the state through taxation. As such, preserving property is, or can be, a general interest. However, it is not the only one. Moreover, property is worthless by itself. It is only valuable as a tool for the satisfaction of needs, such as access to housing, food, clothing, leisure, etc. Hence, its preservation is one among multiple and potentially competing interests. Since the late eighteenth century, scholars and philosophers generally associated with liberalism have contributed significantly to more egalitarian conceptions of society, sometimes even questioning the omnipotence of property – people like Mary Wollstonecraft, Thomas Paine, John Stuart Mill and John Rawls.[80] However, for much of the second half of the twentieth century, liberalism was associated with a return to individualism and negative liberty, a trend that Moyn connects with the politics of the Cold War.[81] There are good reasons to be critical of liberal – let alone libertarian – arguments for the right to property. Waldron writes that no rights-based argument 'provides an adequate justification for a society in which some people have lots of property and many have next to none'.[82] Similarly, for Van der Walt, 'the rights paradigm tends to stabilize the current distribution of property holdings by securing extant property holdings on the assumption that they are lawfully acquired, socially important and politically and morally legitimate'.[83] Ferrajoli also argued that property rights are vitally different from fundamental rights. Rights are meant to be universal, non-disposable and held irrespective of inequalities in relation, among others, to wealth. By contrast, property is, by definition, not universal – most people do not have it, or not much of it – and disposable, and property is precisely the

Oxford University Press, 2019), at 1043–1045.

79 Jeremy Waldron, *The Right to Private Property* (Oxford University Press, 1990), 4.

80 Matthew McManus, *The Political Theory of Liberal Socialism* (Routledge, 2024).

81 Samuel Moyn, *Liberalism Against Itself: Cold War Intellectuals and the Making of Our Times* (Yale University Press, 2023).

82 Jeremy Waldron, *The Right to Private Property* (Oxford University Press, 1990), 6.

83 A. J. Van der Walt, *Property in the Margins* (Hart, 2009), viii.

dividing line of wealth.[84] Hardt and Negri saw property, not as a foundation of freedom and the rule of law, but as 'an obstacle to economic life, the basis of unjust structures of social control, and the prime factor that creates and maintains social hierarchies and inequalities'.[85] As an antidote, they long for 'an equal and open structure for access to wealth together with democratic mechanisms of decision-making', which they call 'nonproperty'.[86]

For liberals and libertarians, original possession and/or labour are determinative in the justification of property as an entitlement. However, from the observation that someone (could have) claimed first that a piece of land was theirs does not follow that such a portion of the earth ought to be theirs to the exclusion of everybody else. Whether there is a human instinct to stockpile is, again, not relevant from a moral perspective. A toddler might insist everything around belongs to her, and she might resist sharing anything with others, but that is no foundation for the right to property. She also wants to eat all the ice-cream in the world, and that does not make it a right.

Liberals and libertarians tend to think of property as if wealth were acquired through talent and effort. However, the reality is that the rate of capital return in advanced economies is consistently higher than the rate of economic growth.[87] Most wealth is inherited, passed on, and accumulated through capital gains with little or no labour involved, not least from those who benefited from the accumulation. Particularly in the last four to five decades, advanced economies have also experienced extraordinary levels of material inequalities between rich and poor. In Waldron's words, 'if private property rights are something that each person needs for the satisfactory development of his autonomy, then it should be a matter of deep concern if the distribution of these rights is such that some people end up with none'.[88]

The conceptually limitless right to property of Locke and Nozick – and of Article 1 Protocol 1 of the European Convention on Human Rights (ECHR) – is the sort of law that Anatole France satirised, that is, the law that, 'in its majestic equality, forbids rich and poor alike to sleep under bridges, to beg in

[84] Luigi Ferrajoli, Fundamental Rights, 14(1) *International Journal for the Semiotics of Law* 1 (2001), at 10–15.

[85] Michael Hardt and Antonio Negri, *Assembly* (Oxford University Press, 2017), 85.

[86] Ibid, 97.

[87] Thomas Piketty, *Capital and Ideology* (Arthur Goldhammer trans., Harvard University Press, 2020).

[88] Jeremy Waldron, *The Right to Private Property* (Oxford University Press, 1990), 132.

the streets, and to steal their bread'.[89] The right to property is a right for property-holders. The *human* right to property does not protect humans from birth, unless they are born owners. There is no right to acquire property, and there is no duty for public authorities to advance progressively towards the full realisation of this right for everyone on an equal basis. Because the value of property is market-dependent, property is inherently unequal: concentration increases value, making goods less accessible and more sought-after. If access to property were materially universalisable, not as an idea, but as a reality, property would lose interest for investors driven by the accumulation of capital.

4.2 CRITIQUES OF PROPERTY

As seen in the previous section, except for Marxism in the nineteenth and twentieth centuries, Western political thought has been generally accommodating of property either as a right, as a social convention or, at the very least, as a useful institution. In the late twentieth and early twenty-first centuries, however, property in its private form has been the target of vigorous critique. We can cluster these into three groups: as a battering ram of colonialism; as the primary cause of the concentration of wealth; and as the negation of the commons.

4.2.1 Colonial Property

Private property played a central role in the expansion of Western imperialism and colonialism. Koskenniemi has written extensively about the interdependence between ownership and Western political expansionism around the globe: 'Sovereignty and property are the yin and yang of European power.'[90] For Tzouvala, the expansion of the concept of private property was an imperative of capitalist modernity, and the colonial standard of civilisation was used to globalise the protection of property rights and to preserve metropolitan interests in the colonies.[91] Terretta argues that the appropriation of land by white Europeans, as property and colony, cannot be disjointed from the ideology of

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[89] Anatole France, *Le Lys Rouge* 118 (1894). (Via Wikisource). Source for the translation:

Andrew Sepielli, The Law's 'Majestic Equality', 32(6) *Law and Philos* 673 (2013).

[90] Martti Koskenniemi, *To the Uttermost Parts of the Earth: Legal Imagination and International Power* (Cambridge University Press, 2021), 959.

[91] Ntina Tzouvala, *Capitalism as Civilisation: A History of International* Law (Cambridge University Press, 2020), 59.

racial superiority inherent to colonialism.[92] Bhandar also presents a compelling narrative about the linkages between the general understanding of private property and the fabrication of racialised and gendered identities separating owners and non-owners in colonial contexts:

> The land title document is intended to mirror ownership as well as any other legal interests that another person might have over that piece of real property, which is represented on the title document as a drawing indicating the boundaries of the property and a description of it in words. Of significance to the analysis pursued here is that the system of title by registration renders prior ownership interests irrelevant; that which is recorded on the document archived in the state registry becomes the proof of ownership, not the historical memory, social use, kinship ties, or other relations that were bound up with land use and ownership for centuries prior to becoming more fully commodified.[93]

While there were differences in the processes and the strategies between the British, the French and the Spanish settlers in the Americas,[94] the symbiosis between property and sovereignty was commonly key from the very beginning of colonial domination. As stated earlier (section 4.1.1), Locke's justification of the original acquisition of property through labour – actually, through the managerial control of the people who do the actual labour – offered an ideological defence for dispossession in North America, where natives had not claimed the land as their own in exclusivity, not at least in a way European settlers could recognise as legally significant in their own eyes.[95] The principle would be central to the development of both jurisdiction and private property in the United States, particularly since the judicial recognition of the 'discovery doctrine' (US Supreme Court, *Johnson v. McIntosh*, 1823), according to which any territory previously unknown to Europeans would be considered *terra nullius*, nobody's land, and therefore subject to the myth of first occupation.[96]

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[92] Meredith Terretta, Claiming Land, Claiming Rights in Africa's Internationally Supervised Territories, in *Social Rights and the Politics of Obligation in History* 264 (Steven L. B. Jensen and Charles Walton, eds, Cambridge University Press, 2022).

[93] Brenna Bhandar, *Colonial Lives of Property: Law, Land, and Racial Regimes of Ownership* (Duke University Press, 2018), 84–85.

[94] Allan Greer, *Property and Dispossession: Natives, Empires and Land in Early Modern North America* (Cambridge University Press, 2018).

[95] Jeremy Waldron, 'To Bestow Stability upon Possession': Hume's Alternative to Locke, in *Philosophical Foundations of Property Law* 1 (James Penner and Henry Smith, eds, Oxford University Press, 2013), at 3.

[96] Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press, 2019), 34.

Writing a few decades before Locke, Grotius argued that private actors were entitled to wage a 'private war' when corporate actors felt excluded from trade and commerce,[97] a sort of private *casus belli* that the Dutch and British East India Companies and other company-states would rely on. Company-states thrived in the early stages of modernity, from the early 1600s to the late 1700s, and were granted sovereign prerogatives, such as waging war, making peace, administering justice and minting currency. At the same time, they existed as a profit-making machine and were accountable to private individuals.[98] For Phillips and Sharman, the functioning company-states challenged an important assumption in the theoretical conception of the state: 'That a public/private divide clearly separated sovereigns from non-sovereigns makes little sense in the early modern period, when company-states routinely mediated the West's relations with large portions of the non-European world.'[99]

Colonialism and empire contributed to blurring the lines between public sovereign interests and private corporate interests. As put by Anghie in his retrospective of three decades of third-world approaches to international law (TWAIL), 'while we might see the corporation as a proxy for the sovereign, it may be possible to view the sovereign as a proxy for the corporation'.[100] In fact, here lie the origins of what would become international investment law. In the process of decolonisation in the second half of the twentieth century, the protection of Western companies would be 'an essential element in the development of the law of state responsibility'.[101] Empire would be instrumental in the conflation of the human rights discourse and business interests in international law: the language of rights was used to protect Western corporations – and their property – in the colonial and imperial endeavours. In fact, the word *corporation* itself alludes to the legal fiction of giving shape, body, *corpus*, to an artificial entity set up for the purposes of trade. As covered in Chapter 2 (section 2.1.3), the European Human Rights Court has had no qualms about giving companies the status of rights-holders.[102] In his surveying of TWAIL literature, Anghie reflects insightfully:

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[97] Hugo Grotius, *Commentary on the Law of Prize and Booty* (Liberty Fund, 2006), chapter VII. (Via Online Library of Liberty.)

[98] Andrew Phillips and J. C. Sharman, *Outsourcing Empire: How Company-States Made the Modern World* (Princeton University Press, 2020), 5.

[99] Ibid, 209.

[100] Antony Anghie, Rethinking International Law: A TWAIL Retrospective, 34(1) *European Journal of International Law* 7 (2023), at 88.

[101] Ibid, 89.

[102] ECtHR, *Slovenia v. Croatia* [GC] (dec.), Application No. 54155/16 (18 November 2020), para. 62–63; ECtHR, *Société Colas Est and Others v. France*, Application No. 37971/97 (16 April 2002), para 41.

> It is surely both startling and revealing that the one prominent area of international law in which reparations became a crucial topic was in debates initiated by the West about acquired rights and state succession. Western multinational corporations argued that their acquired rights had been breached, that they were being "expropriated" and were therefore entitled to compensation.[103]

In her 1993 article 'Whiteness as Property', the American professor Cheryl Harris wrote about how racial identity and private property have historically been deeply interrelated concepts through the systems of domination of black people and indigenous communities.[104] Slavery, the ownership of humans by other human beings, was a constitutive element of colonialism and the global expansion of racialised capitalism. Since Eric Williams's *Capitalism and Slavery* (1944), much has been written about whether morality or economics trump one another in explaining the decline and end of Western-led slavery in the nineteenth century.[105] Williams's position was that slavery came to a conclusion in the British empire when Britain reached a stage of capitalist development where slavery was no longer profitable. Leaving aside the debate about morality's role in it, the end of human enslavement brings to the table the critically important question of compensation for expropriation as a form of deprivation of property. It is pertinent to recall the very different paths followed by the United Kingdom and the United States when slavery ended in their respective domains. For the so-called founding fathers of the US, in the late eighteenth century a slave-owning society might have been shameful, but it was perfectly conceivable – as subsequent decades proved – while it would have been extremely hard for them to imagine a society without private property.[106] Having said that, and despite the structural racial discrimination that persisted after the end of the American Civil War, in its aftermath, the 14th amendment (1866) forthrightly ruled out 'any claim for the loss or emancipation of any slave'.[107] By contrast, only in 2015 did the British Government finally pay off the handsome loan obtained 180 years earlier, in 1835, to compensate British

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[103] Antony Anghie, Rethinking International Law: A TWAIL Retrospective, 34(1) *European Journal of International Law* 7 (2023), at 97.

[104] Cheryl Harris, Whiteness as Property, 106(8) *Harvard Law Review* 1707 (1993).

[105] Eric Williams, *Capitalism and Slavery* (University of North Carolina Press, 1994); for a review of the controversy, see: Christopher L. Brown, Funhouse Mirror, 45(24) *London Review of Books* 13 (2023).

[106] Andro Linklater, *Owning the Earth: The Transforming of Land Ownership* (Bloomsbury, 2013), 192.

[107] Fourteenth Amendment, on Equal Protection and Other Rights, Section 4 (1866). (Via Congress.gov.)

slave owners for the loss of their property over human beings.[108] The British approach illustrated, as Piketty put it, 'both the political power of the slaveholders and the grip of proprietarian ideology'.[109]

Colonialism also meant the consolidation of land regimes that resulted in the concentration of wealth in a very small elite, and the wealth accumulation and dominance would generally endure after the process of decolonisation. The issue of the colonial legacy can also have powerful resonance within national borders, as we saw in the case of South Africa (Chapter 3, section 3.2). As appreciated by Anghie, 'any discussion of reparations must begin by engaging with the process by which the world was transformed into property and by confronting the historical fact of the unprecedented dispossession that followed'.[110] At a time of ongoing debates about whether and how Western countries should compensate societies and individual victims of slavery and the historical plundering of resources, it is pertinent to interrogate what, if anything, human rights law and principles can say about the forms and extent of compensation in the case of interference with property rights when it is in the public interest. This is an issue we must return to in Chapter 5.

4.2.2 Property and the Concentration of Wealth

In *Capital and Ideology* (2020), Piketty writes extensively about how the law, including international law, has been used as an ideological front to validate rampant inequalities of income and wealth under capitalism.[111] Decades earlier, E. P. Thompson argued that English land enclosure was 'a plain enough case of class robbery, played according to fair rules of property and law laid down by a parliament of property-owners and lawyers'.[112] From an entirely different ideological perspective, in *The Road to Serfdom* (1944), Friedrich Hayek agreed in respect to the central role that public authorities play in setting up rules to favour capitalist development: 'In no system that could be rationally defended would the state just do nothing. An effective competitive system

[108] Kris Manjapra, Necrospeculation: Postemancipation Finance and Black Redress, 37(2) *Social Text* 29 (2019).

[109] Thomas Piketty, *Capital and Ideology* (Arthur Goldhammer trans. Harvard University Press, 2020), 213.

[110] Antony Anghie, Rethinking International Law: A TWAIL Retrospective, 34(1) *European Journal of International Law* 7 (2023), at 96.

[111] Thomas Piketty, *Capital and Ideology* (Arthur Goldhammer trans. Harvard University Press, 2020).

[112] Edward Palmer Thompson, *The Making of the English Working Class* (Pantheon, 1963), 218.

needs an intelligently designed and continuously adjusted legal framework.'[113] In *Capitalism as Freedom* (1962), Milton Friedman would add that the state must do something that the market cannot do: 'to determine, arbitrate, and enforce the rules of the game'.[114] Mancur Olson was straightforward: 'There is no private property without government!'[115]

Piketty, Thompson, and other historians, economists, sociologists, critical legal scholars, and activists in the last half a century have put the finger on private property as the trigger of the concentration of wealth, which would be inherently unfair and would benefit disproportionately a privileged capitalist class. Waldron, in *The Right to Private Property* (1990), asserted: 'The slogan that property is a human right can be deployed only disingenuously to legitimize the massive inequality that we find in modern capitalist countries.'[116] In the name of private initiative and autonomy, transnational corporations have benefited from the generous – for their interests – regulation of property rights, which allows them to accumulate wealth, commodify land and the natural environment, exert control over the international financial markets, and have a definitive influence in the global power system.[117] There is nothing immediately and universally intuitive about private property; as the architect Rowan Moore puts it, we are dealing instead with a legal and economic category whose meaning is constructed and whose value is ascribed by a powerful elite:

> There is nothing natural about demarcating fixed lines in the ground, recording them in maps and plans, and documenting them and protecting them by laws. Private property in the modern sense only appeared late in the development of human beings, and only in certain societies. Concepts such as possession and territory may be known to almost all humans and even to animals, but they can take many other forms than the codified and bounded systems of private property.[118]

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[113] Friedrich A. Hayek, *The Road to Serfdom* (University of Chicago Press, 2007), 40.

[114] Milton Friedman, *Capitalism and Freedom* (University of Chicago Press, 2002), 35.

[115] Mancur Olson, Dictatorship, Democracy and Development, 87(3) *American Political Science Review* 567 (1993), at 572.

[116] Jeremy Waldron, *The Right to Private Property* (Oxford University Press, 1990), 6.

[117] Jean-Philippe Robé, *Property, Power and Politics: Why We Need to Rethink the World Power System* (Bristol University Press, 2020), 13; Priya S. Gupta, Property in Law and Development, in *The Oxford Handbook of International Law and Development* 635 (Ruth Buchanan, Luis Eslava and Sundhya Pahuja, eds, Oxford University Press, 2023).

[118] Rowan Moore, *Property: The Myth that Built the World* (Faber, 2023), 171.

A particularly compelling vivisection of the way the law is weaponised to create wealth and income inequality is Katharina Pistor's *The Code of Capital* (2019). Pistor demonstrates that the legal coding can turn virtually any asset into capital, thereby enlarging the holder's wealth. Depending on the circumstances, the laws on contracts, collateral, trusts, bankruptcy and corporate regulation give assets priority and comparative advantage over competing claims: durability – extending the value over time; universality – extending it over space *erga omnes*; and convertibility, which operates as an insurance device.[119] This is why it would be wrong to see property rights as a restraint on state power. Rather the opposite, as Pistor notes, 'capital is linked to and dependent on state power'.[120] The system works because 'states back and, if necessary, coercively enforce the legal code of capital, whether or not they had a direct hand in choosing the coding strategy for the asset in question'.[121] The absence of a formal universal law or a global state is no hindrance for the transnational capitalist class, which manages to pick and choose the laws that benefit them, imposing foreign laws if necessary. To take a case in point, in 2020, the UK Government estimated that 45% of the outstanding stock of international sovereign bonds was governed by English law.[122] The selective application of alien legislation 'severs the umbilical cord between the individual's self-interest and social concerns', as Pistor puts it,[123] which can dangerously dislocate property from its social function.

For some, the idea of global human rights, and the international community of human rights champions, should face its share of responsibility for the level of concentration of wealth of our times. Slobodian decries how the international institutions of the postwar era, including the international human rights regime, were defined at their core by a conception of rights that shielded foreign capital from nationalisations and other forms of state intervention.[124] Moyn targets human rights for being epistemically incapable – for being 'not enough' – to address the root causes of inequality between societies and within

[119] Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press, 2019), 2–3, 13–15.
[120] Ibid, 4.
[121] Ibid, 21.
[122] UK House of Commons, PQ 45237, Debts: Developing countries (18 May 2020).
[123] Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (Princeton University Press, 2019), 9.
[124] Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Harvard University Press, 2018), chapter 4.

society.[125] For Whyte, human rights, as an idea and as a global community, would be complicit because it provided a layer of legitimacy allowing neoliberals to introduce themselves as the defenders of a liberal rules-based international order based on the free market.[126] Salomon writes about the need to emancipate human rights from capitalism by making property work for the common good.[127]

In the last decade, the philosopher Ingrid Robeyns has formulated a radical proposal: limitarianism. Robeyns advocates for the recognition of a threshold of wealth above which nobody should be. It is not a moral position in abstract terms, but a philosophy for the world as we know it, one cognisant of the inequality between rich and poor, both at the global level and at the national level. In particular, by setting an upper limit to wealth, Robeyns seeks to address the challenges of extreme global poverty, local and global disadvantages, and the urgent collective action problem of climate change.[128] As opposed to propositions gazing at sufficiency levels and aiming to lift upwards people at the bottom, limitarianism 'is concerned with who should contribute to the redistributive policies and interventions aimed at collective action problems, and how much they should contribute'.[129] Robeyns is unambiguous in the position that the benefit of seeing the opportunities of vulnerable and disadvantaged groups widen trumps any hypothetical concerns about the curtailment of equal opportunities for the richest in society.[130]

While not explicitly in dialogue with Robeyns, human rights commentators have also argued in favour of setting limits to growth. If human rights are about limits on power, there is indeed a human rights case for limiting the extreme concentration of wealth.[131] Sigrun Skogly contends that the world's richest people 'may have reached a human rights ceiling beyond which the

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125 Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Harvard University Press, 2018).

126 Jessica Whyte, *The Morals of the Market: Human Rights and the Rise of Neoliberalism* (Verso, 2019).

127 Margot Salomon, Emancipating human rights: Capitalism and the common good, 36(4) *Leiden Journal of International Law* 857 (2023).

128 Ingrid Robeyns, Having Too Much, 58 *Nomos* 1 (2017), 10–11; Ingrid Robeyns, What, if Anything, is Wrong with Extreme Wealth?, 20(3) *Journal of Human Development and Capabilities* 251 (2019).

129 Ingrid Robeyns, Why Limitarianism?, 30(2) *Journal of Political Philosophy* 249 (2022), at 265.

130 Ingrid Robeyns, Having Too Much, 58 *Nomos* 1 (2017), at 33.

131 Caroline Dommen, 'The human rights case for drawing a line under extreme wealth', *Open Global Rights* (18 June 2025).

right to continuous improvement of living conditions no longer features'.[132] The right to continuous improvement of living conditions can be found in Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR),[133] and this right, alongside all the others in that treaty, is in principle subject to non-retrogression, meaning that public authorities should not adopt measures that result purposely in lesser enjoyment of socioeconomic rights.[134] However, in the name of redistribution, and bearing future generations in mind, Skogly argues that it would be fair and necessary to adopt deliberately retrogressive measures targeting only the world's richest population (about non-retrogression, see Chapter 2, section 2.2).

4.2.3 Private Property Against the Commons

In general, from the early days of capitalist development, enhancing the productivity of the land was thought of as the main argument to prioritise private property above subsistence rights and communal customary rights.[135] Historical research shows that enclosure of formerly communal land in England was correlated with higher productivity but also with higher inequality in land distribution.[136] As discussed earlier when dealing with colonial property (section 4.2.1), indigenous peoples suffered particularly from the privatisation of land generally held in common until the Europeans appeared on shore. The myth of *terra nullius*, the notion that the land was vacant and did not belong to anyone, resulted in the displacement of indigenous peoples. Natives and colonisers did not use the same legal-epistemic categories, but empire ensured settlers' willpower eclipsed collective and ancestral practices.

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[132] Sigrun Skogly, The Right to Continuous Improvement of Living Conditions and Human Rights of Future Generations – A Circle Impossible to Square?, in *The Right to the Continuous Improvement of Living Conditions: Responding to Complex Global Challenges* 147 (Jessie Hohmann and Beth Goldblatt, eds, Hart, 2021), at 153.

[133] General Assembly Resolution 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, Article 11 (16 December 1966).

[134] CESCR, General Comment No. 3: The Nature of States Parties' Obligations, UN doc. E/1991/23 (14 December 1990), para. 9.

[135] Ellen Meiksins Wood, *Liberty and Property: A Social History of Western Political Thought from Renaissance to Enlightenment* (Verso, 2012), 114–115; Julia McClure, The Legal Construction of Poverty: Examining Historic Tensions Between Property Rights and Subsistence Rights, in *Poverty and Human Rights* 54 (Suzanne Egan and Anna Chadwick, eds, Edward Elgar, 2021), at 54–59.

[136] Leander Heldring, James A. Robinson and Sebastian Vollmer, *The Economic Effects of the English Parliamentary Enclosures* (National Bureau of Economic Research, 2022), 19.

Graeber and Wengrow's magnificent *The Dawn of Everything* (2021) provides abundant anthropological and archaeological evidence to prove that communal and non-exclusivist approaches to property have existed in a good number of relatively egalitarian – more egalitarian than in the West – societies in the long history of humanity. The book shows how colonisation pushed indigenous peoples out of their lands and often resulted in the destruction of entire civilisations. Land dispossession was in fact behind the creation of European-style settler colonial societies, blurring once again the boundaries between private and public. Before Europeans' arrival, indigenous peoples roamed the land, made use of it, and had – and have – an understanding of personal property, both material and incorporeal – like magic formulae, stories, medical knowledge, performances, the right to use certain clothing and other forms of traditional knowledge. Still, they did not claim ownership in the Western sense of the word.[137] By comparison, Graeber and Wengrow observe a particularly odd feature in the Western notion of human rights:

> Which is that – quite unlike free societies – we take this absolute, sacred quality in private property as a paradigm for *all* human rights and freedoms… Just as every man's home is his castle, so your right not to be killed, tortured or arbitrarily imprisoned rests on the idea that you *own* your own body, just as you own your chattels and possessions, and legally have the right to exclude others from your land, or house, or car, and so on.[138]

Dispossession was not only about grabbing land; it was also about imposing an epistemic framework. The only way for indigenous peoples to enjoy their land was by accepting the legal system of private property established by the European settlers. This is why Nichols turns around Proudhon's classic 'property is theft',[139] and argues that the opposite is historically more accurate and analytically less self-defeating: 'Theft is property', in the sense that theft is the *conditio sine qua non* that made property possible in the first place:[140]

> "Dispossession" may be coherently reconstructed to refer to a process in which new proprietary relations are generated but under structural conditions that demand

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137 David Graeber and David Wengrow, *The Dawn of Everything: A New History of Humanity* (Allen Lane, 2021), chapter 4.

138 Ibid, 159.

139 Jeremy Waldron, *The Right to Private Property* (Oxford University Press, 1990), chapter 9; Karl Marx, On the Jewish Question, in *The Marx-Engels Reader* 42 (Robert Tucker, ed., W.W. Norton, 1978).

140 Robert Nichols, *Theft Is Property!: Dispossession and Critical Theory* (Duke University Press, 2020), 6.

> their simultaneous negation. In effect, the dispossessed come to "have" something they cannot use, except by alienating it to another.[141]

Traditionally, property theory has largely neglected non-private forms of property.[142] Private property was indeed the focus of Western political theory over the centuries (section 4.1). In the twentieth century, the Law and Economics school followed the utilitarian approach that, regardless of deontological positions, private property is the most beneficial model because it prevents what they saw as the flaws of the tragedy of the commons, namely, free-riders, underproduction and overconsumption (section 4.1.3). Since the 1990s, however, there has been a growing volume of research showing that the so-called tragedy of the commons is not unavoidable. In certain circumstances, closely-knit communities, for example, indigenous peoples, are capable of managing resources successfully in common, avoiding the need for privatisation but also of state-run management of resources. The essential difference between communal property and private property is that in the former case nobody has the right to exclude anyone else from accessing the resource in question. A turning point in this regard was Elinor Ostrom's *Governing the Commons* (1990), for which she was recognised with the Nobel Memorial Prize in Economic Sciences in 2009:

> Not all users of natural resources are similarly incapable of changing their constraints. As long as individuals are viewed as prisoners, policy prescriptions will address this metaphor. I would rather address the question of how to enhance the capabilities of those involved to change the constraining rules of the game to lead to outcomes other than remorseless tragedies.[143]

Seeking to apply different levels of rights and rules for individual users and for the community, Schlager and Ostrom came up with their own bundle of rights for property regimes in common: the rights of – physical – access, withdrawal, management, exclusion and alienation.[144] The conceptual approach was later revisited by Sikor, He and Lestrelin, who identified eight types of property rights under property regimes of the natural environment: (1) use of direct

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[141] Ibid, 8.

[142] J. W. Harris, *Property and Justice* (Oxford University Press, 2002), 100; Leon Terrill, Property theory's neglect of non-private property, in *Research Handbook on Property, Law and Theory* 231 (Chris Bevan, ed., Edward Elgar, 2024).

[143] Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge University Press, 1990), 7.

[144] Edella Schlager and Elinor Ostrom. Property-Rights Regimes and Natural Resources: A Conceptual Analysis, 68(3) *Land Economics* 249 (1992), at 250–252.

benefits of access and use; (2) use of indirect benefits – such as tourism or spiritual value; (3) management; (4) exclusion – because the list of potential users may not be limitless; (5) transaction; (6) monitoring; (7) definition of the space for the exercise of control rights; and (8) allocation of control rights to particular users.[145]

While a hugely significant contribution in the narrative about common property, Ostrom's approach may be excessively restrictive, to the extent that it is confined essentially to common-pool resources, meaning, 'a natural or man-made resource system that is sufficiently large as to make it costly (but not impossible) to exclude potential beneficiaries from obtaining benefits from its use'.[146] Examples of common-pool resources are large forests, beaches, fisheries and irrigation systems. For De Schutter and Rajagopal, besides common-pool resources, one must also consider 'open access' goods such as creative commons in the online world, where individual use does not increase the transaction costs, and also 'collaborative goods', whose sustenance and continuous improvement require coordination among users.[147] Just like there might be a tragedy of the commons, one may also face what Heller calls a 'tragedy of the anticommons', that is, a situation in which 'when too many people own pieces of one thing, nobody can use it' – for example, when certain patents prevent the development of collaborative scientific research.[148]

It is far from certain that private property necessarily leads to better outcomes than property in common. As appreciated by Alison Clarke, 'legal rules have the potential both to facilitate and to discourage the development of successful commons. We need to look more closely at our legal institutions to ensure that they are doing the former and not the latter.'[149] Against the mantra of exclusionary private property, De Schutter and Rajagopal have called for greater recognition and protection of communal property to address what they see as

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[145] Thomas Sikor, Jun He and Guillaume Lestrelin, Property Rights Regimes and Natural Resources: A Conceptual Analysis Revisited, 93 *World Development* 337 (2017), at 338–340.

[146] Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge University Press, 1990), 30.

[147] Olivier De Schutter and Balakrishnan Rajagopal, Conclusion: The revival of the 'commons' and the redefinition of property rights, in *Property Rights from Below: Commodification of Land and the Counter-Movement* 203 (Olivier De Schutter and Balakrishnan Rajagopal, eds, Routledge, 2020), at 207.

[148] Michael Heller, The Tragedy of the Anticommons: A Concise Introduction and Lexicon, 76(1) *Modern Law Review* 6 (2013), at 7.

[149] Alison Clarke, Creating New Commons: Recognition of Communal Land Rights within a Private Property Framework, 59(1) *Current Legal Problems* 319 (2006), at 357.

a general problem of the commodification of property, namely, that it 'leads to the allocation of use rights being based on purchasing power, rather than need. Once they are subject to market mechanisms, the goods or resources go to the highest bidder, not to those who most deserve support.'[150] In the same spirit, Mazzucato has advocated for a new political economy of the common good based on democratic decision-making to shape the objectives the economy is supposed to serve.[151] Xu talks of the need for a 'law-and-community approach' to property that is mindful of the value of assets for individuals but also for the collective where those individuals operate.[152] Clarke helpfully presents a list of minimal requirements that could derive from a human rights approach to communal property: access – *locus standi* – for communities as claimants in front of human rights courts and other supranational bodies; access to remedies; recognition of the commons as a form of property with equal value as the private one; recognition that the interests of the local community may not necessarily coincide with the public or general interest in society at large; and access to the means so that the community can have their collective property rights recognised, protected and vindicated by the state.[153]

Since the early 2000s, international human rights law has taken vital steps forward in the protection of communal property. As we saw in Chapter 2, case law in both the Inter-American and the African human rights systems has advanced considerably in the recognition of collective forms of property as the expression of indigenous peoples' identity and cultural heritage (Chapter 2, section 2.1.3). *Lhaka Honhat v. Argentina* (2020) and *Endorois Welfare Council v. Kenya* (2010) are two remarkable examples.[154] Also noteworthy were the

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[150] Olivier de Schutter and Balakrishnan Rajagopal, Property rights from below: an introduction to the debate, in *Property Rights from Below: Commodification of Land and the Counter-Movement* 1 (Olivier De Schutter and Balakrishnan Rajagopal, eds, Routledge, 2020), at 8.

[151] Mariana Mazzucato, Governing the economics of the common good: from correcting market failures to shaping collective goals, 27(1) *Journal of Economic Policy Reform* 1 (2024).

[152] Ting Xu, A law-and-community approach to compensation for takings of property under the European Convention on Human Rights, 39(3) *Legal Studies* 398 (2019), at 402–403.

[153] Alison Clarke, Property, Human Rights and Communities, in *Property and Human Rights in a Global Context* 19 (Ting Xu and Jean Allain, eds, Hart, 2015), at 37–39.

[154] IACtHR, *Indigenous Communities of Lhaka Honhat (Our Land) Association v. Argentina*, Merits, Reparations and Costs, Judgment (6 February 2020); ACHPR, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, Communication No. 276/2003, Decision (2010).

2012 Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security, adopted by the Committee on World Food Security of the UN Food and Agriculture Organization.[155] As noted by De Schutter and Rajagopal, the Voluntary Guidelines gave continuation to the principle that, as part of the poverty-reduction objectives, local communities should be trusted with the management of their common resources, such as fisheries.[156] Such an approach was considered preferable to the alternative system of transferable fishing quotas. The Human Rights Committee had declared transferable quotas contrary to the right to equality before the law and equal protection of the law, because they can lead to rent capture by astute private actors since they 'can be sold or leased at market prices instead of reverting to the State for allocation to new quota holders in accordance with fair and equitable criteria'.[157] No less significant is the 2007 UN Declaration on the Rights of Indigenous Peoples, which proclaimed that the 'indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess';[158] 'they also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions'.[159] Also noteworthy is the 2018 UN Declaration on the Rights of Peasants, asserting, for example, the right of peasants to land, water bodies and fisheries, individually and collectively, and the right to have access and use sustainably the natural resources in their communities.[160] The said case of *Lhaka Honhat* (2020) also contributed to the development of standards applicable to peasants' communal property rights tied to their specific mode of livelihoods, culture

[155] Food and Agriculture Organization of the United Nations, *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security – Revised version* (FAO, 2022).

[156] Olivier De Schutter and Balakrishnan Rajagopal, Conclusion: The revival of the 'commons' and the redefinition of property rights, in *Property Rights from Below: Commodification of Land and the Counter-Movement* 203 (Olivier De Schutter and Balakrishnan Rajagopal, eds, Routledge, 2020), at 215.

[157] Human Rights Committee, *Haraldsson and Sveinsson v. Iceland*, Communication No. 1306/2004, UN Doc. CCPR/C/91/D/1306/2004 (2007), para. 10.4.

[158] General Assembly Resolution 61/295, UN Declaration on the Rights of Indigenous Peoples, Article 26(2) (13 September 2007).

[159] Ibid, Article 31(1).

[160] General Assembly Resolution 73/165, UN Declaration on the Rights of Peasants and Other People Working in Rural Areas, Articles 5 and 17 (17 December 2018).

and relation to land.[161] In recent years, there has been a movement in favour of the explicit recognition of the right to land as a stand-alone right linked to but sufficiently discernible from the right to property and the right to adequate housing.[162] In fact, customary forms of property, including communal property of peasants and indigenous peoples, are also recognised as part of a social rights approach to land by the UN Committee on Economic, Social and Cultural Rights in their General Comment No. 26 (2022).[163] In general, UN Treaty Bodies have embraced the close association between indigenous peoples' cultural identity and their access to traditional land and the commons, for example: *Lars-Anders Ågren et al v. Sweden* (Committee on the Elimination of Racial Discrimination, 2020), *Oliveira Pereira et al v. Paraguay* (Human Rights Committee, 2021), *M.E.V., S.E.V. and B.I.V. v. Finland* (Committee on the Rights of the Child, 2024), and *J.T., J.P.V. and P.M.V. v. Finland* (Committee on Economic, Social and Cultural Rights, 2024).[164]

4.3 PROGRESSIVE PROPERTY

In this section, I will unpack key issues that underpin progressive property as interpreted by some of its main characters and critical friends: (a) the meaning of human flourishing; (b) the value of freedom and agency; (c) the role of the collective; and (d) the differences of opinion about the role of the state and regulation. These four issues are not only central to the understanding and critique of progressive property. They are also instrumental in building an

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[161] Angel Gabriel Cabrera Silva and Lorenza B. Fontana, Indigenous vs. Peasants' rights? *Lhaka Honhat v. Argentina* and the role of the Inter-American Human Rights System in communal interethnic conflicts, 23(5) *Journal of Human Rights* 492 (2024), at 501–502.

[162] Jérémie Gilbert, *Natural Resources and Human Rights: An Appraisal* (Oxford University Press, 2018), chapter 2; Jérémie Gilbert, The Human Right to Land: 'New Right' or 'Old Wine in a New Bottle'?, in *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric* 97 (Andreas von Arnauld, Kerstin von der Decken and Mart Susi, eds, Cambridge University Press, 2020).

[163] CESCR, General Comment No. 26: Land and Economic, Social and Cultural Rights, UN Doc. E/C.12/GC/26 (22 December 2022), para. 19, 25, 35.

[164] CERD, *Lars-Anders Ågren et al v. Sweden*, Communication No. 54/2013, UN Doc. CERD/C/102/D/54/2013 (18 November 2020), para. 6.6; Human Rights Committee, *Oliveira Pereira et al v. Paraguay*, Communication No. 2552/2015, UN Doc. CCPR/C/132/D/2552/2015 (14 July 2021), para. 8.6; CRC, *M.E.V., S.E.V. and B.I.V. v. Finland*, Communication No. 172/2022, UN Doc. CRC/C/97/D/172/2022 (13 September 2024), para. 9.24; CESCR, *J.T., J.P.V. and P.M.V. v. Finland*, Communications No. 251/2022 and 289/2022, UN Doc. E/C.12/76/D/251/2022 and E/C.12/76/D/289/2022 (27 September 2024), para. 14.2, 14.3, 14.4.

epistemic bridge between property theory and human rights, as I will seek to do in Chapter 5.

In 2009, Gregory Alexander, Eduardo Peñalver, Joseph Singer and Laura Underkuffler published the two-page 'Statement of Progressive Property'.[165] The statement referred to property as 'an idea and an institution' serving 'plural and incommensurable values', some of them individual and some others collective, values that may elicit 'moral demands and obligations', as a result of which it is necessary to consider how social relations are shaped by ownership and lack thereof.[166] Progressive property borrows from some of the classics of Western political thought – Aristotle, Aquinas and Hegel, primarily. It emerged as a school of thought anchored squarely in US scholarship and its debates, but quickly enough it gained traction in other English-speaking countries, particularly the UK, Ireland and South Africa.[167]

Authors in the progressive property community embark on a continuous search for a general justification of property beyond the maximalism of the likes of Locke, Blackstone or Nozick, with their minds at once on the equal right to personal autonomy, and on collective interests related to public order, interpersonal relationships, and efficient, fair and sustainable allocation of resources.[168] Underkuffler observes three general commonalities among scholars subscribed to progressive property.[169] First, this school is premised on the acceptance of private property as a historically and philosophically grounded institution. However, progressive property theorists also acknowledge that assets are finite, and many of them are non-shareable, which inevitably means there will be conflicting and competing claims between owners, and between owners and non-owners. Second, the value of property lies in its ability to serve a plurality of other values, most prominently, human flourishing, physical security, and the ability to make individual choices in life. And third, by allocating limited resources, property confers and distributes power,

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165 Gregory Alexander, Eduardo Peñalver, Joseph Singer and Laura Underkuffler, A Statement of Progressive Property, 94(4) *Cornell Law Review* 743 (2009).

166 Ibid, 743–744.

167 For an excellent overview of the school and its ramifications, see: Rachael Walsh, *Property Rights and Social Justice: Progressive Property in Action* (Cambridge University Press, 2021), chapter 2.

168 Alison Clarke, Justifying property: looking beyond the Blackstonian paradigm of private ownership by a self-interested autonomous human individual, in *Research Handbook on Property, Law and Theory* 15 (Chris Bevan, ed., Edward Elgar, 2024), at 29–30.

169 Laura Underkuffler, A Theoretical Approach: The Lens of Progressive Property, in *Researching Property Law* 11 (Susan Bright and Sarah Blandy, eds, Palgrave, 2016), at 13–14.

and therefore the regulation of property must be mindful of the impact on individual and community life.

Human flourishing is the first issue or key concept of the progressive property school, articulated within this community particularly by Alexander and Peñalver.[170] In progressive property, human flourishing is dependent upon living 'a life of dignity, self-respect, and satisfaction of basic material needs'.[171] Human flourishing supports value pluralism, in the sense that there are multiple ways in which humans, in exercise of their individual freedom, could lead a life with dignity and respect.[172] The value of property is not measured by the economic value of stuff, but by the value of the decisions that one can make when one has access to stuff. The Supreme Court of the US state of New Jersey put it this way in *State v. Shack* (1971), a case that progressive property scholars cite frequently: 'Property rights serve human values. They are recognized to that end, and are limited by it.'[173] At the same time, human flourishing is dependent on the community one is part of, since communities 'are the mediating vehicles through which we come to acquire the resources we need to flourish and to become fully socialized into the exercise of our capabilities', in Alexander's words.[174] As social animals, community members are dependent on one another for the construction of their identities and for the development of their capabilities.[175] In society, one cannot flourish alone. A social thesis follows from this: one must preserve and sustain the society that makes one's flourishing possible, including the moral obligation to provide material support to vulnerable or marginalised members of society who may be at greater risk of disadvantage. While the quote is longer than usual, it is worth letting Alexander summarise the argument in his own words:

> In order for me to be this kind of person – a free person with the basic essential capabilities – I must own resources that enable the development of my necessary

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[170] For a succinct presentation of the concept in relation to property, see: Gregory S. Alexander and Eduardo M. Peñalver, *An Introduction to Property Theory* (Cambridge University Press, 2012), chapter 5.

[171] Gregory S. Alexander, The human flourishing theory, in *Research Handbook on Private Law Theory* 203 (Hanoch Dagan and Benjamin C. Zirpursky, eds, Edward Elgar, 2020), at 204.

[172] Ibid.

[173] Supreme Court of New Jersey, *State v. Shack*, 58 N.J. 297 (1971), para. 372.

[174] Gregory S. Alexander, The human flourishing theory, in *Research Handbook on Private Law Theory* 203 (Hanoch Dagan and Benjamin C. Zirpursky, eds, Edward Elgar, 2020), at 208.

[175] For the connection between human flourishing and the capability approach of Amartya Sen and Martha Nussbaum, see: Gregory S. Alexander, *Property and Human Flourishing* (Oxford University Press, 2018), chapter 1.

> capabilities. However, in recognition of my obligation to support and sustain the very society that makes my flourishing possible, my ownership is inherently limited by that same obligation. My obligation to support and sustain the society that makes my flourishing possible requires that I promote the capabilities essential for members of my society to live flourishing lives. This obligation to support their capabilities at times includes the obligation to provide them with the material resources that are necessary for their capabilities to develop or at least not to deny them access to such resources. So, whenever my ownership of some resource denies another person access to the same resource and when access to that resource is necessary to develop some essential capability for that person, my social obligation requires that I, as the owner, permit that person to have access to the resource to the extent and in a way demanded by the capability (or capabilities) at stake. This obligation restricts my freedom as a property owner as a limitation that is inherent in the ownership interest itself.[176]

Human flourishing draws inspiration from Western philosophy. In response to Plato's defence of collective property for the common interest, Aristotle argued in *Nicomachean Ethics*, written around 350 BCE, that, while humans benefit from private property to lead a good life, 'external goods' would be useful only to the extent that they serve the function of helping the human to flourish.[177] In the thirteenth century, Aquinas's notion of property as a natural right was sensitive to the material conditions of human sustenance, which is resonant with progressive property's concern with human flourishing.[178] Even Locke's justification of private property was accompanied by two conditions: the sufficiency rule that 'enough, and as good [is to be] left in common for others', and the no-spoliation rule, meaning that nothing should be left to perish uselessly.[179]

In any case, in the progressive property literature of the last 15 or 20 years, more than an argument for state intervention, human flourishing is an appeal to be a good neighbour. Inasmuch as possible, a virtuous citizen who wants to flourish in life ought to be concerned with the general well-being of people surrounding them. Whether this requires strong public services, egalitarian

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176 Ibid, 60.

177 Aristotle, *Nicomachean Ethics* (W. D. Ross, trans.), I.8 (via Internet Classic Archives); Jonny Thakkar, Public and Private Ownership in Plato and Aristotle, in *The Cambridge Handbook of Privatization* 52 (Avihay Dorfman and Alon Harel, eds, Cambridge University Press, 2021), at 61.

178 Rachael Walsh, Progressive property's Thomistic turn: connecting human sustenance and human flourishing, in *Research Handbook on Property, Law and Theory* 182 (Chris Bevan, ed., Edward Elgar, 2024).

179 John Locke, *Two Treatises of Government and A Letter Concerning Toleration* (Yale University Press, 2003), 112 (II.27), 120 (II.47).

taxation, more charity or a socialist revolution is something that the concept of human flourishing does not get down to.

In the 1980s, Margaret Radin carried the torch of the revival of Hegel in property debates in the English language.[180] As reinterpreted ever since, the nineteenth-century German philosopher is sometimes cited to stress the idea that property is an ingredient of self-expression, personal development, individual freedom and community-building.[181] For example, Murphy and Nagel develop their theory of taxation building on a Hegelian approach to property, which they describe as 'deontological' and based on a positive conception of freedom, as opposed to Locke's negative liberty.[182] **Individual freedom** – sometimes presented as **human agency** – is, in fact, the second key issue of progressive property.

Dagan made the case for a self-described liberal theory of property premised on individual self-determination. He argued that the legitimacy of property is dependent upon its ability to satisfy the self-determination of property-holders without unduly denying that of non-property-holders.[183] As such, property does not bestow on property-holders the prerogative to act autonomously unimpeded by others. Instead, Dagan's idea of liberal property entails a requirement of 'relational justice', where members of the community, owners and non-owners, are compelled to see one another as free and equal members of one society.

Dagan's property does not challenge the fairness or unfairness of the distribution of resources in the first place – and this is where the theory may leave some disappointed for its lack of ambition. Moreover, Dagan shares Alexander's conception of human flourishing in relation to property as a matter of individual responsibility, goodwill, virtue and generosity, not a matter of public regulation. For Dagan, 'owners are required to comply with relational justice in their private capacity instead of as citizens of a particular state or as agents enlisted by the state to act on its behalf'.[184] He reiterates the

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[180] Margaret J. Radin, Property and Personhood, 34 *Stanford Law Review* 957 (1982); Amelia Thorpe, Amy J. Cohen and Ilana Gershon, After Hegel: rethinking personhood for the collective, in *Research Handbook on Property, Law and Theory* 125 (Chris Bevan, ed., Edward Elgar, 2024).

[181] Jeremy Waldron, *The Right to Private Property* (Oxford University Press, 1990), 4–5 and chapter 10; Alan Patten, Hegel's Justification of Private Property, 16 *History of Political Thought* 576 (1995), at 577.

[182] Liam Murphy and Thomas Nagel, *The Myth of Ownership: Taxes and Justice* (Oxford University Press, 2002), 44–45.

[183] Hanoch Dagan, *A Liberal Theory of Property* (Cambridge University Press, 2021), 5–9.

[184] Ibid, 128.

point somewhat differently when he talks about the non-statist nature of property: 'This right transcends the state because its normative weight is largely irrelevant to our relationship with or through the state.'[185] While the focus on freedom and individual self-determination resonates with human rights, the profound mistrust of the state makes Dagan's theory unsatisfactory from the perspective of social rights. Social rights, after all, require the direct involvement of public authorities to regulate and deliver public services in relation to housing, health, education and social security. Moreover, as Van der Walt and Viljoen put it, 'insofar as social welfare requires state intervention to ensure a more or less equitable distribution of some or all resources, at least some property will inevitably be taken away from the haves to be redistributed to the have-nots'.[186] An idea of property that is hostile to the state would not be easily reconcilable with a commitment to the social rights the state must ultimately be accountable for.

On the other hand, together with Dorfman, Dagan has also written in favour of 'interpersonal human rights', by which they mean the extension of human rights obligations to private actors by virtue of their power over the freedom and self-determination of others.[187] This is an important point of convergence with human rights law, which entails – as interpreted and applied since the 1990s – both vertical and horizontal obligations, that is, obligations for the state, but also obligations for private actors when there is a significant power imbalance vis-à-vis individual rights-holders – for example, transnational corporations operating in extractive industries, non-state armed groups in relation to civilian populations, or male violence against women.

Alexander disagrees with Dagan because of the latter's 'methodological individualism', by which Alexander means that Dagan sees the value of the community 'only insofar as it contributes to the satisfaction' of individual preferences, as if communities were carefully crafted instruments designed by individuals to maximise their own material well-being.[188] By contrast, for Alexander, the group is at least as important as its members: 'I must be in, belong to, and support a certain kind of society – a society that supports a certain kind of political, social, and moral culture and that maintains a decent

185 Ibid, 175.

186 A. J. Van der Walt and Sue-Mari Viljoen, The Constitutional Mandate for Social Welfare – Systemic Differences and Links between Property, Land Rights and Housing Rights, 18(4) *Potchefstroom Electronic Law Journal* 1035 (2015), at 1036.

187 Hanoch Dagan and Avihay Dorfman, Interpersonal Human Rights, 51(2) *Cornell International Law Journal* 361 (2018).

188 Gregory S. Alexander, *Property and Human Flourishing* (Oxford University Press, 2018), 44.

background material structure.'[189] This takes us to the third key issue of progressive property: **the role of the community and the democratic principle**.

Peter Gerhart developed a conception of property based on the construction of obligations that individuals owe each other in society. As opposed to the conventional approach of thinking of property as a matter of freedom and rights, Gerhart directs our gaze to obligations and responsibilities instead. Property would be an institution, and like any other institution, it would need to be regulated for a community of individuals that treat one another with respect. A theory of property based on obligations and responsibilities would be a theory about choices and decisions about the dissemination of resources in society. The central question of property would not have to do with the value of things, but with potentially conflicting social values that are deemed important in society, and as a result absorbed into law. This would require a democratic process, involving those who own and those who do not own, to decide about the necessary arrangements and distributions to meet those social values. The community would be, at the end of the day, that which provides a normative foundation to property.[190] As opposed to the classics' original occupation or labour (see section 4.1 above), Gerhart talks about the social recognition of property: 'Rights come because, and to the extent that, the community, or a large proportion of the community, recognizes the justness of the claims of possession, labor, or other attributes of ownership.'[191]

Inspired by Rousseau, Essert argues that the institutionalisation of property under a social contract is precisely what can allow members of a society to come up with and implement the rules to preserve equality: 'property law is an essential constituent of a society of equals'.[192] Like Rousseau, Essert is well aware that poor or no regulation can turn property into a lever for ever greater inequality. J. W. Singer presents a 'democratic model of property law' to understand 'the role that property and property law play in a free and democratic society that treats each person with equal concern and respect'.[193] Singer puts the finger on the connection between property and the health of a democratic society. Wealth inequality is often correlated with feebler bonds between individuals, thinner social cohesion, erosion of democracy, and less

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189 Ibid, 56.

190 Peter M. Gerhart, *Property Law and Social Morality* (Cambridge University Press, 2014), 76–80.

191 Ibid, 74.

192 Christopher Essert, *Property Law in the Society of Equals* (Oxford University Press, 2024), 1.

193 J. W. Singer, Democratic Estates: Property Law in a Free and Democratic Society, 94(4) *Cornell Law Review* 1009 (2009), at 1047.

resilience of public institutions.[194] There is indeed empirical evidence that suggests that a significant enough number of wealthy individuals feel far removed from the general population, and feel therefore less concerned about their fortunes.[195] This is a recipe for more limited understanding at the top of the pyramid about the social factors that determine many people's living conditions, such as access to housing, transport or employment circumstances. If that is the case, there is reason to believe that wealth inequality leads to weaker social cohesion and is ultimately negative for democracy. As eloquently put by the sociologist Wolfgang Streeck, inequality reaches a morally unacceptable level when the privileged come to believe that their lives are disconnected from everybody else's:

> [Inequality has] gone so far that the rich may rightly consider their fate and that of their families to have become independent from the fates of the societies from which they extract their wealth. As a result, they can afford no longer to care about them. This becomes a problem – one of "moral hazard" – when differences in wealth become so extensive that they give rise to a fusion of economic and political power – that is, *oligarchy*.[196]

Singer's democratic approach to property is concerned not only with individual self-determination, but with collective self-determination as well, where individuals are directly involved in the functioning of the polis. Property becomes a social institution that must pursue two major objectives at once: the protection of personal freedoms and the preservation of a republican government. For Singer:

> Property is not merely an institution designed to satisfy preferences or to promote wealth or happiness or efficiency; it is a structural component of a polity that values both liberty and equality and defines the sovereign to be "the people" rather than a monarch or an aristocracy… Property rights are consistent with democratic values only if their distribution enables all persons to exercise core liberties, to enjoy equal dignity, and to be treated fairly in their relationships with other owners and nonowners.[197]

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[194] Richard Wilkinson and Kate Pickett, *The Inner Level: How More Equal Societies Reduce Stress, Restore Sanity and Improve Everyone's Well-being* (Allen Lane, 2018); Michael J. Sandel, *The Tyranny of Merit: What's Become of the Common Good?* (Allen Lane, 2020); Jack Jeffrey and Will Snell, *Wealth Gap Risk Register* (Fairness Foundation, 2024).

[195] Paul K. Piff, Daniel M. Stancato, Stéphane Côté and Dacher Keltner, Higher social class predicts increased unethical behavior, 109(11) *PNAS* 4086 (2012).

[196] Wolfgang Streeck, *How Will Capitalism End?* (Verso, 2017), 28.

[197] J. W. Singer, Democratic property: things we should not have to bargain for, in *Research Handbook on Private Law Theory* 220 (Hanoch Dagan and Benjamin

Taking democracy and republicanism seriously requires, I think, reflecting on **public institutions and regulation** in general, and this is the fourth and last key issue to highlight in this section. As a general rule, one must not ignore the state if one is determined to articulate a collective will through a democratic process. This is notwithstanding successful experiences of communal property management, particularly – but not only – at the local level and by indigenous peoples (see section 4.2.3 above).

Let's recap some observations in line with the progressive property tradition. Property, private property, is not a natural right but a socially created institution that confers power and is constituted by rules and regulations. The institution of property serves both individual and social functions. The resources over which ownership is held are, by definition, finite and scarce, and they can ignite multiple and opposing claims, individual and collective. Property requires regulation on the basis of a plurality of values that property is meant to serve, including distributive justice, the promotion of human flourishing, the protection of physical security, and the ability to make choices with as much freedom as possible, particularly for those at the margins of society.

Seizing the challenge of identifying a human rights-based regulation of property requires moving progressive property from the domain of personal responsibility to political morality. In this regard, I echo Larissa Katz's appeal for an institutional and political perspective to property that brings the state back in 'to play its part within a constitutional order that meets the requirements of justice and legality'.[198] Such an approach requires resisting 'certain formulations of property as illegitimate' when the social consequences, particularly for those who are not owners, are not given due consideration.[199] This is in line with Van der Walt's appreciation of the 'relatively modest systemic status of property rights in the broader scheme of fundamental rights protection'.[200] Other rights, including social rights, may trump ownership rights. Van der Walt argues that, in case of conflict between property and social rights and other rights, it may be necessary 'to impose reasonably easily justifiable limitations on property owners' right to exclude nonowners'.[201]

> Property rights are not the condition on which democracy depends; instead, they are circumscribed, defined, by the demands of living in a democratic society – the

C. Zirpursky, eds, Edward Elgar, 2020), at 221.

198 Larissa Katz, It's Not Personal: Social Obligations in the Office of Ownership, 29(3) *Cornell Journal of Law and Public Policy* 587 (2020), at 590.

199 Ibid, 597.

200 A. J. Van der Walt, The Modest Systemic Status of Property Rights, 1 *Journal of Law, Property, and Society* 15 (2014), at 42.

201 Ibid, 83.

> structure of our democracy is the condition for and the guarantee of property rights. Protecting property rights is a legitimate objective of the legal order, but relative to the primary norms that prescribe how we want to live in society it is a systemically modest one.[202]

Motivated by similar concerns, Fox O'Mahony and Roark are the architects of resilient property theory.[203] Like Katz, they also connect property, not with individual morality, but with a political theory of the state and with state responsibility. Fox O'Mahony and Roark reclaim the state as a stakeholder in property regimes. They recognise that when public authorities take measures to mobilise resources that can mitigate individuals' contextually dependent vulnerability, they make both individuals and institutions more resilient at the same time as shoring up the state's own resilience needs, Viljoen points out that a key question for resilient property theory is how the progressive fulfilment of the right to housing and other social rights can fortify the resilience of the state.[204] That notwithstanding, a human rights-based approach to property (like the one I will present in Chapter 5) would need to hold the state accountable for its actions and omissions to ensure social rights for everyone through all appropriate means, including the regulation of property interests in taxation, housing or the private provision of essential services, for example.

4.4 SOCIAL FUNCTION AS THE BRIDGE BETWEEN PROGRESSIVE PROPERTY AND HUMAN RIGHTS

The regulation and practice of the social function of property has varied widely between countries, as shown in Chapter 3. In its original formulation, though, the idea of property as a social function was articulated by the French legal theorist Léon Duguit in a lecture he delivered in Buenos Aires in September 1911. Duguit made two central claims: first, 'the owner has the duty and therefore the power to use the thing he holds to the satisfaction of individual needs, and especially of his own, to use the thing to the development of his physical, intellectual and moral activity'; and second, 'the owner has the duty and therefore the power to use his thing to the satisfaction of collective needs', the needs of the community.[205] For Duguit, private property does not disappear by virtue

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202 Ibid, 102.

203 Lorna Fox O'Mahony and Marc Roark, *Squatting and the State: Resilient Property in an Age of Crisis* (Cambridge University Press, 2022), chapter 5.

204 Sue-Mari Viljoen, Resistance to reform property: A 'resilient property' perspective, 38(1–2) *South African Journal on Human Rights* 24 (2022), at 40.

205 Léon Duguit, Propriété Fonction Sociale, in *Léon Duguit and the Social Obligation Norm of Property* 35 (Paul Babie and Jessica-Viven Wilksch, eds,

of the social function; rather the opposite, private property is protected against any infringement, including from the state, provided the owners' exercise of powers and duties meets both the individual and the social function of property. Wealth bestows power, and the owner must unsheathe that blade with the general interest in mind.

The social function became influential in various spaces of private property scholarship in the twentieth century, and it found a path all the way to progressive property literature.[206] Dagan, for example, sees the social function as an expression of 'social responsibility',[207] while Alexander prefers to talk about the 'social obligation' that owners have towards members of the community at large to enable them to flourish.[208]

There is no transcendent theory or universally applicable definition of the social function. Because it is *social*, the parameters are contingent as they ought to be determined in an open and participatory process within a political community. Establishing the boundaries of the social function will require balancing out individual and collective values and interests concerning rights, freedoms, responsibilities and institutions, but as observed by Davidson, 'what society may require of an owner is always grounded in a particular culture and specific social, economic, and political conditions'.[209]

The social function makes both powers and duties codependent. As appreciated by Foster and Bonilla, the social function of property is based on the recognition that individuals are not isolated, human interdependence is 'the central element of social reality', and 'solidarity is not a political principle but a social fact'.[210] Together with Marion Sandner, I have argued elsewhere that solidarity, as the foundational principle of social rights, can contribute to redefining property as a public institution that must meet the needs of all, those with property and those without, taking account of individual rights as well as responsibilities.[211]

Jessica Viven-Wilksch, trans., Springer, 2019), at 51.

[206] M. C. Mirow, The Social-Obligation Norm of Property: Duguit, Hayem, and Others, 22(2) *Florida Journal of International Law* 191 (2010).

[207] Hanoch Dagan, The Social Responsibility of Ownership, 92(6) *Cornell Law Review* 1255 (2007).

[208] Gregory S. Alexander, *Property and Human Flourishing* (Oxford University Press, 2018), chapter 2.

[209] Nestor M. Davidson, Sketches for a Hamiltonian Vernacular as a Social Function of Property, 80(3) *Fordham Law Review* 1053 (2011), at 1057–1058.

[210] Sheila R. Foster and Daniel Bonilla, The Social Function of Property: A Comparative Perspective, 80(3) *Fordham Law Review* 1003 (2011), at 1005.

[211] Koldo Casla and Marion Sandner, Solidarity as Foundation for Economic, Social and Cultural Rights, 24(2) *Human Rights Law Review* 1 (2024), at 19.

The social function is, therefore, an intrinsically relational concept. Applied to human rights, the social function strengthens the challenge to the prevailing ideal of the 'unencumbered' subject of rights, making the case for the 'relational self' instead.[212] The social function also contributes to ground property on the centrality of relationships between people and between people and place in a democratic society. Morris R. Cohen observed a century ago that 'a property right is a relation not between an owner and a thing, but between the owner and other individuals in reference to things'.[213] We must not forget that property and sovereignty, *dominium* and *imperium*, were born and grew up together from ancient Rome to current times passing through the colonial era (sections 4.2 and 4.3 above). Or, as Duguit said in Buenos Aires, these are 'two legal concepts that have the same origin and march hand in hand'.[214]

A relational approach can improve the general understanding of property in various ways. First, it provides a framework for a more fluid notion of property that puts people and their lived experiences at the centre of the understanding of property.[215] Second, it is more attentive to the values that people attach to the place where they live, values that contribute to turning a house or a flat/apartment into a home, values such as family, privacy, security, control, continuity, identity, expression or identity.[216] A regulation of property that is mindful of the social function must not disregard those values. And third, from a relational approach, one can advance the idea that property is instrumental in the sense that it is valuable for the services that assets can provide. This is in line with Fennell's argument in favour of reconceiving property in terms of the services it offers: 'Things are merely delivery mechanisms, akin to a platter or a firehose.'[217] From prime-location immovable property to fancy electronic gadgets, assets need infrastructure, regulations and public policies in a number

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[212] About these two selves: Andrew Fagan, The Subject of Human Rights: From the Unencumbered Self to the Relational Self, 42(2) *Nordic Journal of Human Rights* 215 (2024).

[213] Morris R. Cohen, Property and sovereignty, 13(1) *Cornell Law Quarterly* 8 (1927), at 12.

[214] Léon Duguit, Propriété Fonction Sociale, in *Léon Duguit and the Social Obligation Norm of Property* 35 (Paul Babie and Jessica-Viven Wilksch, eds, Jessica Viven-Wilksch, trans., Springer, 2019), at 41.

[215] Sarah Blandy, Sarah Nield and Susan Bright, Real property on the ground: the law of people and place, in *Research Handbook on Private Law Theory* 237 (Hanoch Dagan and Benjamin Zipursky, eds, Edward Elgar, 2020), at 237–239.

[216] Lorna Fox, The Meaning of Home: A Chimerical Concept or a Legal Challenge?, 29(4) *Journal of Law and Society* 580 (2002).

[217] Lee Anne Fennell, Streaming Property, 117(1) *Northwestern University Law Review* 95 (2022), at 96.

of areas to become valuable assets in the first place. Assets and owners are not isolated from society. Ownership is, by definition, reliant on politics.[218]

The social function of property has been theorised from within the progressive property tradition as 'a notion that aims to secure the goal of human flourishing for all citizens within any state'.[219] Understood as such, there is room for exploring this idea within the international human rights system, searching for new links between private law and human rights.[220] The social function would revamp the scope of the human right to property with a theory of property to ensure autonomy for all,[221] the *haves* and the *have-nots*. It would be a theory based on the principle of responsibility: to be a moral agent involves, after all, *owning* one's decisions. It would be a theory of property to establish, as Gerhart puts it, 'how individuals ought to treat one another if they are to form an authentic community'.[222]

The idea of the social function of property has been incorporated into a number of national constitutions primarily, but not only, in Latin America, Europe and the Arabian Peninsula (see Chapter 3, section 3.1). As we saw in Chapter 3, while property is omnipresent as a right in constitutions and national laws all over the globe, the social function is not so. Furthermore, the social function has been interpreted very differently, as a loose social-democratic principle (Spain or Germany), as a potentially transformative or even revolutionary tool (implicitly in South Africa and explicitly in Mexico), but also as a close to meaningless varnish for an undemocratic regime (Chile's 1980s Constitution in its original form). I acknowledge that the social function as a legal principle does not exist everywhere, and that, where it exists, it has been defined in various ways by national judges. That said, my point in the next chapter will be this: I will reclaim the social function, as defined here, to reinterpret property as an institution and as a social right that must be preserved and guaranteed alongside all other social rights recognised in international and comparative law.

The social function has not yet found its way onto the regional human rights systems. There is only one reference in the online digest of the Inter-American

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218 Ibid, 98.

219 Colin Crawford, The Social Function of Property and the Human Capacity to Flourish, 80(3) *Fordham Law Review* 1089 (2011); Gregory S. Alexander, *Property and Human Flourishing* (Oxford University Press, 2018), chapter 2.

220 Irina Domurath and Chantal Mak, Private Law and Housing Justice in Europe, 83(6) *Modern Law Review* 1188 (2020), at 1192.

221 Hanoch Dagan, *A Liberal Theory of Property* (Cambridge University Press, 2021), 126.

222 Peter M. Gerhart, *Property Law and Social Morality* (Cambridge University Press, 2014), ix.

Court of Human Rights: in *Chiriboga v. Ecuador* (2008), the Inter-American Court of Human Rights observed that, due to its social function, the state can limit or restrict the right to property in the name of public welfare and collective rights, or in order to preserve individual rights of others.[223] Neither the search engine of the European Court of Human Rights' website nor the authoritative guide on Article 1 of Protocol 1 ECHR suggest that the social function has ever been unequivocally part of the Court's interpretation of that provision.[224] Explicitly at least, the principle is also missing from African human rights case law.[225] (About the different ideas about property in the regional human rights systems in Europe, the Americas and Africa, return to Chapter 2, section 2.1.3.)

Having said that, a conception of property as an institution from which certain rights and obligations derive in light of its social function would not be at odds with human rights exegesis from international bodies. Already in 1969, the UN General Assembly agreed that development required 'the establishment, in conformity with… the social function of property, of forms of ownership of land and of the means of production which preclude any kind of exploitation of man, ensure equal rights to property for all and create conditions leading to genuine equality among people'.[226] In General Comment No. 17 (2006), the Committee on Economic, Social and Cultural Rights established that intellectual property has a social function, as a result of which states should prevent unreasonably high costs for access to medicines, educational material, and means of food production.[227] The point was reiterated in General Comment No. 25 (2020), on science and economic, social and cultural rights.[228] Leilani

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223 IACtHR, *Salvador Chiriboga v. Ecuador*, Preliminary Objection and Merits, Judgment (6 May 2008), para. 60; Themis IA Inter-American Court of Human Rights: https://themisia.corteidh.or.cr/

224 HUDOC ECHR: https://www.echr.coe.int/Pages/home.aspx?p=caselaw/HUDOC&c=.; Council of Europe and European Court of Human Rights, *Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights: Protection of property* (updated on 29 February 2024).

225 Rachel Murray, *The African Charter on Human and Peoples' Rights: A Commentary* (Oxford University Press, 2019), chapter 15; Modibo Sacko (ed.), *African Court Law Report Volume 5 (2021)* (PULP, 2024).

226 General Assembly Resolution 2542 (XXIV), Declaration on Social Progress and Development, Article 6 (11 December 1969).

227 CESCR, General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He or She is the Author, UN Doc. E/C.12/GC/17 (12 January 2006), para. 35.

228 CESCR, General Comment No. 25: Science and Economic, Social and Cultural Rights, UN Doc. E/C.12/GC/25 (30 April 2020), para. 62.

Farha, when she was the UN Special Rapporteur on Adequate Housing, called on states to ensure that public and private investment in housing 'recognizes its social function and States' human rights obligations'.[229]

A child of his time, Duguit adopted a positivistic approach to law, sceptical of the language of (natural) rights. In his writing, ownership did not *have* a social function; it *was* social function.[230] Duguit also had a productivist understanding of the common good. For him, economically valuable property, capital, must be put to good use, so it can be dynamic and fruitful, and serve the general interest:

> Only [the owner] can increase the general wealth by exercising the capital he holds. Thus, he is obliged socially to accomplish this task and he will only be socially protected if he accomplishes it. *Propriété* is no longer the subjective right of the owner, it is the social function of the holder of this wealth.[231]

One cannot just bring Duguit back to the living without making some important adjustments. For one thing, the belief in limitless economic growth, unquestioned in the early twentieth century, can hardly pass the sustainability test today. The welfare state was in its infancy where it existed at all. International human rights law was hardly a dream. In general, the meaning of rights, and what to expect from the state, changed drastically between Duguit's days and ours. Duguit alerts us about the need to think of property's social consequences, and of owners' corresponding responsibilities. But it is important to beware that there are many possible social functions depending on one's values and on the interests at play.[232] The question for our purposes is which social functions are the most consistent with human rights as proclaimed in international law. Answering it is my intention with the next chapter.

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[229] Special Rapporteur on Adequate Housing, Report on the financialization of housing, UN Doc. A/HRC/34/51 (18 January 2017), para. 77.

[230] The English language distinguishes between property and ownership. In French, however, the word *propriété* refers both to the asset and to the possession or title one holds over it. As such, it may be more accurate to speak of the *social function of ownership*. Regardless, for consistency and simplicity, I prefer to use the commonly known expression: social function of property.

[231] Léon Duguit, Propriété Fonction Sociale, in *Léon Duguit and the Social Obligation Norm of Property* 35 (Paul Babie and Jessica-Viven Wilksch, eds, Jessica Viven-Wilksch, trans., Springer, 2019), at 45.

[232] Antonio Azuela, Property in the Post-Post-Revolution: Notes on the Crisis of the Constitutional Idea of Property in Contemporary Mexico, 89(7) *Texas Law Review* 1915 (2011), at 1938–1939.

5. The social right to property: a proposal

This chapter presents an approach to property that is based on all human rights and on the social function. By *human rights-based*, I mean that I seek to reinterpret property in a way that is consistent with all human rights in international and national laws, including social rights like housing, health, education and social security (see Chapter 2). By *social function-based,* I mean that my interpretation of property is inspired by progressive property's adaptation of Léon Duguit for this day and age (see Chapter 4, sections 4.3 and 4.4). This is a relational perspective, aiming to maximise freedom and agency, particularly for those who are at greater risk of disadvantage and discrimination. The proposal is alert to human interdependence and reciprocal responsibilities that grow with wealth. Echoing Article 29 of the Universal Declaration of Human Rights (UDHR), 'everyone has duties to the community in which alone the free and full development of [one's] personality is possible'.[1] All of this requires a democratic society, involving those who own and those who do not own in the definition of the contour of the institution of property in law and policy. The proposal also reserves an important place for the state as ultimately responsible and accountable for actions and omissions to deliver on human rights, including but not only the social right to property.

5.1 PROPERTY IS A HUMAN RIGHT, OF A SOCIAL KIND

In its different forms, property is and has been consubstantial to human interaction from time immemorial. At the same time, property, in its private form, is the grand divide between those who have and those who have not. Historically, property has also been a fundamental political cleavage, both in national politics – as only landowning men were allowed to vote – and in global politics – as plundering of resources was the catalyst of imperialism and colonialism. A theory of property from the angle of international human rights

[1] General Assembly Resolution 217 (III) A, Article 29(1) (10 December 1948).

law (IHRL) must start from the observation that the right to property is recognised in international law sometimes as a socioeconomic right and sometimes as a civil right. The idea of property as a socioeconomic or social right – terms that I use interchangeably in this book – is not the general approach in Europe, but it is aligned with the perspectives followed in the Americas and Africa, and also at the UN level (as developed in Chapter 2, section 2.1). A human rights-based and social function-based approach to property can provide the baseline for a more holistic approach to human rights, like *Lhaka Honhat v. Argentina* (2020), where the Inter-American Court of Human Rights highlighted the interdependence between communal property, the right to a healthy environment, the right to an adequate standard of living, and the right to take part in cultural life (as we saw in Chapter 2, section 2.1.3).[2] In Western political theory, property has often been thought of as individual ownership, protection from interference, and exclusion of everybody else[3] – in other words, as negative liberty. But, I will argue, there is value in presenting **property as a social right, as a positive liberty**.

Property is the product of collective decision-making. That is why it is so important for a democracy to reflect self-critically about whose opinions are listened to when dealing with policy matters affecting property. Property is social also because its value lies in being a stream for services,[4] and as such it is dependent upon infrastructure, policy, regulation, the natural environment, and recognition of one's right by others. Property is an institution, but it can be a right at the same time. This applies to other rights as well. For example, the judicial system and a national health service are public institutions essential to the delivery of the right to a fair trial and the right to health, respectively.

As recalled in Chapter 2, section 2.3, UN General Assembly Resolution 45/98, adopted in 1990, recognised that there are many forms of property. There is private property, but there are also 'communal, social and state forms'; the resolution also considered that further national measures were necessary to protect and preserve 'economically productive property, including property associated with agriculture, commerce and industry', urging states to enhance the status of the right to property in their laws and constitutions.[5] A theory of property from a holistic human rights perspective ought to think of

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[2] IACtHR, *Indigenous Communities of Lhaka Honhat (Our Land) Association v. Argentina*, Merits, Reparations and Costs, Judgment (6 February 2020), para. 92–98, 202–254.

[3] Gregory S. Alexander, *Property and Human Flourishing* (Oxford University Press, 2018), chapter 6.

[4] Lee Anne Fennell, Streaming Property, 117(1) *Northwestern University Law Review* 95 (2022).

[5] General Assembly Resolution 45/1998 (14 December 1990), para. 1, 3, 4.

property in a broad sense, taking account of diverse forms, such as public and communal property, but also private property. Private property is not short of problems linked to colonial legacies, wealth inequalities and the tension with communal or collective interests (see Chapter 4, section 4.2), all of which can lead to clashes with – other – social rights. Conceptualising and operationalising the right to property requires, first and foremost, accepting it as part of the human rights *corpus juris*. It also requires redefining property to reconcile it and to make it compatible with the *corpus juris* as a whole, including economic, social and cultural rights (ESCR). Communal, public or private, all said forms of property can in principle be covered by the right to property. However, not all forms will deserve the same level of protection in case of conflict with other rights.

Some social groups have historically been excluded in law and practice from holding property. As shown in Chapter 2, IHRL is clear in saying that women, racialised people, persons with disabilities, children and migrant workers should be protected from discrimination in relation to tenure status and they should have equal access to property.[6] Beyond that, in general, states used to be free to prevent foreigners, including foreign legal persons, from acquiring property within their borders, effectively discriminating based on nationality. However, this general rule is increasingly experiencing exceptions with the rise of the national treatment and most-favoured-nation treatment rules in bilateral investment agreements – the ideas that foreign and local investors, and that all trade partners, should be treated equally.[7] Furthermore, a blanket prohibition of acquiring property purely based on nationality would not pass the test of equality and non-discrimination under the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). In *Gueye et al v. France* (1989), the Human Rights Committee ruled that the ICCPR applied to everyone irrespective of nationality, and decided that a pension right, as a type of property, could

[6] General Assembly Resolution 34/180, Convention on the Elimination of All Forms of Discrimination Against Women, Articles 15(2), 16(1)(h) (18 December 1979); General Assembly Resolution 61/106, Convention on the Rights of Persons with Disabilities, Article 12(5) (24 January 2007); General Assembly Resolution 44/25, Convention on the Rights of the Child, Article 2(1) (20 November 1989); General Assembly Resolution 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination, Article 5(d)(v) (21 December 1965).

[7] John G. Sprankling, *The International Law of Property* (Oxford University Press, 2014), 221, 231.

not be denied on the ground of nationality.[8] The Committee on Economic, Social and Cultural Rights (CESCR) has also established that, as a general rule, nationality is not a valid reason to bar access to ESCR[9] – that is, with the exception of developing countries, which 'may determine to what extent they would guarantee the economic rights' under the ICESCR.[10] However, the question of potentially different treatment for nationals and non-nationals is not settled. Comparative constitutionalism shows that it is not unusual for states to restrict access to property for foreigners in relation to certain strategic assets or land, for example limiting property to leaseholds, and setting up temporary limits, or subjecting foreigners' access to land to further regulation by law – for example, the constitutions of Kenya (2010), Georgia (1995), Iraq (2005), Montenegro (2007) and Seychelles (1993).[11] All in all, and considering the multiplicity of rights and obligations at play, one possible way out may be to allow states to prevent legal persons and foreign natural persons, if they are not residents in the country, from acquiring certain types of properties under exceptional and well-justified circumstances.

In addition, under IHRL, states have the obligation to respect the right to property, refraining from directly interfering with the enjoyment of property, and they are also obliged to protect from the potential curtailing of the right by third parties. The obligation to fulfil, in the sense of taking measures to facilitate the enjoyment of the right, would include the obligation to register, delimit, demarcate, and grant collective title to indigenous lands, following case law from the Inter-American system.[12] The positive obligation to fulfil would also mean, in application of standards from the European system, that the state should do everything reasonably within their power to protect individuals' private interests in light of a risk that public authorities know or ought to have known.[13] States should also provide judicial mechanisms to settle

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[8] Human Rights Committee, *Gueye et al v. France*, Communication No. 196/1985, UN Doc. CCPR/C/35/D/196/1985 (1989), para. 9.4 and 9.5.

[9] CESCR, General Comment No. 20: Non-discrimination in ESCR, UN Doc. E/C.12/GC/20 (2 July 2009) para. 30.

[10] General Assembly Resolution 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, Article 2(3) (16 December 1966).

[11] Comparative Constitutions Project: https://constituteproject.org/

[12] IACtHR, *Xákmok Kásek Indigenous Cmty. v. Paraguay*, Merits, Reparations and Costs, Judgment (24 August 2010), para. 109.

[13] ECtHR, *Öneryildiz v. Turkey* [GC], Application No. 48939/99 (30 November 2004), para. 134–135.

property disputes and enforce compliance, and the duty would be even more important when the dispute is between an individual and the state.[14]

As discussed earlier (Chapter 4, section 4.1.2), there are fundamental problems with the application of the conventional liberal rights prism to property, which makes people like Jeremy Waldron and Luigi Ferrajoli reject the paradigm entirely. For Ferrajoli, a right to property would be irreconcilable with core principles of human rights, particularly universality, non-disposability and non-discrimination on the basis of wealth.[15] Waldron might find the extension of the obligation to fulfil to a social right to property disconcerting. Fulfilment refers to the states' obligation to take all appropriate measures to advance progressively towards the full satisfaction of ESCR. Waldron observed with concern that the rights-based argument for property is based on the premise that anyone '*might* have' property, that 'no one is ruled out' in principle, but this does not mean that the recognition of the right to property would contribute to making anyone an owner.[16] A right to property would not be a right to own, but a right to the opportunity to own. As the European Court of Human Rights put it in *Marckx v. Belgium* (1979), the right to property applies to existing possessions, but 'it does not guarantee the right to acquire possessions'.[17] Related to this, Fuenzalida Bascuñán regrets that, in *Maya Kaqchikel v. Guatemala* (2021), the Inter-American Court of Human Rights did not find a violation of the right to property in a regulation of radio broadcasting that excluded indigenous peoples from accessing licences for their own community radios.[18] While the Court deemed such a regulation concerning from the perspective of the freedom of expression, it took the view that 'it is not appropriate to condition, directly or indirectly, respect for the right to freedom of expression and thought to the observance of the right of ownership or property rights over the media'.[19] The Inter-American Court regrettably appeared to endorse

[14] ECtHR, *Sierpiński v. Poland*, Application No. 38016/07 (3 November 2009), para. 69.

[15] Luigi Ferrajoli, Fundamental Rights, 14(1) *International Journal for the Semiotics of Law* 1 (2001), at 10–15.

[16] Jeremy Waldron, *The Right to Private Property* (Oxford University Press, 1990), 21.

[17] ECtHR, *Marckx v. Belgium* [Plenary], Application No. 6833/74 (13 June 1979), para. 50.

[18] Sergio Fuenzalida Bascuñán, El acceso a la propiedad privada y la igualdad. A propósito de la sentencia Caso Pueblos Indígenas Maya Kaqchikel de Sumpango y Otros vs. Guatemala, 61 *Revista Derecho del Estado* 121 (2025), at 134–135.

[19] IACtHR, *Maya Kaqchikel Indigenous Peoples of Sumpango et al v. Guatemala*, Merits, reparations and Costs, Judgment (6 October 2021), para. 91.

a conception of property as a right dissociated from the social and political conditions that make ownership more or less possible in the first place.

Acquisition is therefore not guaranteed by the internationally recognised right to property. This caveat would leave many unsatisfied, possibly most of the world's population, who own very little if anything at all. 'There is a right to property – just not for everybody,' condensed Tanveer Rashid Jeewa from South Africa.[20] I admit that the redefinition of property as a *social* right does not mean that property would be fulfilled in theory the way housing, social security, health or education *could* be fulfilled… also in theory. However, certain positive obligations derive from the right to property, as shown in a previous paragraph. And, I hope, the following ingredients in my proposal can contribute to making a *social* right to property more meaningful for the have-nots.

5.2 SOME OF THE 'MAXIMUM AVAILABLE RESOURCES' TO DELIVER SOCIAL RIGHTS ARE PRIVATELY OWNED

Under Article 2(1) ICESCR, states must use 'all appropriate means' and mobilise the 'maximum of available resources' towards the progressive achievement of ESCR.[21] The expression 'all appropriate means' is interpreted by the CESCR as inclusive of legislative measures, judicial and other remedies, and 'administrative, financial, educational and social measures'.[22] In 2007, the CESCR issued a four-page statement on the meaning of the requirement of 'maximum available resources'.[23] The statement made no direct reference to taxation, neither did it talk about privately owned resources. In more recent times, however, the CESCR has made the case for 'progressive taxation schemes' so the state can secure the resources to discharge its obligation to

[20] Tanveer Rashid Jeewa, Yes, There is a Right to Property – Just Not for Everybody: An Audit of the Legitimacy of the Current South African Property System Thirty Years Down the Line, 8 *Journal of Law, Property, and Society* 49 (2024).

[21] General Assembly Resolution 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, Article 2(1) (16 December 1966).

[22] CESCR, General Comment No. 3: The Nature of States Parties' Obligations, UN doc. E/1991/23 (14 December 1990), para. 3–7.

[23] CESCR, An evaluation of the obligation to take steps to the 'maximum of available resources' under an Optional Protocol to the Covenant: Statement, UN Doc. E/C.12/2007/1 (21 September 2007).

fulfil human rights.[24] In its 2025 statement on tax policy, the CESCR called for 'a well-designed tax system… to effectively raise revenue to secure economic, social and cultural rights, and reduce high levels of economic and social inequality'.[25] This is a welcome step from the CESCR. It shows that taxation is not simply a legitimate form of control of the use of property, in the language of Article 1 Protocol 1 of the European Convention on Human Rights (ECHR).[26] As observed by Luis Valencia Rodríguez in his 1993 UN report on the right to property, taxation is a means for the state 'to ensure that property satisfies its social functions'.[27] Taxes say a lot about a society's position with regard to distributive justice. The ultimate test of the fairness of a tax system is not merely how much money it levies and from whom, but also what the state does with the money. Individuals' willingness to pay taxes depends on the level of trust in public authorities, and adjudication of social rights has a critical role to play in preserving and fostering that trust.[28] Taxation is an indispensable public tool to materialise ESCR. Since taxation is a process by which private resources become public, it must follow that **privately owned goods and services ought to be part of the maximum of available resources that public authorities can make use of in order to realise ESCR.**[29] **Contributing to the fulfilment of ESCR is one of the social functions of property, including private property**. In this respect, the CESCR's 2024 draft General Comment on the environmental dimension of sustainable development is a step in the right direction, where the Committee clarifies that the maximum of available

[24] CESCR, General Comment No. 24: State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, UN Doc. E/C.12/GC/24 (10 August 2017), para. 23.

[25] CESCR, Statement on Tax Policy and the ICESCR, UN Doc. E/C.12/2025/1 (27 February 2025), para. 6.

[26] Council of Europe, Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 1(2) (20 March 1952), ETS No. 9.

[27] Luis Valencia Rodríguez, The right of everyone to own property alone as well as in association with others, UN Doc. E/CN.4/1994/19 (25 November 1993), para. 484.

[28] David Vitale, *Trust, Courts and Social Rights: A Trust-Based Framework for Social Rights Enforcement* (Cambridge University Press, 2024), 5–6.

[29] A similar position was announced, in passing, by: Audrey R. Chapman, The Status of Efforts to Monitor Economic, Social, and Cultural Rights, in *Economic Rights: Conceptual, Measurement, and Policy Issues* 143 (Shareen Hertel and Lanse Minkler, eds. Cambridge University Press, 2007), at 149–150.

resources may come 'from the State or from international *or private sources*' (italics added).[30]

The European Court of Human Rights' interpretation of the relationship between taxation and the right to property would be inadequate under this social right to property. The European Court gives states a wide discretion in formulating socioeconomic and fiscal policies. However, any interference with property rights must be 'lawful', which includes the requirement that the information must be accessible and foreseeable.[31] Furthermore, the European Court expects states to respect a 'fair balance' between the general interest of the community and individual property rights, in the sense that taxation must not create an excessive burden.[32] It is important to recall that the European Court of Human Rights does not have a mandate for ESCR, while states are obligated, under international and national law, to respect, protect and fulfil those rights as well. Constrained by Article 1 Protocol 1 ECHR, the European Court thinks of taxation as a potentially valid restriction of the right to property, but not as a vital tool to fulfil other rights. Therefore, the European Court's assessment of the proportionality or the fair balance of a given tax measure or policy is necessarily narrow-minded.

Murphy and Nagel made an important conceptual contribution in this regard. In *The Myth of Ownership* (2002), they argued that 'the tax system cannot be evaluated by looking at its impact on private property, conceived as something that has independent existence and validity. Taxes must be evaluated as part of the overall system of property rights that they help to create.'[33] If property is an institution that serves both individual and social functions, and if taxation is the public tool by which the state acquires the means to deliver on social rights, we must think of property differently. Property cannot be what is owned prior to the inconvenient interference from government; instead, property must become what is left after the state levies the necessary resources to fulfil the obligations in relation to housing, social security, health and other social rights: 'There are no property rights antecedent to the tax structure. Property rights are the product of a set of laws and conventions, of which the tax system forms a part.'[34] Thus, Murphy and Nagel unequivocally

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30 CESCR, Draft General Comment on Economic, Social and Cultural Rights and the Environmental Dimension of Sustainable Development (2024), para. 22.

31 ECtHR, *Špaček, s.r.o. v. The Czech Republic*, Application No. 26449/95 (9 November 1999), para. 54.

32 Robert Attard and Paulo Pinto de Albuquerque, *Taxation at the European Court of Human Rights* (Wolters Kluwer, 2024), 16–18.

33 Liam Murphy and Thomas Nagel, *The Myth of Ownership: Taxes and Justice* (Oxford University Press, 2002), 9.

34 Ibid, 75.

reject the otherwise widespread idea that 'people's pretax income and wealth are theirs in any morally meaningful sense'.[35] There is no property before taxes and private property does not determine what can be taxed; taxes determine what can be owned.

As observed by Underkuffler, 'property rights are, *by nature*, social rights; they embody how we, *as a society*, have chosen to reward the claims of some to external, physical, and finite goods, and to deny the same claims of others'.[36] Ownership does not happen in a vacuum. It is not the result of mere talent and effort on the basis of equal opportunities. In the world we know, property is not acquired through original possession or through Lockean labour. Wealth is often inherited, and even when it is not, wealth can only be accumulated thanks to infrastructures and policies that make accumulation possible in the first place, for example, in relation to taxation, but also in relation to inheritance, labour law, privatisation of services, or (de)regulation of the private rented sector.

Therefore, besides tax policy, a social right to property calls for greater public involvement in the field of private law. For example, in the private rented sector, the right may call for certain additional obligations for landlords – particularly those holding multiple properties – vis-à-vis vulnerable tenants. Putting the societal spectacles on to intercede in relations between private actors is not out of the ordinary. It is generally accepted that actual inequalities between parties justify a more interventionist approach, for instance, in relation to labour relations and consumer protection. O'Connor argues that a social function approach can contribute to regulating businesses' operations in relation to employment and consumer protection in light of the socioeconomic rights proclaimed in EU law.[37] During the COVID-19 emergency in 2020–21, governments of different political colours mobilised privately owned goods and facilities, like hotels and private hospitals, while evictions were suspended, and rent and mortgage payment deferment options introduced, with extra requirements for corporate landlords.[38] The added value of a social right to property would be that these sorts of interventions may not just be possible,

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35 Ibid, 176.

36 Laura S. Underkuffler, *The Idea of Property: Its Meaning and Power* (Oxford University Press, 2003), 145.

37 Niall O'Connor, *Business Freedoms and Fundamental Rights in European Union Law* (Oxford University Press, 2024), 101–107.

38 Koldo Casla, Rights and Responsibilities: Protecting and Fulfilling Economic and Social Rights in Times of Public Health Emergency, in *Covid-19, Law and Human Rights: Essex Dialogues* 11 (Carla Ferstman and Andrew Fagan, eds. University of Essex, 2020).

but expected, unless public authorities come up with a better way of fulfilling social rights.

5.3 THERE IS NO FREE *ABUSUS* UNDER THE SOCIAL RIGHT TO PROPERTY

The right to use entails the prohibition of misuse, understood as the use of an asset in a way that causes harm to others. It is easily understandable that one's possession of a handgun, even if lawful, does not allow one to do as one pleases with it irrespective of the lethal consequences. The prohibition on misuse is in line with a general principle in IHRL, according to which it is not possible to act in such a way that can result in the destruction of the rights and freedoms of others.[39] Misuse is different from abuse, though. The so-called right to abuse encompasses three elements: (1) the consumption of the thing through the intended use; (2) its transformation into a different thing, presumably of a greater value; and (3) the destruction of the thing, therefore eliminating its value entirely, its very existence as an asset. In relation to (1), consumption is a perfectly legitimate use of a perishable good; in fact, one could argue that otherwise there may not be a reason for the good to exist at all – unless it is a piece of fruit or vegetable straight from nature. Regarding (2), transformation of the external world is intrinsic, not to capitalism, but to the most basic form of human ingenuity. However, regarding (3), as written by Sprankling, an unconstrained *jus abutendi* inclusive of the ability to destroy would be contrary to the social function of property.[40] **A social right to property should set limits to *jus abutendi***. A social right to property would be more than mere usufruct. It would cover free disposition, inclusive of use, transformation and transfer, but it **would not condone the destruction of a good or the sort of use that is contrary to its social function**.

This principle could have important implications for environmental protection. It is encouraging to read about proposals for 'sustainable property', where property is presented as the right to use and benefit from nature, but not to plunder resources, because care needs to be taken of this generation's needs

[39] General Assembly Resolution 217 (III) A, Article 30 (10 December 1948); General Assembly Resolution 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, Article 5(1) (16 December 1966); General Assembly Resolution 2200A (XXI), International Covenant on Civil and Political Rights, Article 5(1) (16 December 1966).

[40] John G. Sprankling, *The International Law of Property* (Oxford University Press, 2014), 293–294.

without compromising the needs – and rights – of future generations.[41] The rights of future generations are gaining greater recognition in international law and human rights discourse.[42] As indicated by the European Court of Human Rights in *Klimaseniorinnen* (2024), 'policies to combat climate change inevitably involve issues of social accommodation and intergenerational burden-sharing, both in regard to different generations of those currently living and in regard to future generations'.[43] 'The principle of intergenerational equity,' as the Inter-American Court appreciated in *La Oroya v. Peru* (2023), 'requires States to actively contribute through the creation of environmental policies aimed at ensuring that current generations leave behind a stable environment that will allow future generations similar opportunities for development.'[44] With far less enthusiasm, in its 2025 Advisory Opinion on Climate Change, the International Court of Justice established that 'due regard for the interests of future generations and the long-term implications of conduct are equitable considerations that need to be taken into account where States contemplate, decide on and implement policies and measures in fulfilment of their obligations'.[45]

Making property sustainable may require looking for ways to articulate what Rashmi Dyal-Chand calls 'deliberative co-management', where members of the community would co-manage portions of land and resources they do not legally own, but are affected by in the context of the climate crisis.[46] Beyond that, and given the threat of global warming, a sustainable approach to property would compel us to reconsider the scope of the community to identify reciprocal obligations at a planetary and intergenerational level.[47]

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[41] Bram Akkermans, Sustainable Ownership – new obligations towards achieving a sustainable society, 10(2–3) *European Property Law Journal* 277 (2021).

[42] The Maastricht Principles on the Human Rights of Future Generations: https://www.rightsoffuturegenerations.org/

[43] ECtHR, *Verein Klimaseniorinnen and Others v. Switzerland* [GC], Application No. 53600/20 (9 April 2024), para. 419.

[44] IACtHR, *Inhabitants of La Oroya v. Peru*, Preliminary Objections, Merits, Reparations and Costs, Judgment (7 November 2023), para. 128. See, also, IACtHR, Advisory Opinion OC-32/25, requested by the Republic of Chile and the Republic of Colombia, on Climate Emergency and Human Rights (29 May 2025), para. 305–313.

[45] International Court of Justice, Advisory Opinion on the Obligations of States in Respect of Climate Change (23 July 2025), para. 157.

[46] Rashmi Dyal-Chand, Sharing the Climate, 122(3) *Columbia Law Review* 581 (2022).

[47] Bram Akkermans, Sustainable Ownership – new obligations towards achieving a sustainable society, 10(2–3) *European Property Law Journal* 277 (2021), 287–289 and 298–300.

Nevertheless, it would be important not to take for granted some sort of synonymity between sustainability and environmental protection. In this respect, Claiton Fyock, Judith Bueno de Mesquita and Marina Lostal have critiqued forcefully the assumption that economic growth is inherently good and necessary to ensure *sustainable* development and fulfil human rights.[48]

The idea that *abusus* is not limitless would be a stretch for regional human rights bodies, but there is sufficient fuzziness in their standing case law to suggest that the position could be brought forward if there was will for it. Early in its case law, the European Court of Human Rights, in *Marckx v. Belgium* (1979), established that 'the right to dispose of one's property constitutes a traditional and fundamental aspect of the right of property'.[49] More recently, the Court referred to the right to dispose as '*abusus*',[50] but without getting into the specifics of whether *abusus* necessarily includes the ability to destroy goods one is the owner of. In *Endorois v. Kenya* (2010), the African Commission on Human and Peoples' Rights held that the right to property includes the right to access one's property, protection from interference by others, and 'the free possession and utilization and control of such property, in a manner the owner deems adequate'.[51] In *Ogiek* (2017), another Kenyan case, the African Court on Human and Peoples' Rights embraced what they called the 'classical conception' of the right to property, encompassing *usus*, *fructus* 'and the right to dispose of the thing, that is, the right to transfer it (*abusus*)'.[52] There was, however, no mention of *abusus* as destruction or any sort of misuse, and in fact the African Court stressed that the communal form of property for indigenous peoples 'places greater emphasis on the rights of possession, occupation, use/

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[48] Claiton Fyock, What Might Degrowth Mean for International Economic Law? A Necessary Alternative to the (un)Sustainable Development Paradigm, 12(12) *Asian Journal of International Law* 40 (2022); Judith Bueno de Mesquita, Reinterpreting human rights in the climate crisis: Moving beyond economic growth and (un)sustainable development to a future with degrowth, 42(1) *Netherlands Quarterly of Human Rights* 90 (2024); Marina Lostal, One-Dimensional Law: A Critique of the Human Right to a Clean, Healthy and Sustainable Environment, 29(5) *International Journal of Human Rights* 816 (2025).

[49] ECtHR, *Marckx v. Belgium* [Plenary], Application No. 6833/74 (13 June 1979), para. 63.

[50] ECtHR, *Hirschhorn v. Romania*, Application No. 29294/02 (26 July 2007), para. 57.

[51] ACHPR, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, Communication No. 276/2003, Decision (2010), para. 186.

[52] ACtHPR, *ACHPR v. Kenya*, Application No. 6/2012, Judgment (26 May 2017), para. 124.

utilization of land' than on the right to dispose of or transfer the land.[53] For its part, one of the reasons why the Inter-American Court of Human Rights protects indigenous communal rights is precisely because indigenous peoples tend to favour the sustainability of land and the environment: 'Owing to their interrelationship with nature and their ways of life, the indigenous and tribal peoples can make an important contribution to such conservation.'[54] In other words, property rights are linked to, and implicitly made contingent upon, the protection of the natural environment. Such a position is not far from the limitation of *abusus* under the right to property as proposed here. The exclusion of permanent or temporary destruction of property from the eponymous right is imaginable within the parameters of African and Inter-American human rights jurisprudence. Admittedly, it would be hard to visualise the European Court of Human Rights following through, since ESCR are not directly in its mandate, and considering that the European Court has to this day resisted the idea of the social function of property.

5.4 THE EXTENT OF COMPENSATION FOR TAKINGS OF PROPERTY NEEDS TO BE RECONSIDERED

As covered in Chapter 2, section 2.1.3, compensation in the case of public takings of private property is recognised in the regional human rights systems. Despite it not being proclaimed as such in the foundational treaty, the European Court of Human Rights has established that the owner would generally be entitled to compensation for a price reasonably connected to the market value.[55] Nonetheless, the European Court of Human Rights accepts exceptions: '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.'[56] 'Less than

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[53] Ibid, para. 127.

[54] IACtHR, *Kaliña and Lokono Peoples v. Suriname*, Merits, Reparations and Costs, Judgment (25 November 2015), para. 181.

[55] ECtHR, *Sporrong and Lönnroth v. Sweden* [Plenary], Application No. 7151/75 (23 September 1982), para. 69; ECtHR, *The Holy Monasteries v. Greece*, Application No. 13092/87 and 13984/88 (9 December 1994), para. 71; ECtHR, *Former King of Greece and Others v. Greece*, Application No. 25701/94 (28 November 2002), para. 89; ECtHR, *Jahn and Others v. Germany* [GC], Applications No. 46720/99, 72203/01 and 72552/01 (30 June 2005), para. 93–94; ECtHR, *Guiso-Gallisay v. Italy* [GC], Application No. 58858/00 (22 December 2009), para. 109.

[56] ECtHR, *James and Others v. UK* [Plenary], Application No. 8793/79 (21 February 1986), para. 54.

full compensation may also be necessary *a fortiori* where property is taken for the purposes of fundamental changes of a country's constitutional system or in the context of a change of political and economic regime.'[57] The requirement of 'just compensation' is contained in Article 21 of the 1969 American Convention on Human Rights, devoted to property.[58] For the Inter-American Court of Human Rights, 'the market value of the property object of the expropriation prior to its declaration of public interest must be used, seeking a just balance between the public interest and the individual interest'.[59] The African Commission on Human and Peoples' Rights expects states to ensure 'compensation for public acquisition of property', which should in general 'be reasonably related to the market value of the acquired property', giving consideration to the individual rights and wider social interests at stake.[60]

A social right to property would animate a **reconsideration of the role and price of compensation for public takings of property in the general interest when such takings are necessary for the fulfilment of social rights**. The state would bear the burden to prove that the conditions are being met. The general expectation of compensation applies to situations where public intervention extinguishes private property rights. At the same time, in the language of Article 1 Protocol 1 ECHR, the right to property does not prevent the state from 'control[ling] the use of property in accordance with the general interest'.[61] Two critically important questions follow from this when assessing specific situations: first, is full or even partial compensation necessary and fair considering the competing interests at play? And second, does the public intervention amount to an effective extinction of property rights, or is it instead a mere form of control of use and regulation of property? The first question will be addressed here, and the second one in the next section.

Regarding the first question, a social right to property would invite a conversation about the degree of compensation when the state exercises its power of eminent domain to take private property and use it for public purposes,

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[57] ECtHR, *Urbárska Obec Trenčianske Biskupice v. Slovakia*, Application No. 74258/01 (27 November 2007), para. 115.

[58] Organization of American States, American Convention on Human Rights, Article 21 (22 November 1969), OASTS. No. 36, 1144 UNTS 123.

[59] IACtHR, *Salvador Chiriboga v. Ecuador*, Reparations and Costs, Judgment (3 March 2011), para. 62; IACtHR, *Salvador Chiriboga v. Ecuador*, Preliminary Objection and Merits, Judgment (6 May 2008), para. 98.

[60] ACHPR, Principles and Guidelines on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (October 2011), para. 55.

[61] Council of Europe, Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 1(2) (20 March 1952), ETS No. 9.

regardless of the owner's consent. Compensation was already envisioned as far back as the French 1789 Declaration of the Rights of Man and of the Citizen, where it was established that deprivation of property would only be allowed if publicly necessary, legally determined, and subject to previous and equitable indemnity or compensation to the owner.[62] International investment law in much of the twentieth century was devoted to the protection of Western corporations' private interests in colonies and former colonies. This was despite the strong resistance from newly independent countries in the 1960s and 1970s, which advocated at the UN in defence of their sovereign rights over natural resources, including the right to expropriate and nationalise foreign companies.[63] Under the broad umbrella of the New International Economic Order, and propelled by people like the prominent Algerian legal scholar and diplomat Mohammed Bedjaoui, newly sovereign countries questioned the legality and legitimacy of sovereign debts contracted during the colonial era.[64] Despite the geopolitical controversy, as late as in *James and Others v. UK* (1986), the European Court of Human Rights declared that effective compensation to protect foreigners' property was a general principle of international law; therefore, a matter of legality.[65] Time has passed, and in the current state of development of international law, general principles of international law no longer provide a blanket right to compensation for non-nationals.[66] The payment of compensation would no longer be a matter of legality, but of proportionality in the determination of compliance with fair balance in the public taking of private property.[67] The United Nations Commission on International Trade Law (UNCITRAL) arbitral tribunal decision in *Saluka v. Czech Republic* (2006) was instructive concerning this matter:

> … international law has yet to identify in a comprehensive and definitive fashion precisely what regulations are considered "permissible" and "commonly accepted" as falling within the police or regulatory power of States and, thus, non-compensable.

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62 Declaration of the Rights of Man and of the Citizen of 1789, Article 17. (Via Élysée.)

63 John G. Sprankling, *The International Law of Property* (Oxford University Press, 2014), 8–9, 12.

64 Grégoire Mallard, We Owe You Nothing: Decolonization and Sovereign Debt Obligations in International Public Law, in *Sovereign Debt Diplomacies: Rethinking sovereign debt from colonial empires to hegemony* 189 (Pierre Penet and Juan Flores Zendejas, eds. Oxford University Press, 2021).

65 ECtHR, *James and Others v. UK* [Plenary], Application No. 8793/79 (21 February 1986), para. 62.

66 Douglas Maxwell, *The Human Right to Property: A Practical Approach to Article 1 of Protocol No. 1 to the ECHR* (Hart, 2022), 196.

67 Ibid, 242.

> In other words, it has yet to draw a bright and easily distinguishable line between non-compensable regulations on the one hand and, on the other, measures that have the effect of depriving foreign investors of their investment and are thus unlawful and compensable in international law.[68]

Having reached this point, and beyond the distinction between nationals' and non-nationals' interests, a social right to property would require an assessment of the proportionality of the taking in light of the general interests, historical background and the impact on the community. A social rights approach to public takings may require a lower-than-market value compensation when the intervention is designed to fulfil social rights, or even the possibility of nil compensation under uniquely exceptional circumstances, as envisioned in the South African Constitution and the Expropriation Act 2024 (Chapter 3, section 3.2). This approach would require an interinstitutional dialogue, but courts would be mandated to assess the legality and reasonableness of the executive's claim of a general interest. A government's assertion that a certain intervention would benefit society at large should not be taken at face value. The general interest ought to be evidenced and independently verified. I am mindful of the critique that a government could seek to overreach in declaring that their policy would be best placed to favour social rights. On the other hand, the judiciary could also exceed its power by potentially curtailing the executive's prerogative disproportionately. At the end of the day, one should calibrate the righteousness of this proposition against the alternative where the owner's private interests are given the utmost consideration as the owner is compensated at a market value, which may be accurate but also fictitious. Advocating for a law-and-community approach to compensation, Ting Xu warns that 'the market value approach often concentrates on the economic loss of individuals in takings of property and overlooks the needs to consider the loss of communal interests and identities especially in cases involving indigenous peoples'.[69] As defended by Tembeka Ngcukaitobi in relation to land reform in South Africa, whether someone ought to be compensated for deprivation of property should depend, among other factors, on the illegitimacy of the accession to property in the first place, as, for example, through the

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[68] UNCITRAL Arbitral Tribunal, *Saluka Investments BV (The Netherlands) v. The Czech Republic*, Partial Award (17 March 2006), para. 263.

[69] Ting Xu, A law-and-community approach to compensation for takings of property under the European Convention on Human Rights, 39(3) *Legal Studies* 398 (2019), at 413.

systemically discriminatory policies during apartheid.[70] The historical background as well as the present conditions would need to be examined carefully, not just the market value.

5.5 NOT ALL FORMS OF HOLDING PROPERTY ARE THE SAME, AND THEY DO NOT DESERVE EQUAL PROTECTION FROM HUMAN RIGHTS LAW

The second question above deals with the delineation between deprivation and control. While Section 25 of the South African Constitution uses the term differently, for our purposes 'deprivation' of property refers to situations where the owner loses the legal title or de facto possession of the good, while 'control' does not entail transfer or destruction, simply a restriction in the use.[71] In general, there is no right to compensation in case of mere control of use or other forms of general interference – for example, temporary inability to access one's property, or inconveniences derived from the normal functioning of urban planning – where the property-holder remains in possession and/or retains the legal title.[72] However, in the standard-setting *Sporrong and Lönnroth* case (1982), the European Court of Human Rights opened the door to exceptions if, irrespective of possession and title, the state intervention affects 'the very substance of ownership'.[73] In principle, therefore, unlike deprivation, mere control does not lead to compensation, unless it is deemed to merit so exceptionally. For control to amount to deprivation for the purposes of deserving compensation, notes Maxwell from subsequent jurisprudence in Strasbourg, 'the individual will generally have to establish that they have lost *all* beneficial use of the property, have no prospect of realising their right to property through the domestic legal system and lack the ability to convert the property into money, another asset, a gift or a bequest'.[74] However, international and national courts are not consistent in their positions on the line between deprivation and control, and this adds an additional layer of uncertainty and unpredictability to constitutional property law, potentially

[70] Tembeka Ngcukaitobi, *Land Matters: South Africa's Failed Land Reforms and the Road Ahead* (Penguin, 2021), part IV.

[71] Robert Attard and Paulo Pinto de Albuquerque, *Taxation at the European Court of Human Rights* (Wolters Kluwer, 2024), 7.

[72] Douglas Maxwell, *The Human Right to Property: A Practical Approach to Article 1 of Protocol No. 1 to the ECHR* (Hart, 2022), 261–266.

[73] ECtHR, *Sporrong and Lönnroth v. Sweden* [Plenary], Application No. 7151/75 (23 September 1982), para. 63.

[74] Douglas Maxwell, *The Human Right to Property: A Practical Approach to Article 1 of Protocol No. 1 to the ECHR* (Hart, 2022), 145.

encouraging legislators to remain inactive rather than pursue legal changes that might lead to costly compensation claims.[75] The Inter-American Court of Human Rights has not yet provided criteria to distinguish deprivation of property from other forms of control or restriction.[76] There is not much guidance from the African system either.[77] The African Commission's Principles and Guidelines on the Implementation of the ESCR require 'compensation for public acquisition of property', which should be fair in the balance of individual rights and social needs; compensation should also be 'reasonably related to the market value', but 'in certain circumstances', which remain undefined, a lower rate or no compensation at all may be acceptable.[78]

A social right to property would make it pressing to define the substance of ownership, a sort of minimum core content of the social right to property. By minimum core content I mean the social minimum or the minimum essential level of a right, below which no retrogression is allowed. This is notwithstanding the fact that, as said earlier, there is no human right to acquire property. A minimum core content would not protect everyone's property, but only the property of those who own something. The purpose of a minimum core content of the right to property would be to introduce a gradient in the safeguarding of private property, strongly protected up to a certain threshold, but less so as such a threshold is surpassed. Coming up with a minimum core would require an open and broad dialogue to ensure the appropriate level of detail and regulation, which would need to be subject to judicial control. The state would bear the burden to prove that the standard is being met, meaning that a certain form of intervention of property is necessary in order to fulfil social rights while at the same time respecting the very substance of ownership, its minimum core content. Regarding housing, for example, this would apply to rent caps or the temporary expropriation of use compelling owners to put empty properties in the private rental market (as in the case of Spain, see Chapter 3, section 3.3, and again in Chapter 6).

Not all amounts of private property deserve the protection of human rights law. As defined earlier in this chapter, the social function is based on the

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[75] Rachael Walsh, Constitutional Property and Progressive Property's Compatibility: A Reappraisal, 10(1) *Texas A&M Journal of Property Law* 81 (2024), at 99–100.

[76] Sergio Fuenzalida Bascuñán, La jurisprudencia de la Corte Interamericana de Derechos Humanos sobre el derecho a la propiedad, ¿concepción liberal o republicana?, 18(1) *Estudios Constitucionales* 260 (2020), at 291–292.

[77] Rachel Murray, *The African Charter on Human and Peoples' Rights: A Commentary* (Oxford University Press, 2019), chapter 15.

[78] ACHPR, Principles and Guidelines on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (October 2011), para. 55.

acceptance of reciprocal responsibilities in a community. Responsibility is a function of power, which, applied to property, means that those who own more, can do more, and therefore ought to do more. The wealthy have more responsibilities under a social right to property. A human rights-based and social function-based approach to property requires different degrees of protection of ownership depending on the substantive interests that are being served.

Not all forms of holding property are the same. **It is necessary to distinguish between belongings, or personal private property, and investment in the form of 'property-as-capital'**.[79] However, it is also important to acknowledge, in the way Branko Milanovic does, that the extraordinary level of commodification in the current stage of global capitalist development has resulted in the blurring of the area between personal property and productive capitalist property.[80] One's home can provide benefits as a holiday rental, and daily activities, like cooking, cleaning or dog-walking, are now commodities, assets with an economic value, with ever smaller personal space out of potential trade. Commodification is correlated with the financialisation of the economy, as a result of which personal or family wealth is increasingly tied to the housing market. The phenomenon of financialisation has also resulted in the corresponding increase in private debt, which 'has sustained aggregate demand and economic growth over the past decades, often at the expense of indebted households', as observed by Juan Pablo Bohoslavsky, former UN Independent Expert on Foreign Debt and Human Rights.[81] While the borderline between the personal and the investment is now less clear-cut than it used to be, there is value in treating both differently, because personal property would fall under the umbrella of the minimum core content of a social right to property. There would be a robust foundation for this position in IHRL. Both the Inter-American Court of Human Rights and the African Commission on Human and Peoples' Rights have held that the seizure of personal belongings – like household appliances, money, medicines, clothes and items of personal hygiene – by state agents amounts to a violation of the right to property.[82] For

[79] Paddy Ireland, *Property in Contemporary Capitalism* (Bristol University Press, 2024), 62–66.

[80] Branko Milanovic, *Capitalism, Alone: The Future of the System That Rules the World* (Harvard University Press, 2019), chapter 5.2.b.

[81] Independent Expert on Foreign Debt and Human Rights, Private Debt and Human Rights UN Doc. A/HRC/43/45 (3 January 2020), para. 82.

[82] IACtHR, *Barrios Family v. Venezuela*, Merits, Reparations and Costs, Judgment (24 November 2011), para. 149; ACHPR, *Institute for Human Rights and Development in Africa v. Angola*, Communication No. 202/04, Decision (7–22 May 2008), para. 73; ACHPR, *Sudan Human Rights Organisation & Centre on*

example, in the *Case of the Massacres of El Mozote and Nearby Places v. El Salvador* (2012), the Inter-American Court ruled that the context of collective victimisation, stigmatisation, denial of the community's identity, and destruction of personal items – such as clothes, children's toys and family photographs – made the violation of the right to property 'especially serious and significant, not only because of the loss of tangible assets, but also because of the loss of the most basic living conditions and of every social reference point of the people who lived in these villages'.[83] The Inter-American Court has been clear that it is necessary to consider 'the socioeconomic situation and vulnerability of the victims, and the fact that the damage caused to their property might have a greater effect and impact than it would have had for other persons or groups in other conditions'.[84] Therefore, in addition to constituting an important financial loss, the destruction of homes and other personal belongings can cause economically vulnerable people the loss of 'their most basic living conditions', making the violation of the right to property 'particularly grave'.[85]

The substance of property – or the essential or minimum core content of property – is an important term in the IHRL glossary. In relation to the causes for deprivation or for restriction – control – of property, the Inter-American Court requires that the 'law and its application respect the essential content of the right to property'.[86] For its part, the African Commission on Human and Peoples' Rights established in *Endorois* (2010) that 'the "public interest" test is met with a much higher threshold in the case of encroachment of indigenous land rather than individual private property'.[87] The African Commission also considers that whether the 'very essence' of a right is at risk should be part of the proportionality test in case of conflict of rights.[88] Similarly, as far back as 1979, the then Court of Justice of the European Communities concluded that

Housing Rights and Evictions (COHRE) v. Sudan, Communications No. 279/03 and 296/05, Decision (13–27 May 2009), para. 205.

83 IACtHR, *Case of the Massacres of El Mozote and Nearby Places v. El Salvador*, Merits, Reparations and Costs, Judgment (25 October 2012), para. 180.

84 IACtHR, *Vereda la Esperanza v. Colombia*, Preliminary objection, Merits, Reparations and Costs, Judgment (31 August 2017), para. 240.

85 IACtHR, *Ituango Massacres v. Colombia*, Preliminary Objections, Merits, Reparations and Costs, Judgment (1 July 2006), para 182.

86 IACtHR, *Salvador Chiriboga v. Ecuador*, Preliminary Objection and Merits, Judgment (6 May 2008), para. 65.

87 ACHPR, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, Communication No. 276/2003, Decision (2010), para. 212.

88 ACHPR, *Zimbabwe Lawyers for Human Rights and Associated Newspapers of Zimbabwe v. Zimbabwe*, Communication No. 284/03, Decision (30 March – 3 April 2009), para 176.

a certain national policy was contrary to European Law because it resulted in a 'disproportionate and intolerable interference' that impinged upon 'the very substance of the right to property',[89] language that, as we saw earlier, the European Court of Human Rights would also use in *Sporrong and Lönnroth* (1982).[90]

It has been said that the 'essence' or 'substance' of rights feels like 'sugar in hot milk': We are unable to precisely determine its individual components, nor can we establish a specific threshold at which the 'essence' or the 'substance' become distinctly compromised.[91] Having said that, while the specifics of the minimum essential content of property would need to be defined in law following a democratic process, its substance would probably exceed mere personal property. After years of rising housing costs, residential properties are not just personal property. They can be a hefty financial investment as well. At the same time, there are strong reasons to protect a resident's own property as part of the core content. The idea of the minimum core content of the social right to property means that a basic level of property ought to be preserved, while private property beyond such a level would be subjected to greater scrutiny if necessary and proportionate for the public interest of fulfilling other human rights. The exact level at which such scrutiny would begin would be a matter of debate and analysis, but a helpful normative reference could be Article 23 of the American Declaration of the Rights and Duties of Man: the level of private property that 'meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home'.[92] The prioritisation of personal property and property that meets the needs of a life with dignity as the core content of property is in line with Fox O'Mahony and Roark's conception of property as an 'asset of resilience'.[93] Property, at least some amount of it, can indeed function as a mitigator of individuals' experiences of vulnerability from setbacks and inadequate welfare safety nets, yet not all property serves that purpose. Or, rather, not all quantity of property

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[89] Court of Justice of the European Communities, *Case 44/79, Hauer v. Land Rheinland-Pfalz* 3729 (13 December 1979), at 3747.

[90] ECtHR, *Sporrong and Lönnroth v. Sweden* [Plenary], Application No. 7151/75 (23 September 1982), para. 63.

[91] Sébastien Van Drooghenbroeck and Cecilia Rizcallah, The ECHR and the Essence of Fundamental Rights: Searching for Sugar in Hot Milk?, 20(6) *German Law Journal* 904 (2019).

[92] American Declaration of the Rights and Duties of Man, Article 23 (2 May 1948).

[93] Lorna Fox O'Mahony and Marc Roark, Property as an Asset of Resilience: Rethinking Ownership, Communities and Exclusion Through the Register of Resilience, 36(4) *International Journal for the Semiotics of Law* 1477 (2023).

is necessary to that end. Above a certain threshold, which would need to be defined, property can be capital investment, luxury, expression of power, conspicuous consumption… but not resilience.

This idea of protecting property to a limited extent is not unheard of in IHRL. In General Comment No. 17, on the protection of authors' rights derived from their artistic, literary or scientific productions, the CESCR makes clear that the protection of the authors' moral and material interests 'need not necessarily reflect the level and means of protection found in present copyright, patent and other intellectual property regimes'.[94] The material interests of authors the CESCR is concerned about are those that contribute to the enjoyment of the right to an adequate standard of living, not the interests above that threshold.[95] Thereby, the CESCR opens the door to a level of protection of property rights, qua human rights, lower than that granted to property under other legal regimes.

Provided the core content of property is preserved, states' duty to fulfil ESCR proclaimed in international and national law ought to be one of the most sufficiently important objectives that may justify limiting the right to property as a matter of public interest. This proposition builds on existing practice of international human rights bodies. The Inter-American Court of Human Rights, the African Commission on Human and Peoples' Rights, and the African Court of Human and Peoples' Rights have all established that the right to property can be restricted if it is proportionate and necessary for the public interest.[96] In *James and Others v. UK* (1986), the European Court of Human Rights declared that 'eliminating what are judged to be social injustices' is one of the legitimate aims of regulation affecting and potentially limiting individual property rights.[97] For example, in an advisory opinion requested by the French Conseil d'État (2022), the European Court established that the right to property does not protect the right to hunt on one's own land and that

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[94] CESCR, General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He or She is the Author, UN Doc. E/C.12/GC/17 (12 January 2006), para. 10.

[95] Ibid, para. 15.

[96] IACtHR, *Yakye Axa Indigenous Community v. Paraguay*, Merits, Reparations and Costs, Judgment (17 June 2005), para. 145; ACHPR, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, Communication No. 276/2003, Decision (2010), para. 211–214; ACtHPR, *ACHPR v. Kenya*, Application No. 6/2012, Judgment (26 May 2017), para. 129.

[97] ECtHR, *James and Others v. UK* [Plenary], Application No. 8793/79 (21 February 1986), para. 47.

limits can be set in the name of the general interest of environmental protection.[98] In *Yordanova and Others v. Bulgaria* (2012), the Court observed that the proportionality of an eviction in public land 'is inextricably linked to the use for which the authorities seek to recover the land'.[99] Part of the equation, therefore, must be whether property would be used for the general interest, to promote the general well-being of the population, especially of people at greater risk of harm, disadvantage and discrimination.[100]

As discussed in Chapter 2, section 2.2, the CESCR stated in *López Albán v. Spain* (2019) that the proportionality test of evictions 'entails examining not only the consequences of the measures for the evictee but also the owner's need to recover possession of the property. This inevitably involves making a distinction between properties belonging to individuals who need them as a home, or to provide vital income and properties belonging to financial institutions.'[101] I lamented in Chapter 2 that the UN Committee had not provided an adequate justification of such a position given its reluctance to acknowledge property's place in international human rights law. However, having reached this point in the book, we can say that a human rights-based and social function-based approach to property would provide a legal and moral justification to the CESCR's position in *López Albán*. While the income from private renting may be essential or close to essential for many private individuals, it would not be so for most corporate landlords. Human rights should not provide the same level of protection to the property of the former and the latter.

In this chapter, I have presented a proposal for a social right to property, based on a combined reading of IHRL and social function. It is premised on a relational understanding of property as a social institution that serves a plurality of values, both individual and social, aiming to maximise freedom and agency for everyone, and mindful of human interdependence and individual responsibility, correlated to the power stemming from wealth. The proposal also sees the state as the ultimate duty-bearer, in charge of regulating property to boost its ability to fulfil social rights, social cohesion and material freedom for everyone, those who own and those who do not own. The proposal

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[98] ECtHR, *Advisory Opinion on the difference in treatment between landowners' associations "having a recognized existence on the date of the creation of an approved municipal hunters' association" and landowners' associations set up after that date,* Request No. P16-2021-002 (13 July 2022), para. 80.

[99] ECtHR, *Yordanova and Others v. Bulgaria*, Application No. 25446/06 (24 April 2012), para. 127.

[100] ECtHR, *Ghailan and Others v. Spain*, Application No. 36366/14 (23 March 2021), para. 60 and 78.

[101] CESCR, *López Albán v. Spain*, Communication No. 37/2018, UN Doc. E/C.12/66/D/37/2018 (2019), para. 11.5.

is articulated in five key messages: (1) property is a human right, of a social kind; (2) some of the maximum available resources to satisfy social rights are privately owned; (3) there is no free *abusus* under the social right to property; (4) we should reconsider the role and price of compensation for public takings of property when the general interest is the fulfilment of social rights; and (5) not all forms of holding property are the same, and therefore we need to define the minimum core content of property, above which the duty to fulfil social rights is one of the most important justifications to restrict the property of those who own more as a matter of public interest. Chapters 6 and 7 will explore the implications of this theoretical proposal in relation to the right to adequate housing and the private provision of essential services.

6. Adequate housing and the social right to property

This chapter applies the principles of the proposal for a social right to property from Chapter 5 to the right to adequate housing. Ensuring adequate housing for all requires public investment to maintain and progressively enlarge a public housing stock. It also requires developing and implementing effective policies to ensure that low-income families have access to affordable housing. This includes regulating the private rented sector. In this chapter, I will focus on three policy recommendations stemming from the social right to property. First, human rights law can confront the financialisation of housing by establishing the principle that residential properties must not be kept deliberately empty. Second, a social function-based and human rights-based approach to property should elicit extra obligations, conditions and restrictions for corporate landlords and for landlords with large immovable property investment portfolios. And third, public authorities should actively consider rent control schemes as instruments to preserve security of tenure and to make housing more affordable in the private sector.

6.1 THE RIGHT TO ADEQUATE HOUSING AND ITS RELATIONSHIP WITH PROPERTY

The right to adequate housing is part of the right to an adequate standard of living in international human rights law. It is recognised in: Article 25 of the Universal Declaration of Human Rights (UDHR); Article 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR); Article 27(4) of the Convention on the Rights of the Child (CRC); Article 5(e) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); Article 14 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); Article 28 of the Convention on the Rights of Persons with Disabilities (CRPD); and Article 43 of the International Convention on the Protection of the Rights of All

Migrant Workers and Members of Their Families (ICRMW).[1] The right to housing is present in one way or another in 44% of the world's constitutions, with a broad geographical spread.[2] Housing is also part of the regional human rights systems. In accordance with Article 34 of the Charter of the Organization of American States, countries agree to dedicate every effort to secure 'adequate housing for all sectors of the population', and state parties to the American Convention on Human Rights must advance progressively towards the full realisation of this right.[3] In Europe, Article 31 of the Revised European Social Charter of 1996 proclaims the right to adequate housing, and the European Committee of Social Rights has established that the legal, social and economic protection of families of the 1961 version of the European Social Charter includes the adequate provision of housing.[4] Although not explicitly mentioned in the African Charter on Human and Peoples' Rights, the African Commission on Human and Peoples' Rights has said that the right to adequate housing is implicit in the Charter, as the substance of the right can be inferred

[1] General Assembly Resolution 217 (III) A, Article 25 (10 December 1948); General Assembly Resolution 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, Article 11(1) (16 December 1966); General Assembly Resolution 44/25, Convention on the Rights of the Child, Article 27(4) (20 November 1989); General Assembly Resolution 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination, Article 5(e) (21 December 1965); General Assembly Resolution 34/180, Convention on the Elimination of All Forms of Discrimination Against Women, Article 14 (18 December 1979); General Assembly Resolution 61/106, Convention on the Rights of Persons with Disabilities, Article 28 (24 January 2007); General Assembly Resolution 45/158, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, Article 43 (18 December 1990).

[2] Michelle Oren and Rachelle Alterman, The Right to Adequate Housing Around the Globe: Analysis and Evaluation of National Constitutions, in *Rights and the City: Problems, Progress, and Practice* 159 (Sandeep Agrawal, ed., University of Alberta Press, 2022) at 170.

[3] Organization of American States, Charter of the Organization of American States, Article 34 (30 April 1948), OASTS No. 1-C and 61, 1609 UNTS 119; Organization of American States, American Convention on Human Rights, Article 26 (22 November 1969), OASTS. No. 36, 1144 UNTS 123.

[4] Council of Europe, European Social Charter, Article 16 (18 October 1961), ETS No. 35; Council of Europe, European Social Charter (Revised) Article 31 (3 May 1996), ETS No. 163; ECSR, *European Roma Rights Centre v. Greece*, Collective Complaint No. 15/2003, Decision on the Merits (8 December 2004), para. 24 and 51.

from other rights recognised therein, including the right to health, the protection of the family, and the right to property.[5]

In international human rights law, housing is understood as much more than a roof over one's head, and much more than a mere commodity. Housing, as observed by the UN Committee on Economic, Social and Cultural Rights (CESCR), 'should be seen as the right to live somewhere in security, peace and dignity'.[6] Housing is the physical space where we develop our personalities, flourish as individuals, nurture our loving relationships, grow as families, and acquire some of the tools to contribute meaningfully to society. Housing is far greater than the right to adequate housing, and a person's relationship with their home is protected by other rights as well, such as the right to private and family life, freedom of expression, and indeed the right to property.[7]

The CESCR has identified seven criteria to determine the meaning of adequacy in the right to *adequate* housing: (1) legal security of tenure, including protection from forced evictions, irrespective of the type of property and tenure – homeownership, rental, informal settlement, etc.; (2) availability of services, materials, facilities and infrastructure, including access to natural and common resources, all of which are essential for health, security, comfort and nutrition; (3) affordability, including protection from unreasonable rent levels and increases, so as not to compromise or threaten the attainment and satisfaction of other essential needs and rights; (4) habitability, in terms of protection from cold, damp, heat, rain, wind and other threats to health and safety; (5) accessibility, paying particular attention to the requirements of groups and individuals at greater risk of harm, disadvantage and discrimination; (6) location, allowing access to employment, healthcare services, schools, transport and other facilities, bearing environmental concerns in mind as well; and (7) cultural adequacy, using materials and tools that recognise and express appropriately the cultural identity and diversity of the population.[8]

The CESCR and other international human rights bodies have made clear that public authorities have certain obligations to materialise the right to adequate housing. This includes maintaining and developing a public housing

[5] ACHPR, *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*, Communication 155/96, Decision (2002), para. 60.

[6] CESCR, General Comment No. 4: Right to Adequate Housing, UN Doc. E/1992/23 (13 December 1991), para. 7.

[7] Jessie Hohmann, Property and the right to housing: Synergies and tensions, in *The Routledge Handbook of Property, Law and Society* 125 (Nicole Graham, Margaret Davies and Lee Godden, eds, Routledge, 2023), at 128.

[8] CESCR, General Comment No. 4: Right to Adequate Housing, UN Doc. E/1992/23 (13 December 1991), para. 8.

stock, alongside comprehensive plans to guarantee the right to adequate housing for low-income persons, with indicators and benchmarks to assess the reasonableness of the extent to which the plan is being delivered on.[9] States must also keep meaningful statistics to assess needs, resources and outcomes, carry out impact assessments, establish timeframes to assess progress, and pay particular attention to the effects of policy on the most vulnerable groups and individuals.[10] Like all other social rights, adequate housing is also subject to progressive realisation, understood as the direction of travel in public policy, with concrete, targeted and measurable milestones to hold authorities to account.[11]

While the state has direct obligations in relation to adequate housing, generally speaking most residential properties are owned by private actors, a variable number of whom rent them out. The right to *access* to housing means that people must have the possibility of entering – and exiting from – the housing system, and this applies both to the public sector where it exists and is needed, and to the private market.[12] In this respect, the right to adequate housing necessarily engages in a dialogue, sometimes in tension, with property rights. Fredman writes that the evolution of both international law and comparative law shows that courts increasingly recognise that the right to housing can provide 'a substantive counterweight' to landlords' right to property.[13] Contrariwise, as covered in Chapter 2, section 2.2, private property is the elephant in the room of CESCR case law. Adequate housing is, by far, the most frequently claimed right in individual complaints in front of the UN Committee. Up to the end of 2023, 101 of the 118 cases resolved – with a decision of violation or not – by the Committee were about housing, and 91% of all cases concerned Spain.[14] The CESCR has not yet addressed the question

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[9] CESCR, *Ben Djazia and Bellili v. Spain*, Communication No. 5/2015, UN Doc. E/C.12/61/D/5/2015 (2017), para. 21(d).

[10] European Committee of Social Rights (ECSR), *Feantsa v. France*, Collective Complaint No. 39/2006, Decision on the Merits (5 December 2007), para. 53–54; Padraic Kenna, 'Report on the right to housing in light of European standards and European good practices' (Council of Europe, 2024).

[11] CESCR, General Comment No. 3: The Nature of States Parties' Obligations, UN Doc. E/1991/23 (14 December 1990), para. 2–4.

[12] Andrei Quintiá Pastrana and Michel Vols, Tracing the Right to Access to Housing: Insights from Human Rights Theory and Practice, 18(2) *European Journal of Homelessness* 39 (2024), at 60.

[13] Sandra Fredman, *Comparative Human Rights Law* (Oxford University Press, 2018), 304.

[14] Global Initiative for Economic, Social and Cultural Rights, *Yearbook of the Committee on Economic, Social and Cultural Rights 2023* (GI-ESCR, 2024), 22–23.

of private property head-on. However, it has made clear that housing rights ought to be preserved not only against the state but also horizontally vis-à-vis private actors. In *IDG v. Spain* (2015), the CESCR called for better protection of the procedural rights of homeowners facing foreclosure.[15] In *Ben Djazia and Bellili v. Spain* (2017), the Committee established that there must be an independent assessment of the proportionality of evictions in the private rented sector.[16] To be compatible with international human rights law, the grounds for the eviction need to be established in the law, the eviction must serve a legitimate interest, it must be the last resort with no less onerous alternatives available, evictions should not take place at night, in winter, with particularly bad weather, or from shelters, alternative housing should be provided to those who require it, certain procedural requirements ought to be respected – including active participation, sufficient notice, and judicial oversight and legal aid and remedies – and there must be compensation in case of an illegal eviction.[17] In *López Albán v. Spain* (2019), the CESCR extended the principle of proportionality to situations of occupation or squatting, and established that the proportionality test requires looking not only at the personal circumstances of the family facing an eviction but also at the financial position of the landlord seeking it, including, as was indeed the case in *López Albán*, whether the landlord is a corporation.[18] In *Makinen Pankka and Fernández Pérez v. Spain* (2019), the Committee made clear that its role is to protect the primary residence; seizures affecting immovable property investments are not its concern.[19] In *Walters v. Belgium* (2021), the CESCR reminded states of the obligation to

[15] CESCR, *IDG v. Spain*, Communication No. 2/2014, UN Doc. E/C.12/55/D/2/2014 (2015), para. 13.6.

[16] CESCR, *Ben Djazia and Bellili v. Spain*, Communication No. 5/2015, UN Doc. E/C.12/61/D/5/2015 (2017), para. 15.1.

[17] CESCR, General Comment No. 7: Forced Evictions, UN Doc. E/1998/22 (20 May 1997), para. 14–16; Emma N. Nic Shuibhne, Michelle Bruijn and Michel Vols, Deconstructing the Eviction Protections Under the Revised European Social Charter: A Systematic Content Analysis of the Interplay Between the Right to Housing and the Right to Property, 23(4) *Human Rights Law Review* 1 (2023), at 9, 12; Michel Vols, The Optional Protocol to the ICESCR, Homelessness and Moral Hazard: The Alternative Adequate Housing Requirement in the CESCR's Jurisprudence – an Incentive Not to Pay for Housing?, 12(1) *International Human Rights Law Review* 1 (2023), at 7–8.

[18] CESCR, *López Albán v. Spain*, Communication No. 37/2018, UN Doc. E/C.12/66/D/37/2018 (2019), para. 10.1, 11.5.

[19] CESCR, *Makinen Pankka and Fernández Pérez v. Spain*, Communication No. 9/2015, UN Doc. E/C.12/65/D/9/2015 (2019), para. 8.4.

regulate the business of private actors operating in the housing sector in order to prevent abuses and other foreseeable negative effects.[20]

The right to adequate housing builds on the respect of the home under the right to private and family life. In *Connors v. UK* (2004), the European Court of Human Rights declared that this right is 'of central importance to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community'.[21] In the landmark *McCann v. UK* (2008), the Court established the general principle of proportionality of evictions because 'the loss of one's home is a most extreme form of interference with the right to respect for the home'.[22] 'Home' is an autonomous concept for the European Court of Human Rights; it depends on the factual circumstances, including the existence of a sufficient and continuous link between a person and a place, and whether the occupation was lawful or unlawful is immaterial for these purposes.[23] The European Court of Human Rights has indeed upheld that the right to private and family life entails obligations relevant to safeguarding certain elements of the right to adequate housing in relation to evictions.[24] Yet the right to respect for the home, part of private and family life, does not include access to adequate housing. The right to adequate housing introduces the aforementioned public obligations of progressive realisation and public provision of housing. It also entails the horizontality in the proportionality of evictions in the private rented sector, a general requirement that has not been established yet from within the strict parameters of the respect of the home. That said, even from the narrowness of the right to private and family life, Bruijn's empirical analysis of 200 Strasbourg cases shows that the European Court of Human Rights does not exclude proportionality assessments from all cases between private parties; rather than the public–private divide, the conclusive factor appears to be the existence – or not – of clearly articulated contractual obligations between the parties.[25] It might be argued that the practical impact on the proportionality test would not be colossal in

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[20] CESCR, *Walters (L.J.W.) v. Belgium*, Communication No. 61/2018, UN Doc. E/C.12/70/D/61/2018 (2021), para. 11.5.

[21] ECtHR, *Connors v. UK*, Application No. 66746/01 (27 May 2004), para. 82.

[22] ECtHR, *McCann v. UK*, Application No. 19009/04 (13 May 2008), para. 50.

[23] ECtHR, *Paulić v. Croatia*, Application No. 3572/06 (22 October 2009), para 33.

[24] Sarah Fick and Michel Vols, Horizontality and Housing Rights: Protection against Private Evictions from a European and South African Perspective, 9(2) *European Journal of Comparative Law and Governance* 118 (2022).

[25] Michelle Bruijn, X Factors and Tipping Points in Eviction Cases: A Statistical Analysis of Eviction Litigation of the European Court of Human Rights, 24(4) *Human Rights Law Review* 1 (2024), at 23.

many judicial encounters, where judges, having applied it, may simply confirm the eviction, or perhaps postpone it slightly. However, comparative law shows that even the possibility of relying on the proportionality defence can have an influence on property-holders' litigation strategies, and as a result, have an impact in the stages before and after the court procedure too.[26] For example, landlords may decide to wait to collect more evidence, document better the level of seriousness of the breach of contract, refrain from seeking to evict a household where children are involved, or make an effort to ensure that tenants are supported by local social services, all to persuade the judge that an eviction really is the last resort after exhausting less intrusive options.[27]

6.2 AGAINST EMPTY PROPERTIES

There is no single census of empty properties in Europe, let alone in the world. However, based on data from 2011, the European Federation of National Organisations working with the Homeless (FEANTSA) and Abbé Pierre Foundation estimated that there were around 38 million empty homes in Europe, one in six residential properties.[28] Information about vacant dwellings does not exist in all states, and where it exists, there are discrepancies as regards the definition of emptiness. For example, in some countries, seasonal or holiday homes are considered vacant for statistical purposes, while in others they are not. Despite the differences, data compiled by the Organisation for Economic Co-operation and Development (OECD) in 2024 showed that a non-negligible number of residential properties are empty – excluding seasonal and holiday – in many advanced economies: between 10% and 15% in Spain, Japan and Portugal, and between 5% and 10% in Colombia, Austria, the United States, France, Ireland, Canada, Denmark and England.[29]

There will always be a variable but relatively small percentage of baseline frictional vacancy as a result of the natural and flexible movement of people in and out of residential properties. However, as a general rule, a social right to property would mean that there should not be empty dwellings, not at least in

[26] Michel Vols, European Law and Evictions: Property, Proportionality and Vulnerable People, 27(4) *European Review of Private Law* 719 (2019), at 751–752.

[27] Koldo Casla, Unpredictable and damaging? A human rights case for the proportionality assessment of evictions in the private rental sector, 2022(3) *European Human Rights Law Review* 253 (2022), at 272.

[28] FEANTSA and Fondation Abbé Pierre, 'Filling Vacancies: Vacant Real Estate: Seizing the Opportunity to Find Affordable Housing Solutions in Europe' (FEANTSA and Fondation Abbé Pierre, 2016).

[29] OECD, 'OECD Affordable Housing Database – indicator HM1.1. Housing stock and construction' (OECD, last update from April 2024), 3. https://oe.cd/ahd

towns or neighbourhoods where there is a high need for housing. Houses exist, first and foremost, so people can live in them. Governments must be able to show that they are putting in place reasonable legislative and policy measures to mobilise all strategic resources, including privately owned properties, to ensure access to adequate housing for everyone.

This position stems from the two principles articulated in the proposal for a social right to property presented in Chapter 5. According to one of the principles (section 5.2), privately owned assets – like residential properties – are to be treated as part of the maximum of available resources that public authorities must make use of in order to realise social rights like adequate housing. Contributing to the fulfilment of social rights is a social function of private property, and this includes residential ownership. This needs to be nuanced in light of another principle presented therein, namely, that not all forms of property-holding are the same (section 5.5). Consequently, it will be necessary to make a distinction between main residences, which serve the function of providing a roof over the owner's head and their family, and immovable property owned for investment purposes.

The second of the relevant principles (Chapter 5, section 5.3) states that a social right to property imposes limits to *jus abutendi* by not providing coverage to the destruction of the good or to the type of use that contradicts the social function of property in line with the social rights proclaimed in international and national laws. Using an asset in a way that is directly contrary to its social function – for example, keeping a residential property empty for a long period of time in an area of high demand with the sole goal of speculating with its value – is tantamount to destroying the asset at least temporarily – in the sense that it is as if it did not exist. Certainly, in this example, the dwelling is not being destroyed in the literal sense of the word. The physical space will continue in existence. But the dwelling is a special sort of good with a particular purpose: to provide people a place to live in. The financial asset made of brick and mortar may persist in the future, but the need for a home must be satisfied here and now. Whether the property contributes to meet this concrete function ought to be examined when ascertaining compliance with the social norm of residential property.

This has implications for state action. Satisfying the right to adequate housing requires public investment in social housing. But public housing is generally insufficient, especially in countries with a small stock. It becomes necessary to intervene in the private sector, not only because owners, particularly those in possession of multiple properties, have broader shoulders, but also because they have benefited from legislation, public policies and general conditions that allowed them to acquire and concentrate wealth.

As stated in Chapter 3, section 3.2, following the South African Constitutional Court's words, an 'interference with the use, enjoyment or exploitation of

private property' would only be 'arbitrary' when the state 'does not provide sufficient reason for the particular deprivation in question or is procedurally unfair',[30] or where the interference or limitation is so substantial 'that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society'.[31] Understood as such, a social right to property would mean that a public interference with the use or disposition of property against its social function need not be arbitrary. In fact, such an interference may become necessary, and potentially proportionate, in certain circumstances: for example, if it serves the purpose of reversing the injustices of unfair land distribution, as with South Africa's Expropriation Act 2024 – inclusive of nil compensation when the land is unused or abandoned, or when its value is lower than the state's investment or subsidy (Chapter 3, section 3.2) – or satisfying a social right like adequate housing, as in the case of some Spanish regions' 'expropriation of use' ('*expropiación de uso*') of empty residential properties out of the rental market (Chapter 3, section 3.3).

The financialisation of housing makes keeping properties empty possible, even sensible, from a mere financial standpoint. In her 2017 report, then UN Special Rapporteur on Adequate Housing, Leilani Farha, defined the phenomenon of the financialisation of housing as the 'structural changes in housing and financial markets and global investment whereby housing is treated as a commodity, a means of accumulating wealth and often as security for financial instruments that are traded and sold on global markets'.[32] Sometime later, the Independent Expert on Foreign Debt and Human Rights, Juan Pablo Bohoslavsky, issued a report to document the causality between the financialisation of housing and households' over-indebtedness.[33] Financialisation makes 'dehumanized housing and speculative vacancies' possible, wrote Davy.[34] As a result of the financialisation of housing, investors may choose to keep properties deliberately empty and still make money out of them; in fact, in certain

[30] *First National Bank of SA Limited t/a Wesbank v. Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v. Minister of Finance* (CCT19/01) [2002] ZACC 5; 2002 (4) SA 768; 2002 (7) BCLR 702 (16 May 2002), para. 57, 100.

[31] *Mkontwana v. Nelson Mandela Metropolitan Municipality* (CCT 57/03) [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) (6 October 2004), para 32.

[32] Special Rapporteur on Adequate Housing, Report on the financialization of housing, UN Doc. A/HRC/34/51 (18 January 2017), para. 1.

[33] Independent Expert on Foreign Debt and Human Rights, Private Debt and Human Rights UN Doc. A/HRC/43/45 (3 January 2020), para. 82.

[34] Benjamin Davy, 'Dehumanized housing' and the ideology of property as a social function, 19(1) *Planning Theory* 38 (2020), 45.

circumstances, empty properties may be more valuable than occupied ones, since owners would avoid the inconvenience of having to deal with tenants.

Prohibiting or making it extremely difficult to keep properties deliberately empty for longer than necessary in areas of high demand would be a valuable contribution of human rights law to stop the financialisation of housing. In fact, this prohibition – preceded strategically by forceful discouragement – would be a precondition of other necessary measures, such as extra obligations for corporate landlords and owners of multiple properties and rent controls (developed in Chapter 5, sections 5.3 and 5.4). It is sometimes argued that these policies are ill-advised because they frighten resourceful investors away; investors may prefer to sell their properties or simply keep them out of the private market. In relation to the first point – that investors may get rid of their immovable property investments – this may not be the worst thing; in fact, sellers' eagerness may contribute to diminish or at least contain house prices. In relation to the second point – that more obligations, such as rent freezes, may push corporate and non-corporate large landlords to hollow out their properties – if residential properties are not meant to be kept empty, that hypothesis would not be possible to start with, or it would be very expensive to do so. This sort of behaviour would not be protected by the right to property when recognised and regulated as a social right.

Governments may resort to multiple tools to deliver on the general principle that residential properties must not remain empty. This is an empirical question, and it would need to be tested in different scenarios. Legislators and policy-makers in multiple jurisdictions have explored various options. One example is the social rent intermediation, in place in France since the early 1990s,[35] and indeed in the Basque Country and Catalonia in Spain for several years as well. The state brings tenants and private landlords together, and tenants pay an affordable rate, which is complemented by public authorities. While the addition will normally not be as high as the market rate, landlords benefit from the state's collateral, and the authorities would also respond if the property were damaged. Another option that an executive may want to explore and test is the fiscal incentive in the form of tax credits and deductions. Gradually moving from carrots to sticks, a stricter policy tool would be the imposition of vacancy taxes, or empty home premiums, as in the case of the UK.[36] Fines and penalties, like those in various regional laws on the right to housing adopted in Spain in the 2010s, can serve an analogous role. The expropriation of use, also envisioned in some Spanish regional laws, would

[35] Sara Saidi, 'Can rental intermediation improve the right to housing in France?', *Equal Times* (26 May 2021).

[36] Mark Sanford, 'Why am I paying an empty homes premium on my council tax?', *House of Commons Library* (4 July 2023).

take the intervention a step further, but still reasonably under the parameters of what is reasonable. As covered in Chapter 3, section 3.3, under the Spanish temporary expropriation, corporate investors are required to open their properties to tenants in an economically vulnerable position, for which they are entitled to compensation. Spain's model is not unique. In the UK, 66 Empty Dwelling Management Orders were approved by the competent first-tier residential property tribunal between 2004 and 2012 – the UK Government does not hold or has not disclosed more recent data.[37] Full expropriation, with the corresponding compensation, can also be fitting, and has been on the table in Berlin since the 2021 referendum to expropriate corporate landlords,[38] and it is also being considered from a sustainability standpoint in the Scottish land reform (for both, see Chapter 3, section 3.1). Particularly in tourist destinations, it would be important to regulate short-term letting as well, as otherwise investors may move away from more tightly controlled longer tenancies towards more profitable seasonal and holiday rentals. This can have negative implications for the general affordability of housing for the local population, which is, after all, the reason why intervening in the private rented sector was necessary in the first place. On this matter, in March 2025, Spain's Constitutional Court ruled that Catalonia's regulation of short-term seasonal rentals, which includes public licences limited in number – per population – and time, was compliant with the right to property in light of its social function: 'the possibility of putting a dwelling aside for short-term seasonal rent is not one of the prerogatives without which the right to property over a residential unit becomes unrecognizable'.[39]

There is no silver bullet, and public authorities would need to identify the tools best suited to their particular contexts, testing and incrementing the measures as necessary. The bottom line remains, in any case, that all those policies – and more – would pass the threshold of property as a social right. Governments would be expected, first, to take measures to realise the right to adequate housing; second, to ensure that those measures are reasonable, including through intervention in the private sector when required, and prioritising those at greater need of support; and third, to review the policies

[37] House of Lords, Debate of 28 November 2012, Column WA57; House of Lords, written question on Empty Dwelling Management Order, UIN HL4462, 8 January 2018; Responses to the author's FOI requests from the Ministry of Housing, Communities and Local Government on 6 February 2025, and the Ministry of Justice on 6 March 2025.

[38] Philipp Stehr, Expropriation as a measure of corporate reform: Learning from the Berlin initiative, 24(1) *European Journal of Political Theory* 70 (2025).

[39] Constitutional Court of Spain, Judgment 64/2025 (13 March 2025), Legal Foundation No. 4.

continuously to ensure the progressive realisation of the right to adequate housing and other social rights.[40]

6.3 EXTRA CONDITIONS, RESTRICTIONS AND OBLIGATIONS FOR LARGE AND CORPORATE LANDLORDS

The fifth principle of the proposal presented in Chapter 5 is that not all holdings and amounts of property are the same and deserve the same consideration and protection from human rights law (section 5.5). Value-wise, there are important differences between property as capital investment and the property of the American Declaration of the Rights and Duties of Man, that which 'meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home'.[41] Under this proposal for a social right to property, the personal and familial value of the protection of the home trumps the instrumental value of an immovable property investment; a home is not fungible.[42] The principle of social function mandates that members of a community must show responsibilities to one another. Those responsibilities are a function of power, meaning that those who own more can do more, and therefore owe more. In the case of the private rented sector, this means that large corporate landlords or rentier capitalists should not be treated as if they were small landlords of modest means. They must face extra conditions and obligations. One of the measures could be (as argued in section 5.1) to prevent foreign investors and transnational corporations from purchasing land and residential properties in areas of high demand, where the flow of foreign capital can make housing unaffordable for the local population.

The notion that landlords are people in a humble financial situation who need the rental income to get by is an ideology-driven myth. Examining the Australian case, Hulse, Reynolds and Martin call it 'the everyman archetype', that is, a prevalent politico-cultural discourse that depicts landlords as enterprising and self-reliant 'mum and dad investors' who, far from warranting criticism, deserve society's appreciation.[43] Their investigation shows that, despite

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[40] Similarly, *Mazibuko and Others v. City of Johannesburg and Others* (CCT 39/09) [2009] ZACC 28; 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC) (8 October 2009), para. 67.

[41] American Declaration of the Rights and Duties of Man, Article 23 (2 May 1948).

[42] Margaret J. Radin, Property and Personhood, 34 *Stanford Law Review* 957 (1982), at 991–996.

[43] Kath Hulse, Margaret Reynolds and Chris Martin, The Everyman archetype: discursive reframing of private landlords in the financialization of rental

the fable, Australian landlords are far from ordinary folk; by and large, they are in fact a minority of high-income investors.[44] Hochstenbach observes an analogous discursive strategy in the Dutch context, while his research shows that not only landlords with larger house portfolios, but also smaller-scale landlords, belong to the upper economic section of society.[45] A similar dynamic can be found in Spain, where the median of landlords' earnings is twice as high as that of tenants. As covered in Chapter 3, section 3.3, 60% of the rental market in the city of Barcelona is captured by landlords with more than one property to rent out, and just over 1% of Barcelona's landlords control 24.1% of the market. The number of large property-holders – owning 10 properties or more – went up by 20% between 2014 and 2024 in Spain as a whole.[46]

It was discussed in Chapter 3, section 3.3, how Spanish regional authorities since the 2010s, and the Spanish Government and Parliament in the early 2020s, reformed their housing legislation to establish that ownership must serve the social function of satisfying a housing need, and houses kept out of the market did not meet the legally recognised essential content of residential property. They also imposed extra obligations on corporate landlords and landlords owning multiple properties – the number may vary, but often five or more units. Principally, this includes the mentioned expropriation of use, the requirement of a proportionality test in the regulation of court procedures concerning evictions, the expectation that corporations and large landlords ought to offer an affordable rent to economically vulnerable tenants before seeking an eviction, and the mandate to take effective action against bullish practices intended to intimidate low-income tenants with anti-social behaviour. In addition, the regional authorities in the Canary Islands and the Balearic Islands are reportedly considering taking action to prevent non-residing foreigners from purchasing residential properties and/or setting limits to the number of cars

housing, 35(6) *Housing Studies* 981 (2020).

44 Ibid, 992–996.

45 Cody Hochstenbach, Landlord Elites on the Dutch Housing Market: Private Landlordism, Class, and Social Inequality, 98(4) *Economic Geography* 327 (2022).

46 Javier Gil, Lorenzo Vidal and Miguel A. Martínez, *¿Cómo afectará el control de precio de los alquileres a los caseros?* (IDRA, 2023); Dani Domínguez, 'El número de grandes propietarios aumenta un 20% en la última década', *La Marea* (16 September 2024); Pablo Pérez Ruiz, Jaime Palomera Zaidel and Marta Ill Raga, *De propietarios a inquilinos: Informe sobre la creciente desigualdad en el acceso a la propiedad* (IDRA, 2024); Pablo Pérez Ruiz, Jaime Palomera Zaidel and Marta Ill Raga, *Vivir de alquiler: inseguridad garantizada por ley* (IDRA, 2024).

brought over to the islands.[47] Both archipelagos are major tourist hotspots, and both are currently governed by right-wing parties.

Another interesting example is Denmark. Corporations own more than half of private dwellings in the country, but the proportion goes up to two-thirds of residential units in Copenhagen, and three-quarters for buildings built since 1990. At the same time, the private rented sector has historically been tightly regulated to protect tenants from unreasonable housing costs.[48] In 2020, the Danish Government took action to counteract the growing influence of Blackstone and other transnational corporate investors in Copenhagen, who were deemed responsible for worsening habitability conditions and a spike in rents. Among other things, a new piece of legislation, informally known as 'the Blackstone law', increased the energy-efficiency requirements, required prior local authority certification for house improvements, prevented landlords from paying tenants to vacate the premises, and prohibited landlords from increasing rents for several years after purchasing a building for investment purposes.[49] As reported in *The Guardian* in 2022, 'the Blackstone law is one of the few successful cases of a country taking a stand against the transformation of homes into a resource for the finance industry'.[50]

The South African Constitutional Court ruled in *City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties 39 (Pty) Ltd and Another* (2011) that a private landowner can be expected to have to wait longer to repossess a property when they purchased it for commercial purposes, as opposed to residential purposes, and when they knew that the property was occupied, even if unlawfully.[51] Spain's Constitutional Court observed that the use of housing as an investment by legal entities can conflict with the right to housing of individual tenants, and this clash can reasonably justify imposing different burdens on private and corporate landlords and providing different

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[47] Lucía Bohórquez, 'Mallorca plantea limitar la entrada de coches y poner un tope a los de alquiler para frenar la saturación', *El País* (24 October 2024); EFE/Canarias Ahora, 'Canarias quiere usar su condición de RUP para limitar que extranjeros no residentes compren viviendas en las islas', *Eldiario.es* (12 November 2024).

[48] Kath Scanlon, Private Renting in Denmark: Foreign Investors in the Crosshairs, in *Private Renting in the Advanced Economies: Growth and Change in a Financialised World* 161 (Peter A. Kemp, ed., Bristol University Press, 2023).

[49] Ibid, 163–165.

[50] Hettie O'Brien, 'The Blackstone rebellion: how one country took on the world's biggest commercial landlord', *Guardian* (29 September 2022).

[51] *City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties 39 (Pty) Ltd and Another* (CC) [2011] ZACC 33; 2012 (2) BCLR 150 (CC); 2012 (2) SA 104 (CC) (1 December 2011), para. 40.

degrees of protection to their property rights.[52] Both rulings have in common that the purpose of the investment – commercial or residential – and the identity of the investor – corporate or natural person – were considered valid justifications to treat property differently.

The proposition that corporate landlords and landlords owning multiple properties should face additional conditions and obligations is in line with the CESCR's *López Albán* principle, according to which the proportionality test of evictions requires looking not only at the evictee's personal circumstances, but the landlord's as well: 'This inevitably involves making a distinction between properties belonging to individuals who need them as a home, or to provide vital income and properties belonging to financial institutions.'[53] Upholding property rights proportionally would favour prioritising the level of property necessary to preserve a life with dignity, in the language of the 1948 American Declaration on the Rights and Duties of Man.[54] In other words, human rights laws and principles would protect property to the extent that we are dealing with an 'asset of resilience' – in Fox O'Mahony and Roark's theoretical framework – helpful to mitigate the consequences of economic vulnerability.[55]

The proposition is also consistent with established international human rights case law, according to which the right to property can be restricted if it is proportionate and necessary for the general interest.[56] The proportionality principle is a common feature in comparative constitutional property law.[57]

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[52] Constitutional Court of Spain, Judgment 16/2018 (22 February 2018), Legal Foundations No. 10 and 17.

[53] CESCR, *López Albán v. Spain*, Communication No. 37/2018, UN Doc. E/C.12/66/D/37/2018 (2019), para. 11.5.

[54] American Declaration of the Rights and Duties of Man, Article 23 (2 May 1948).

[55] Lorna Fox O'Mahony and Marc Roark, Property as an Asset of Resilience: Rethinking Ownership, Communities and Exclusion Through the Register of Resilience, 36(4) *International Journal for the Semiotics of Law* 1477 (2023).

[56] ECtHR, *James and Others v. UK* [Plenary], Application No. 8793/79 (21 February 1986), para. 47; ECtHR, *Yordanova and Others v. Bulgaria*, Application No. 25446/06 (24 April 2012), para. 127; IACtHR, *Yakye Axa Indigenous Community v. Paraguay*, Merits, Reparations and Costs, Judgment (17 June 2005), para. 145; ACHPR, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, Communication No. 276/2003, Decision (2010), para. 211–214; ACtHPR, *ACHPR v. Kenya*, Application No. 6/2012, Judgment (26 May 2017), para. 129.

[57] Gregory Alexander, *The Global Debate over Constitutional Property: Lessons from American Takings Jurisprudence* (University of Chicago Press, 2006), chapter 5; Rachael Walsh, *Property Rights and Social Justice: Progressive Property in Action* (Cambridge University Press, 2021), 107–108, chapter 7.

A proportionality assessment need not be a mere cost–benefit analysis; it is a qualitative balance exercise based on the equality of rights and the equal moral worth of rights-holders.[58] Such a qualitative assessment would consider, among other things, whether a core or a peripheral aspect of a certain right is at risk, providing more protection in the former case than in the latter.[59] Part of the equation also entails interrogating the general interest that is meant to be served with the intervention; or to put it differently, whether the means are *reasonably* capable of achieving the goals. Such ultimate goal would include the promotion of the general well-being of the population, especially disadvantaged and marginalised individuals and groups, and people facing situations of risk.[60] This approach echoes Katharine Young's and Sandra Liebenberg's calls for a more substantive engagement with both proportionality and reasonableness – 'proportionality-inflected reasonableness' – in the analysis of public policy concerning social rights.[61] On the basis of the democratic and equality-grounded values that a free and fair society is supposed to be built upon, it is not fitting to be equally deferential to all holdings of property.

6.4 CAPPING RENT

As argued in Chapter 5, section 5.5, human rights should protect a minimum level of property, prioritising personal property and property that meets the needs of a life with dignity. Above the substantive core content of the social right to property, public authorities can intervene in the private sector and even interfere with the enjoyment of private property if it is necessary and

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[58] Samantha Besson, Human Rights in Relation: A Critical Reading of the ECtHR's Approach to Conflicts of Rights, in *When Human Rights Clash at the European Court of Human Rights: Conflict or Harmony?* 23 (Stijn Smet and Eva Brems, eds, Oxford University Press, 2017), at 34.

[59] Stijn Smet, Conflicts between Human Rights and the ECtHR: Towards a Structured Balancing Test, in *When Human Rights Clash at the European Court of Human Rights: Conflict or Harmony?* 38 (Stijn Smet and Eva Brems, eds, Oxford University Press, 2017), at 47.

[60] CESCR, An evaluation of the obligation to take steps to the 'maximum of available resources' under an Optional Protocol to the Covenant: Statement, UN Doc. E/C.12/2007/1 (21 September 2007), para. 8(f); ECtHR, *Ghailan and Others v. Spain*, Application No. 36366/14 (23 March 2021), para. 60 and 78.

[61] Katharine G. Young, Proportionality, Reasonableness, and Economic and Social Rights, in *Proportionality: New Frontiers, New Challenges* 221 (Vicki C. Jackson and Mark Tushnet, eds. Cambridge University Press, 2017) at 268–271; Sandra Liebenberg, Reasonableness Review, in *The Oxford Handbook of Economic and Social Rights* (Malcolm Langford and Katharine G. Young, eds, Oxford University Press, 2022).

proportionate to do so. To enhance security of tenure and the affordability of housing, rent control mechanisms would not only be potentially admissible forms of public incursion in a private domain. Public authorities should actively consider them as potentially effective policies that can contribute to delivering on both the right to adequate housing and the social right to property.

Both the UN Special Rapporteur on Adequate Housing and the Committee on Economic, Social and Cultural Rights have on occasion called on states to implement rent caps; they have done so in reports concerning, at least, Argentina, Egypt, France, Italy, Portugal and Rwanda.[62] In his 2020 report on Spain, the UN Special Rapporteur on Extreme Poverty and Human Rights, Philip Alston, recommended that the authorities give due consideration to rent control. The Special Rapporteur wrote: 'The experience in Paris, Berlin and an increasing number of cities in the United States of America indicates that rent stabilization schemes can work well, provided they are carefully designed to avoid the clumsiness and inflexibility of schemes devised decades ago in very different circumstances.'[63]

From the narrow perspective of Article 1 Protocol 1 ECHR – which does not call for specific measures, but accepts some modest forms of control of the use of property[64] – the European Court of Human Rights has made it clear that rent caps can be compatible with individual private property. For the European

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[62] CESCR, Concluding Observations: Rwanda, UN Doc. E/C.12/RWA/CO/2–4 (10 June 2013), para. 23; CESCR, Concluding Observations: Italy, UN Doc. E/C.12/ITA/CO/5 (28 October 2015), para. 41(a); CESCR, Concluding Observations: France, UN Doc. E/C.12/FRA/CO/4 (13 July 2016), para. 37(f); Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context, Report: Mission to Argentina, UN Doc. A/HRC/19/53/Add.1 (21 December 2011), para. 62; Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context, Report: Mission to Portugal, UN Doc. A/HRC/34/51/Add.2 (28 February 2017), para. 90(b); Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context, Report: Mission to Egypt, UN Doc. A/HRC/40/61/Add.2 (3 October 2019), para. 98(d); Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context, Report: Mission to France, A/HRC/43/43/Add.2 (28 August 2020), para. 92(g)(ii).

[63] Special Rapporteur on Extreme Poverty and Human Rights, Report: Mission to Spain, UN Doc. A/HRC/44/40/Add.2 (21 April 2020), para. 42.

[64] Council of Europe, Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 1(2) (20 March 1952), ETS No. 9.

Court, rent controls in the private sector are not necessarily contrary to the right to property when 'the means chosen [are] suited to achieving the legitimate aim pursued'.[65] Rent controls would not be accepted by the European Court in all circumstances, though. For example, in *Lindheim and Others v. Norway* (2012), the policy did not meet the Court's threshold of proportionality because the lease was to be extended indefinitely with no possibility of rent increase, and only tenants would be able to put an end to the contractual relationship.[66] At the same time, the European Court of Human Rights has expressed reservations about controlled rents as a matter of general policy. In *Hutten-Czapska v. Poland* (2006), the first major case concerning the protection of tenants living in properties privatised in post-communist Eastern Europe, the European Court's Grand Chamber acknowledged that public authorities have a margin of appreciation in relation to socioeconomic policies, but also voiced concerns about the allocation of responsibilities underpinning rent caps:

> The legitimate interests of the community in such situations call for a fair distribution of the social and financial burden involved in the transformation and reform of the country's housing supply. This burden cannot, as in the present case, be placed on one particular social group, however important the interests of the other group or the community as a whole.[67]

The line was reiterated in subsequent cases.[68] Based on this evolving and increasingly sceptical position of the Strasbourg Court, Tom Allen writes that the burden of social policies to protect tenants 'should be spread across taxpayers in general', since 'leaving the cost entirely on landlords may be questionable *under human rights law*' (italics added).[69] That might be so under the currently prevalent interpretation of Protocol 1 ECHR by the European Court of Human Rights, but international human rights law goes further and wider. From a broader human rights perspective inclusive of social rights, one must consider that landlords, as a social class, benefit from a certain politico-economic ideology and matching policies that made their venture possible in the

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65 ECtHR, *Mellacher and Others v. Austria*, Applications No. 10522/83, 11011/84, 11070/84 (19 December 1989), para. 57.

66 ECtHR, *Lindheim and Others v. Norway*, Applications No. 13221/08 and 2139/10 (Judgment of 12 June 2012), para. 128–134.

67 ECtHR, *Hutten-Czapska v. Poland* [GC], Application No. 35014/97 (19 June 2006), para. 225.

68 ECtHR, *Bittó and Others v. Slovakia*, Application No. 30255/09 (28 January 2014), para. 115; ECtHR, *Statileo v. Croatia*, Application No. 12027/10 (10 July 2014), para. 142.

69 Tom Allen, *Parliament, the Constitution, and Property in the United Kingdom* (Hart, 2025), 164.

first place. It is true that, particularly in countries with a meagre welfare state, homeownership and a residential investment can act as a store of resources that provides a financial baseline that can be passed on between members of a family line. However, at the same time, specific public policies favoured homeownership, such as tax credits and overall diminution of the tax pressure for the wealthy, deregulation of the rental market, privatisation of public housing, lack of public investment, etc.[70] This contributed to a realignment of interests and the commodification of housing, treating it as an asset, not a public service or a human right. As observed by Christoph Schmid, through these policies, over the years, governments all over Europe rediscovered the importance of the private rented sector as 'a "low cost" provider of housing'.[71] It was deliberate, and some people benefited from it, while others did not. For example, over 2 million homes were sold by public authorities in England since the introduction of the 'right-to-buy' scheme in 1980; these units were not replaced with new constructions, halving the public housing stock – from 31% of all dwellings in 1980 to 16% in 2023 – and 41% of the homes sold under right-to-buy ended up in the hands of private landlords.[72] The private rented sector allows landlords to absorb the surplus value generated by tenants. It perpetuates a system of wealth extraction, where lower-income households are forced to divert a significant portion of their income towards paying rent, largely benefiting more affluent landlords. Meanwhile, tenants receive none of the benefits that come with rising property values. It is pressing to design a system where renters' financially insecure lives are not means to the end of sustaining somebody's more privileged life.

To be effective and fair, rent stabilisation mechanisms would cap rents, but not freeze them entirely, and they should include transparent and objective criteria to uprate the rents annually in line with inflation. Rent caps can secure a commensurate return for landlords while protecting security of tenure and keeping rental prices within reason. Just like a value-added tax does not kill commerce, and minimum wages do not necessarily increase unemployment, rent controls need not damage the supply of housing.[73] There is some evidence

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[70] Sebastian Kohl, The political economy of homeownership: A comparative analysis of homeownership ideology through party manifestos 18(4) *Socio-Economic Review* 913 (2020).

[71] Christoph Schmid, Introduction, in *Tenancy Law and Housing Policy in Europe* 1 (Christoph Schmid, ed., Edward Elgar, 2018), at 2.

[72] Alex Diner and Hollie Wright, 'Reforming Right to Buy: Options for Preserving and Delivering New Council Homes for the Twenty-First Century', *New Economics Foundation* (2024), 5.

[73] Tom Slater, Rent Control and Housing Justice, 55(114) *Finisterra* 59 (2020), at 66–68.

indicating that strict rent restrictions could have some negative effects on new housing construction, but these unintended consequences could be offset by more social housing and targeted public stimulation of private housing construction.[74] Literature review and comparative research by Gibb, Soaita and Marsh to inform policy discussions in Scotland and Wales showed that there is urgent need for evidence-based policy-making, because existing data about rent controls is insufficiently wide. They also argue that it is important to recognise contextual differences, stepping away from one-size-fits-all solutions, and acknowledge that ideological standpoints have sometimes shaped research design and recommendations, both in favour and against controlled rents.[75] At the end of the day, the question of whether rent caps work is an empirical one that needs to be answered in specific circumstances. I can understand – even share – a dose of scepticism about rent controls if the concern is genuinely about whether the policy would work in practice. An entirely different matter is when the verbalisation of this supposed concern is just a smokescreen to camouflage the overt opposition to any and all policies minimally restricting private property interests. Furthermore, from the perspective of the social right to property, rent controls would be accompanied by policies to prevent or hamper the existence of empty properties – including the regulation of seasonal or holiday residential properties – and by additional conditions, obligations and restrictions for corporate landlords and landlords owning multiple properties (Chapter 5, sections 5.2 and 5.3). Because governments are expected to use 'all appropriate means' to mobilise the maximum of available resources,[76] if they choose not to implement rent stabilisation mechanisms, they must show why these would not be suitable and how alternative policies would be more successful in advancing progressively towards the full satisfaction of the right to adequate housing.

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[74] Konstantin A. Kholodilin and Sebastian Kohl, Do Rent Controls and Other Tenancy Regulations Affect New Construction? Some Answers from Long-Run Historical Evidence, 23(4) *International Journal of Housing Policy* 671 (2023).

[75] Kenneth Gibb, Adriana Mihaela Soaita and Alex Marsh, 'Rent control: A review of evidence base', *UK Collaborative Centre for Housing Evidence* (2022); Kenneth Gibb and Alex Marsh, 'Rent control: principles, practicalities and international experience', *UK Collaborative Centre for Housing Evidence* (2022); Kenneth Gibb and Bob Smith, 'Welsh Government Briefing Paper on Rent Control: Context, Issues and Options', *UK Collaborative Centre for Housing Evidence* (2022); Alex Marsh, Kenneth Gibb and Adriana Mihaela Soaita, Rent regulation: unpacking the debates, 23(4) *International Journal of Housing Policy* 734 (2023).

[76] General Assembly Resolution 217 (III) A, Article 25 (10 December 1948); General Assembly Resolution 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, Article 2(1) (16 December 1966).

If one challenges the assumption that residential properties are an ordinary market commodity, rent controls are justifiable based on the importance of private and family life as a matter of rights and the social value of preserving communities' cohesion.[77] One of Léon Duguit's arguments for property as social function was that private property must mobilise the wealth contained therein to serve society. In the context of the early twentieth century, that meant that 'property cannot remain unproductive'.[78] In a similar spirit, his coeval R. H. Tawney distinguished between active, creative, constructive, productive and industrious property, on the one hand, and passive property based on acquisition, exploitation and usurpation, on the other hand; society as a whole benefits from active property, wrote Tawney, but not from the passive one.[79] Regulation in a democratic society ought to account for this critical distinction. In the context of the housing financialisation of the twenty-first century, residential ownership should be property over a good that exists to serve a public function that is at least as important as its private function: even above satisfying an investor's otherwise legitimate private interest, a house exists to give people a place to live in peace, security and freedom.

[77] Margaret J. Radin, Residential Rent Control, 15(4) *Philosophy & Public Affairs* 350 (1986), at 371.

[78] Sheila R. Foster and Daniel Bonilla, The Social Function of Property: A Comparative Perspective, 80(3) *Fordham Law Review* 1003 (2011), at 1007.

[79] R. H. Tawney, *The Acquisitive Society* (Harcourt, Brace and Company, 1920), 62–63. (Via Gutenberg.org).

7. Private provision of public services and the social right to property

All over the world, private actors are involved in the direct and indirect provision of essential public services. By *public services* I mean those that are necessary for the satisfaction of social rights for the general interest of the population. This includes healthcare and education, as well as water, electricity, gas and other forms of energy. Insofar as social rights are increasingly reliant on online access and familiarity with technological gadgets, there is an argument for the recognition of the internet as a public service as well.[1] The concept of public services includes, for this chapter's purposes, what under EU law is known as 'services of general economic interest', meaning, commercial services that deliver public goods that would not be supplied under the same conditions – of quality, quantity, safety, affordability, etc – by the market without public intervention.[2] The EU and its member states are expected to 'take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions'.[3] The EU formally recognises 'the essential role and the wide discretion of national, regional and local authorities in providing, com-

[1] Oreste Pollicino, The Right to Internet Access: Quid Iuris?, in *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric* 263 (Andreas von Arnauld, Kerstin von der Decken and Mart Susi, eds, Cambridge University Press, 2020); Başak Çalı, The Case for the Right to Meaningful Access to the Internet as a Human Right in International Law, in *The Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric* 276 (Andreas von Arnauld, Kerstin von der Decken and Mart Susi, eds, Cambridge University Press, 2020); Merten Reglitz, The socio-economic argument for the human right to internet access, 22(4) *Politics, Philosophy & Economics* 441 (2023).

[2] European Commission, A Quality Framework for Services of General Interest in Europe, EU Doc. COM(2011) 900 final (20 December 2011), 3. Consolidated Version of the Treaty on the Functioning of the European Union (Official Journal of the European Union C 326/47, 2012), Article 106.

[3] Consolidated Version of the Treaty on the Functioning of the European Union (Official Journal of the European Union C 326/47, 2012), Article 14.

missioning and organising services of general economic interest as closely as possible to the needs of the users'.[4] Services of general economic interest can include electricity and gas, postal services, transport or banking, for example. In Spain, various regional laws on housing – in the Region of Valencia, Basque Country, Catalonia, Navarre, Balearic Islands – and the 2023 Spanish Law on the Right to Housing recognise certain activities related to housing as 'services of general interest', such as the construction and maintenance of public housing, energy efficiency, and ensuring habitability standards; this framing of housing as a service of general interest has an effect on the expectation that housing ought to be regulated and funded publicly (see Chapter 3, section 3.3).[5] The definition of services of general interest in relation to housing could be broader, so as to hold both public and private actors to account in relation to the satisfaction of adequate housing in the public and private sectors.

Private providers of public services may *own* the resources with which they deliver those services, but they also *owe* their position to public authorities and to society at large. They must comply with certain public obligations. This chapter applies the social right to property to deal with this tension. First, it explores the extent to which human rights laws and principles may constrain public authorities' ability to privatise public services. Many of the private providers of public services are in effect transnational corporations; hence, the second part of the chapter looks at the interaction between international human rights law (IHRL) and international investment law. The third, fourth and final parts of the chapter focus on two specific public services that are regularly provided by private actors: transport and energy.

7.1 HUMAN RIGHTS LIMITS OF PRIVATISATION

'The idea of a privatized state sounds like a contradiction. Yet it is the state of contradiction in which we currently live,' reflects Chiara Cordelli in the introduction of *The Privatized State* (2020).[6] The privatisation of public companies and public services has been an omnipresent phenomenon of the neo-

[4] Protocol No. 26 on Services of General Interest, Consolidated Version of the Treaty on the Functioning of the European Union (Official Journal of the European Union C 326/47, 2012), Article 1.

[5] Law 12/2023, of 24 May, on the Right to Housing (BOE official gazette No. 124/2023); Natalia Paleo Mosquera and Andrei Quintiá Pastrana, Las políticas de vivienda desde una perspectiva multinivel: un análisis comparado de la legislación autonómica, in *Políticas y derecho a la vivienda. Gente sin casa y casas sin gente* 309 (Natalia Paleo Mosquera, ed., Tirant lo Blanch, 2020), at 336.

[6] Chiara Cordelli, *The Privatized State* (Princeton University Press, 2020), 1.

liberal political economy, where the role of the state becomes to facilitate an institutional framework to release entrepreneurial freedoms through private property rights, free markets and free trade.[7] When it comes to the provision of essential services to the satisfaction of public welfare and social rights, the neoliberal agenda includes the replacement of state functions with private actors driven by the rules of the market.

Traditionally, international human rights law in relation to social rights has been agnostic about economic systems. In General Comment No. 3 (1990), on the nature of obligations derived from the International Covenant on Economic, Social and Cultural Rights (ICESCR), the UN Committee on Economic, Social and Cultural Rights (CESCR) stated:

> The Covenant is neutral and its principles cannot accurately be described as being predicated exclusively upon the need for, or the desirability of a socialist or a capitalist system, or a mixed, centrally planned, or laissez-faire economy, or upon any other particular approach. In this regard, the Committee reaffirms that the rights recognized in the Covenant are susceptible of realization within the context of a wide variety of economic and political systems, provided only that the interdependence and indivisibility of the two sets of human rights… is recognized and reflected in the system in question.[8]

This is despite the fact that, by then, in the early 1990s, governments all around the world had been implementing neoliberal policies for at least a decade, if not more, and the International Monetary Fund and the World Bank had pushed the so-called Washington Consensus to prescribe trade and finance liberalisation policies, privatisation, and strict limitations on public deficits in the form of structural adjustments.

It was when the financial and economic crisis and the austerity that followed reached the shores of Europe, after 2007–08, that international human rights bodies began to look more seriously at the compatibility of rigid fiscal and monetary constraints with the human rights obligations in relation to work, social security, health, and public services in general. To take a few cases in point: in 2013, the Commissioner for Human Rights of the Council of Europe published a report on the impact of austerity and the economic crisis on the enjoyment of human rights, and the relevant standards applicable; in 2016, the CESCR issued a statement on public debt, austerity and the ICESCR; in 2018, the Independent Expert on Foreign Debt and Human Rights, Juan Pablo Bohoslavsky, launched the Guiding Principles on human rights

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[7] David Harvey, *A Brief History of Neoliberalism* (Oxford University Press, 2005), 2.

[8] CESCR, General Comment No. 3: The Nature of States Parties' Obligations, UN Doc. E/1991/23 (14 December 1990), para. 8.

impact assessments of economic reforms; and also in 2018, the UN Special Rapporteur on Extreme Poverty and Human Rights, Philip Alston, devoted his annual report to privatisation.[9]

In General Comment No. 24 (2017), on state obligations in relation to business activities, the CESCR adopted a new line in relation to privatisation, using phrasing that was more precise than that used up to that point. The Committee's position can be summarised with these key words: acceptance, regulation, accessibility, adequacy, affordability, and accountability. First, the Committee admitted that the privatisation of public services poses 'new challenges' but added that it is 'not per se prohibited by the Covenant, even in areas such as the provision of water or electricity, education or health care where the role of the public sector has traditionally been strong'. Second, the Committee urged states to impose 'strict regulations' and 'public service obligations' on private providers. Third, those obligations would include ensuring the accessibility, adequacy and affordability of the public service in question without discrimination; privatisation should not 'result in excluding certain groups that historically have been marginalized'. And fourth, as a matter of accountability, the Committee calls for active participation of individuals in the assessment of the adequacy of the provision of privatised services.[10]

The CESCR's General Comment No. 24 (2017) builds on positions occasionally expressed before, while not in a coherent and systematic manner.[11] In General Comment No. 15 (2003), on the right to water, the Committee had called for regulation of private provision to ensure the universality of coverage, continuity of the service, affordable prices, independent monitoring, public participation, and penalties for non-compliance.[12] It is well established in

[9] Commissioner for Human Rights, *Safeguarding human rights in times of economic crisis* (Council of Europe, 2013); CESCR, Public debt, austerity measures and the International Covenant on Economic, Social and Cultural Rights: Statement, UN Doc. E/C.12/2016/1 (22 July 2016); Independent Expert on the effects of foreign debt on human rights, Guiding principles on human rights impact assessments of economic reforms, UN Doc. A/HRC/40/57 (19 December 2018); Special Rapporteur on Extreme Poverty and Human Rights, Report on privatization and human rights, UN Doc. A/73/396 (26 September 2018).

[10] CESCR, General Comment No. 24: State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, UN Doc. E/C.12/GC/24 (10 August 2017), para. 21–22.

[11] Aoife Nolan, Privatization and Economic and Social Rights, 40(4) *Human Rights Quarterly* 815 (2018), at 827–841.

[12] CESCR, General Comment No. 15: The Right to Water, UN Doc. E/C.12/2002/11 (20 January 2003), para. 24; Khulekani Moyo and Sandra Liebenberg, The Privatization of Water Services: The Quest for Enhanced Human Rights Accountability, 37(3) *Human Rights Quarterly* 691 (2015), at 695–699.

international human rights law now that states must exercise due diligence to prevent, punish, investigate or redress the harm caused by private actors, including companies.[13] This is particularly important in relation to actions carried out by private actors with 'the acquiescence or connivance of the authorities', as recognised by the European Court of Human Rights.[14] The principle is also applicable when a private actor performs a public function, as in the case of privatised public services. In this respect, the Inter-American Court of Human Rights ruled in *Ximenes-Lopes v. Brazil* (2006) that 'the acts performed by any entity, either public or private, which is empowered to act in a State capacity, may be deemed to be acts for which the State is directly liable, as it happens when services are rendered on behalf of the State'.[15] Along similar lines by the African Commission on Human and Peoples' Rights, the state may be directly liable when a private provider abuses human rights even if 'the State or its agents are not the immediate cause of the violation'.[16]

While a contribution in limiting the scope of privatisation of public services necessary for social rights, General Comment No. 24 (2017) merits questioning from various fronts. For Nolan, in this authoritative document, the CESCR missed the opportunity 'to engage with the issue of privatization in a holistic way', among other reasons, because the state's obligation to protect – from infringement of rights by private actors – does 'all the heavy lifting', while 'the potential of the obligation to fulfill with regard to privatization goes unrealized' in the general comment in question.[17] For Birchall, a focus on the obligation to fulfil social rights should impose a 'duty to protect from profiteering' with harmful practices, including through extractive labour practices, and a

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[13] Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add. 13 (26 May 2004), para. 8; Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, UN Doc. A/HRC/17/31 (21 March 2011), Principle 4.

[14] ECtHR, *Ilaşcu and Others v. Moldova and Russia* [GC], Application No. 48787/99 (8 July 2004), para. 318.

[15] IACtHR, *Ximenes-Lopez v. Brazil*, Merits, Reparations and Costs (4 July 2006), para. 87.

[16] ACHPR, *Haregewoin Gabre-Selassie and IHRDA (on behalf of former Dergue Officials/Ethiopia)*, Communication No. 301/05, Decision (October-November 2011), para. 130.

[17] Aoife Nolan, Privatization and Economic and Social Rights, 40(4) *Human Rights Quarterly* 815 (2018), at 854–855.

'duty to fulfil through market regulation'.[18] The decision to privatise a public service simply cannot result in a back-door unilateral relinquishment of the state's obligation to take all appropriate measures to advance progressively towards the full satisfaction of social rights. Like Nolan and Birchall, Nowak also called for an analysis of privatisation from the perspective of the state's obligation to fulfil and to not incur in retrogressive measures.[19] Cordelli takes a radically democratic approach. For her, the excessive privatisation of public functions dangerously diminishes the role of the state – and its democratically accountable bodies – in making decisions about the common good. Even if privatisation could facilitate the achievement of desirable goals and do so more efficiently – conditions that one should not take as a given in the first place – Cordelli argues that there would be vital non-instrumental reasons linked to public control, democracy and accountability, to object to the privatisation of public services.[20] Mégret articulates an even more primordial concern. It is not about democracy, but about the state itself. Some functions are 'inherently sovereign' in international law. For example, outsourcing law-making would be considered by most as an internal contradiction, because if a state exists for one reason, that reason must be writing the rules. If there are inherently sovereign functions in international law, since international law proclaims obligations to respect, protect and fulfil social rights, then it becomes necessary to reflect carefully about the extent to which the necessary actions to meet those obligations can be subcontracted to private actors in part or at all. [21]

One could even argue that the goods and services to deliver on the promise of social rights ought to be not only regulated and monitored but also provided directly by public bodies. That is the position taken by the African Commission on Human and Peoples' Rights (ACHPR) in its General Comment No. 7 on the

[18] David Birchall, Reconstructing State Obligations to Protect and Fulfil Socio-Economic Rights in the Era of Marketisation, 71(1) *International and Comparative Law Quarterly* 227 (2022), at 229.

[19] Manfred Nowak, *Human Rights or Global Capitalism: The Limits of Privatization* (University of Pennsylvania Press, 2017), 168. See also: Adam McBeth, Privatising Human Rights: What Happens to the State's Human Rights Duties When Services Are Privatised, 5(1) *Melbourne Journal of International Law* 133 (2004); Koen De Feyter and Felipe Gómez Isa (eds), *Privatisation and Human Rights in the Age of Globalisation* (Intersentia, 2005).

[20] Chiara Cordelli, *The Privatized State* (Princeton University Press, 2020), 21–22.

[21] Frédéric Mégret, Are There 'Inherently Sovereign Functions' in International Law?, 115(3) *American Journal of International Law* 452 (2021), at 484–490.

private provision of social services (2022).[22] Private providers must be tightly regulated, but society at large should interrogate the value and significance of externalising social services to begin with. The principle that social rights should, as a general rule, be delivered by bodies accountable to the public is certainly not alien to the discourse of social rights. It is the starting point in relation to the right to education. States are not only required to make education available without discrimination and, in some levels, free to all; they must also 'actively pursue' the 'development of a system of schools at all levels', according to the ICESCR.[23] That is why the CESCR observed that 'it is clear that article 13 regards the state as having principal responsibility of direct provision of education in most circumstances'.[24] In this spirit, the former Special Rapporteur on the Right to Education, Kishore Singh, called on governments to mobilise the maximum of national resources for education 'rather than relying on private financial support for education through public-private partnerships'.[25] It is true that international human rights law recognises the liberty of parents to choose the religious and moral education they want for their children, and this may include opting for institutions outside the public system.[26] But parents' choices do not create a general obligation on the state to fund private institutions; if a state does provide funding to private schools, it must do so without incurring linguistic, religious, or any other kind of discrimination.[27] While the state must permit private education, it is not required to pay for it, and in fact, public authorities should not have *carte blanche* to fund private education with public resources either – through tax breaks, charitable status, subsidies, or favourable contractual terms, for example. As observed by Fredman, 'where public funding of private providers diverts funding from public schools, thereby making quality education less accessible for some chil-

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[22] ACHPR, General Comment 7: State obligations under the African Charter on Human and Peoples' Rights in the context of private provision of social services (28 July 2022), para. 36.

[23] General Assembly Resolution 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, Article 13(2) (16 December 1966).

[24] CESCR, General Comment No. 13: The Right to Education, UN Doc. E/C.12/1999/10 (8 December 1999), para. 48.

[25] Special Rapporteur on the Right to Education, Report on public-private partnerships, UN Doc. A/70/342 (26 August 2015), para. 49.

[26] General Assembly Resolution 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, Article 13(3) (16 December 1966); General Assembly Resolution 2200A (XXI), International Covenant on Civil and Political Rights, Article 18(4) (16 December 1966).

[27] CESCR, General Comment No. 13: The Right to Education, UN Doc. E/C.12/1999/10 (8 December 1999), para. 54.

dren… it is very likely to infringe the State's duties to respect, protect, and fulfil the right to education'.[28] *De lege ferenda*, these general observations are broadly applicable to housing, social security, healthcare, and social rights at large. The mentioned ACHPR's General Comment No. 7, on the private provision of social services (2022), sets a valuable reference in this regard:

> In this General Comment, the term "public" is less concerned with the public nature of the entity delivering the services, that generally is the State, than with the practical modalities of *how* the service is delivered, and to what standards the service provider is held to account. In this understanding, public provision of social services is distinctive in that it allows for the equal and democratic involvement of all members of the community or society in their design, organisation, governance, financing, delivery and monitoring of social services, in the exclusive pursuit of the public interest. As a result, publicly delivered social services must be able to take a long-term perspective and must be democratically accountable to the public, as opposed to commercial actors and their shareholders and investors which typically respond to a range of private interests.[29]

Further research is necessary within the academic and practitioner communities to delimit the privatisation of public services necessary for the satisfaction of social rights. This research agenda requires elaborating on the substantive obligations and the corresponding institutional mechanisms of the state to fulfil social rights even when delivery has been assigned to private actors. More broadly, it is imperative to reflect critically about the implications of privatisation for democratic accountability and decision-making. This requires addressing fundamental questions about the state's inherently sovereign functions in relation to general welfare, substantive equality and an adequate standard of living conditions for everyone.

7.2 SOME PRIVATE ACTORS ARE NOT LOCAL: INTERNATIONAL INVESTMENT AND THE IDEA OF PROPERTY

Susan Strange wrote in the early 1990s that major structural changes were taking place in global affairs, whereby governments were expected to bargain with a burgeoning number of influential transnational corporations that were

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[28] Sandra Fredman, State funding of private education: the role of human rights, in *Realizing the Abidjan Principles on the Right to Education* 104 (Frank Adamson, Sylvain Aubry, Mireille de Koning and Delphine Dorsi, eds, Edward Elgar, 2021), at 129.

[29] ACHPR, General Comment 7: State obligations under the African Charter on Human and Peoples' Rights in the context of private provision of social services (28 July 2022), para. 14.

increasingly shaping international laws, policies and regulations.[30] In fact, as discussed in Chapter 4 when dealing with the critique of colonial property (section 4.2.1), transnational corporations have defined the meaning and practice of property for centuries. So-called company-states thrived in the 1600s and 1700s, and spearheaded European expansionism and colonialism in Asia, Africa and the Americas. They enjoyed sovereign prerogatives far away from the metropolis, including waging war, forging peace, and developing and applying the law, all of which they did while remaining exclusively or primarily accountable to private investors.[31] These first global corporations became key actors in the formation of European empires until well into the nineteenth century, playing a key role in what we may now call international diplomacy, and challenging the supposed separation between public sovereignty and private interests, between *imperium* and *dominium*. Corporations receded from the front row of the global governance of colonialism in the nineteenth century and the beginning of the twentieth century, and that is when international law developed a system of rules to protect corporate investments as 'rights of aliens' – rights that are extended to aliens as long as they own capital but rights that are largely denied to undocumented migrant workers.[32]

With revenues comparable with the gross domestic product of many advanced economies, transnational corporations now hold an extraordinary level of power never seen before. Both Yanis Varoufakis and Steve Bannon – politically worlds apart from one another – call it 'techno-feudalism', a new politico-economic era defined by a prevailing oligarchic elite that owns and manages technological firms, concentrating power and wealth and imposing their dominance over the whole world, with little or no regard for borders.[33] Zuboff would add that these firms also benefit from free supply of labour and raw materials in the form of aggregate behavioural data from billions of users.[34] Not all transnational corporations in this day and age are technological, of course. Others are extractive industries, provide financial services, operate in the hospitality sector, run supply chains… and others provide public services that are essential for the satisfaction of social rights, as well as other

[30] Susan Strange, States, Firms and Diplomacy, 68(1) *International Affairs* 1 (1992).

[31] Andrew Phillips and J. C. Sharman, *Outsourcing Empire: How Company-States Made the Modern World* (Princeton University Press, 2020), 5.

[32] Antony Anghie, Rethinking International Law: A TWAIL Retrospective, 34(1) *European Journal of International Law* 7 (2023), at 87–90.

[33] Yanis Varoufakis, *Technofeudalism: What Killed Capitalism* (Bodley Head, 2023); Ross Douthat, 'Steve Bannon on "Broligarchs" vs. Populism', *New York Times*, Matter of Opinion (31 January 2025).

[34] Shoshana Zuboff, *The Age of Surveillance Capitalism* (Profile Books, 2019).

services of general interest, as in the case of Blackstone with the private rented sector globally (see Chapter 6, section 6.3).

It has been argued that, given the level of staggering inequalities and material power held by corporations, the time has come to impose direct economic, social and cultural rights (ESCR) obligations horizontally on companies, including a positive duty to fulfil these rights.[35] However, for now, international human rights law focuses on calling on businesses to respect human rights, conduct due diligence, and provide for and cooperate in the remediation of adverse impacts they may have caused or contributed to.[36] A social right to property, nonetheless, would invite a reconsideration of the international legal framework in this respect. As discussed in Chapter 5, section 5.5, a human rights-based and social function-based approach to property calls for different degrees of protection of private interests for different types of property-holding – from personal property to property as capital. In addition, as a matter of public sovereignty, states are within their rights to exclude non-resident foreign actors from nationally strategic sectors, or indeed restrict their ability to purchase key resources, including land (Chapter 5, section 5.1). Doing so successfully may prove challenging, however, as transnational actors can easily use nationally domiciled entities and so-called special purpose vehicles – front companies – and piercing the corporate veil may not be legally possible or may not work in practice in a given jurisdiction. Be that as it may, when foreign corporations are involved in the delivery of public services, a social right to property would require interpreting the laws concerning international investment in light of international human rights standards on ESCR. As the ACHPR put it in General Comment No. 7 (2022), 'any commercial actors participating in social service provision does so *voluntarily*, and subject to strict requirements' under the African Charter on Human and Peoples' Rights,[37] and indeed the

[35] Marius Pieterse, Relational Socio-Economic Rights, 25(2) *South African Journal on Human Rights* 198 (2009); Olivier de Schutter, Corporations and Economic, Social, and Cultural Rights, in *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* 193 (Eibe Riedel, Gilles Giacca, and Christophe Golay, eds, Oxford University Press, 2014); Bonita Meyersfeld, Corporations and positive duties to fulfil socio-economic rights: developing international human rights law, 29(2) *International Journal of Human Rights* 240 (2025).

[36] Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, UN Doc. A/HRC/17/31 (21 March 2011).

[37] ACHPR, General Comment 7: State obligations under the African Charter on Human and Peoples' Rights in the context of private provision of social services

rest of the global human rights framework. This requires a 'systemic integration' of international investment law and international human rights law towards a holistic idea of a global right to property, taking into account all relevant rules applicable to seek to harmonise the fragmented international law (Chapter 3, section 3.5).[38]

In its current form, international investment law provides a robust level of protection for foreign investors above and beyond any other system of protection available to private parties under international law. When states face competing international requirements, they often prioritise investment law – over human rights – obligations, as the consequence of not doing so would be much more severe.[39] This approach puts arbitrators' interpretation of investor–state disputes at odds with international human rights standards beyond Article 1 Protocol 1 of the European Convention on Human Rights (ECHR). As shown in Chapter 2, the right to property is not proclaimed in all the international treaties where one might expect to find it; where it is present, international human rights law focuses on marginalised communities and it does not offer a univocal definition of the right, with a more collective and culturally-specific flavour in the Americas and Africa, and a more individualist take in Europe. Yet, Álvarez and Bauder observe that 'an elite of international lawyers in the West' treat international investment law and Protocol 1 ECHR as 'the "international law of property" at the global level',[40] disregarding other human rights standards.

Multilateral and bilateral treaties of international investment law give primacy to the protection of private interests of foreign investors, and they rely uncritically on market-based values in the case of public takings of property. With no conception of the social function of property, they tend to restrict the states' room for manoeuvre by deeming an intervention invasive of the very substance of ownership.[41] In the *Chorzow Factory case* (1928), the

(28 July 2022), para. 62.

[38] Campbell McLachlan, *The Principle of Systemic Integration in International Law* (Oxford University Press, 2024); Study Group of International Law Commission (Martti Koskenniemi), Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc. A/CN.4/L.682 (13 April 2006); Vienna Convention on the Law of Treaties, Article 31(3)(c) (23 May 1969), UNTS 1155; John G. Sprankling, *The International Law of Property* (Oxford University Press, 2014), 350–351.

[39] I am grateful to Anil Yilmaz for expressing these points so clearly to me in her feedback.

[40] José E. Álvarez and Judith Bauder, *Women's Property Rights under CEDAW* (Oxford University Press, 2024), 242.

[41] Ibid, chapter 5.

Permanent Court of International Justice established that an act contrary to international law can give rise to a corporation's claim for reparations.[42] In 1938, US Secretary of State Cordell Hull asserted the formula that would become known after him: 'No government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate, and effective payment therefor.'[43] Nearly a hundred years later, in the current stage of development of international law, general principles of international law do not guarantee any longer an automatic right to compensation for non-nationals; compensation payments will be assessed based on a proportionality review to ensure they align with the fair balance in the public acquisition of private property (Chapter 5, section 5.4).[44] However, the adequacy of the compensation is usually determined by a so-called fair market value, meaning in the words of a United Nations Commission on International Trade Law (UNCITRAL) arbitral tribunal, the price 'at which property would change hands between a hypothetical willing and able buyer and a hypothetical and able seller, acting at arm's length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts'.[45] It is important to note that this is a legal fiction from the moment there is no real market to measure the premise against. The proposition should be subjected to critical scrutiny having due regard to the multiplicity of interests at play, not only the corporate interest of preserving the value of the investment. This is particularly important when otherwise the compensation could compromise the resilience of the institutions and be 'crippling' for the state and the population.[46] A social right to property, it was argued in Chapter 5, demands a reconsideration of the value of compensation in the case of public takings in the name of the general interest; beyond the market value, it would be necessary to consider the actual use of the asset in private hands, the potential use in public hands, the historical background of the acquisition, and the extent of direct or indirect state investment that may have enriched the asset's value prior to the moment of the public taking.

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[42] Permanent Court of International Justice, *The Factory at Chorzow (Claim for Indemnity) Germany v. Poland* (Judgment of 13 September 1928), para. 125.

[43] John G. Sprankling, *The International Law of Property* (Oxford University Press, 2014), 9.

[44] Douglas Maxwell, *The Human Right to Property: A Practical Approach to Article 1 of Protocol No. 1 to the ECHR* (Hart, 2022), 196, 242.

[45] UNCITRAL Arbitral Tribunal, *National Grid PLC v. Argentina*, Award (3 November 2008), para. 263, note 99; John G. Sprankling, *The International Law of Property* (Oxford University Press, 2014), 266.

[46] Martins Paparinskis, A Case Against Crippling Compensation in International Law of State Responsibility, 83(6) *Modern Law Review* 1246 (2020).

The international investor–state dispute settlement regime has been accused of creating 'justice bubbles for the privileged', given the fact that only a few resourceful foreign investors can afford to access it.[47] International investment law imposes three distinct limitations on states' capacity to safeguard social rights when services are delivered by private providers;. As such, international investment law can restrict the state's ability, first, to modify how a service is delivered to provide essential human rights services, second, to alter the regulations governing the provision of the service, and, third, to take measures to favour affordability of the service.[48] With a heavy dose of scepticism, Deva and Van Ho argue that the international investor–state dispute settlement regime could only be made compatible with international human rights obligations on the basis of a radical transformation based on the principles of equality, accessibility, participation, independence, diversity, coherence, transparency and reviewability.[49] Perhaps less drastically, Desierto presents a series of policy recommendations to embed ESCR considerations in the international adjudication of the international investment system, including: implementing extraterritorial obligations under the ICESCR for both the host and the home state; incorporating the obligations to respect, protect and fulfil ESCR and the public duty to provide social protection in investment treaties and in corporate due diligence; and reviewing the compensation valuation methods in the case of expropriations and other forms of public intervention.[50] The latter includes the idea that 'a host State's good faith compliance with the ICESCR could be an equitable basis to temper compensation'.[51]

Notwithstanding the warranted criticism, *Urbaser* (2016) was an interesting case in which an arbitral tribunal constituted under the auspices of the International Centre for Settlement of Investment Disputes (ICSID) paid attention to the state's – in that case, Argentina – right and duty to regulate public services – the supply of water and sanitation services in Buenos Aires – as well as to international investors' rights and responsibilities. Argentina

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[47] Anil Yilmaz Vastardis, Investment Treaty Arbitration: A justice bubble for the privileged, in *The Oxford Handbook of International Arbitration* 617 *(*Thomas Schultz and Federico Ortino, eds, Oxford University Press, 2020).

[48] Luis Felipe Yanes, *Social Rights in International Investment Law: Reconciliation and Integration* (Routledge, 2026), 96–108.

[49] Surya Deva and Tara Van Ho, Addressing (In)Equality in Redress: Human Rights-Led Reform of the Investor-State Dispute Settlement Mechanism, 24(3) *Journal of World Investment & Trade* 398 (2023).

[50] Diane A. Desierto, *Public Policy in International Economic Law: The ICESCR in Trade, Finance, and Investment* (Oxford University Press, 2015), chapter 5.

[51] Ibid, 352.

counterclaimed that the foreign investor's actions had undermined the state's ability to comply with its international legal duty to provide clean water. The ICSID arbitral tribunal acknowledged the existence of a right to water, in the general framework of ESCR, as proclaimed in the Universal Declaration of Human Rights and in the ICESCR. The arbitration tribunal also appreciated that the investor's 'contractual rights should not be considered in isolation. Instead, they are placed in a legal framework embracing the rights and obligations of the host State and of its authorities, subject to the protections provided' in the bilateral investment treaty – in this case, between Argentina and Spain, where the investor was domiciled. However, the ICSID tribunal ruled, the company had no obligation to fulfil the right to water in Argentina:

> The State's obligation is based on its obligation to enforce the human right to water of all individuals under its jurisdiction, [but] this is not the case for the investors who pursue, it is true, the same goal, but on the basis of the Concession and not under an obligation derived from the human right to water… The situation would be different in case an obligation to abstain, like a prohibition to commit acts violating human rights would be at stake. Such an obligation can be of immediate application, not only upon States, but equally to individuals and other private parties.[52]

While Argentina's counterclaim was eventually dismissed, the arbitrators' reasoning opened the door to what could just turn to be a more fruitful engagement with human rights obligations in international investment disputes.[53]

Some private providers of public services are international, and this reality demands international investment law to engage with a broader and social conception of property, integrating systemically the multiple human rights obligations of the state. This calls for a holistic interpretation of property rights, not merely as individualistic, exclusivist and maximalist claims, but with the whole *corpus juris* in mind, including the protection of collective interests, culturally significant communal property, the protection of the environment, and the preservation of public services necessary to ensure social rights. Private international investors involved in the delivery of public services ought to be steered, regulated and held accountable by public authorities to ensure the satisfaction of social rights. Prioritising the general interest of the population, particularly marginalised communities and most vulnerable groups, the state

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[52] ICSID, *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Bizkaia Ur Partzuergoa v. Argentina*, Award (8 December 2016), para. 619, 1196–1197, 1210.

[53] Anil Yilmaz Vastardis, 'Is International Investment Law moving the ball forward on IHRL obligations for business enterprises?', *EJIL: Talk!* (15 May 2017); Yulia Levashova, The Right of Access to Water in the Context of Investment Disputes in Argentina: Urbaser and Beyond, 16(2) *Utrecht Law Review* 110 (2020).

would have a sovereign margin of appreciation to restrict, if necessary, the private ownership over strategic assets for foreign players who do not reside in the state. In the case of public takings for the general interest, factors other than the hypothetical market value ought to be borne in mind, including the social utility of the asset, the amounts of subsidies granted by the state, and, when relevant, the history of the acquisition of property in the first place – for example, in the case of an origin dating from a colonial and/or dictatorial regime.

7.3 IRRESPECTIVE OF OWNERSHIP, PUBLIC TRANSPORT MUST BE AFFORDABLE, ACCESSIBLE AND OF GOOD QUALITY

Property is a human right, of a social kind, and some of the maximum available resources necessary to deliver social rights are owned by private actors, as developed in the proposal for a social right to property (Chapter 5). Bus and train routes are public services that have been privatised in a number of countries. These services are now delivered by private companies, relying totally or partially on privately owned resources. In some cases, privatisation brought devastating consequences in the form of service cuts and deteriorating infrastructure. For example, Friends of the Earth reports that urban bus services outside London in England and Wales – where they are privately run – dropped by 48% and rural bus services by 52% between 2008 and 2023.[54] This coincided approximately in time with a 38% reduction in local authorities' financial support for bus services, an 18% average increase in fares, and a 10% overall decline in bus use during the years of steep austerity in public finance between 2010 and 2019.[55] Philip Alston, in his role as UN Special Rapporteur on Extreme Poverty and Human Rights, concluded in 2019 that UK local authorities had 'often simply abandoned their responsibilities by relegating key services to the private sector and failing to take any regulatory measures to ensure basic service provision'.[56] It is important to avoid broad-brush generalisations. The scrutiny needs to be careful and nuanced, because public is no panacea and private does not always anticipate disaster. There does not seem

[54] Friends of the Earth, 'How Britain's bus services have drastically declined' (2023).

[55] National Audit Office, 'Improving local bus services in England outside London' (2020), 4.

[56] Special Rapporteur on Extreme Poverty and Human Rights, Report: Mission to UK, UN Doc. A/HRC/41/39/Add.1 (23 April 2019), para. 45. See also: Lyle Barker and Koldo Casla, 'Deflation of Rights Amidst the Cost-of-Living Crisis in England: Submission to the European Committee of Social Rights', University of Essex – Human Rights Centre (2024), 24–34.

to be a significant enough difference in terms of the frequency of cancellations between nationalised and private train providers in the UK, and evidence from other jurisdictions shows that private provision can indeed be efficient, reliable and sustainable.[57] Having said that, privatisation can erode accountability, and a decline in quality does have a disproportionate effect on marginalised communities with more limited economic resources. The moment public transport is delivered by private actors, one needs to assess critically the service's compatibility with the social right to property and other social rights, including states' obligation to fulfil and overall principles of sovereign functions and democratic control (as discussed in section 7.1 above).

There is no stand-alone right to public transport in international human rights law. While not formalised as a right as such, the Convention on the Rights of Persons with Disabilities gives prominence to transportation as an essential component of the accessibility of persons with disabilities and the right to live independently and to participate fully in all aspects of life.[58] The Convention on the Elimination of All Forms of Discrimination Against Women singles out the role of transport in ensuring adequate living conditions for women living in rural areas in particular.[59] International human rights monitoring bodies have also recognised the importance of public transport for the satisfaction of social rights. Both the UN CESCR and the Independent Expert on Human Rights of Older Persons have highlighted the link between older persons' mobility, accessibility of public transport, ability to participate meaningfully in society and the mental and physical health of older persons.[60] Public transport is also instrumental in ensuring the physical accessibility of healthcare and

[57] Philip Georgiadis, Clara Murray and Jim Pickard in London and Jennifer Williams, 'Can nationalisation fix England's rail network?', *Financial Times* (28 November 2024); Emilio Casalicchio, 'Can Labour make the trains run on time?', *Politico* (6 September 2024).

[58] General Assembly Resolution 61/106, Convention on the Rights of Persons with Disabilities, Article 9(1) (24 January 2007).

[59] General Assembly Resolution 34/180, Convention on the Elimination of All Forms of Discrimination Against Women, Article 14(2)(h) (18 December 1979).

[60] CESCR, General Comment No. 6: The Economic, Social and Cultural Rights of Older Persons, UN Doc. E/1996/22 (8 December 1995), para. 33; Independent Expert on the Enjoyment of all Human Rights by Older Persons, Report: Mission to Moldova, UN Doc. A/HRC/57/42/Add.2 (30 July 2024), para. 63–64; Independent Expert on the Enjoyment of all Human Rights by Older Persons, Report: Mission to Nigeria, UN Doc. A/HRC/54/26/Add.1 (24 July 2023), para. 50 and 62; Independent Expert on the Enjoyment of all Human Rights by Older Persons, Report: Mission to Finland, UN Doc. A/HRC/51/27/Add.1 (22 August 2022), para. 96, 99–100.

education.[61] The same applies to the location of housing, because the adequacy of housing is partly dependent upon the connection between the place one lives in and the places where one can secure a livelihood and access commercial and social facilities.[62] Access to safe, affordable, accessible and sustainable transport systems, notably by expanding public transport, is also Target 11.2 of the Sustainable Development Goals.[63]

Public transport is essential to realising *access* to social rights, like healthcare, education, work, etc. In fact, the principle is applicable to civil rights as well – for example, freedom of religion, expression or association, or the right to vote.[64] It is not enough for public services to exist or to be available in abstract or general terms; they need to be reachable so people can use them. As appreciated by Coggin and Pieterse, the notion of access attached to social rights 'lends a distinct physical and geographical dimension to these rights'.[65] Public transport can play a critically important role in bringing otherwise disjointed communities and individuals physically closer to one another, reducing territorial inequalities and reinforcing the sense of social bonds and common purpose. Public transport is also generally more efficient and more sustainable than private alternatives.

Public transport is the thread that weaves the social tapestry. An effective and reliable public network of transportation can connect people and communities, improve access to opportunities, and reverse economic disparities between neighbourhoods, towns and regions. This observation is aligned with the philosophy of the right to the city, understood not as a subjective right as such, but as a socio-political frame to empower residents to reclaim the urban space they share and the amenities the city provides. Looking at the situation in South Africa, Coggin and Pieterse argue that 'viewing the use of public transport as an enactment of the right to the city, rather than as making use of an economic service, underlines that accessible public transport used by all

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[61] CESCR, General Comment No. 13, Right to Education, UN Doc. E/C.12/1999/10 (8 December 1999), para. 6(b); General Comment No. 14: Right to Health, UN Doc. E/C.12/2000/4 (11 August 2000), para. 12(b).

[62] CESCR, General Comment No. 4: Right to Adequate Housing, UN Doc. E/1992/23 (13 December 1991), para. 8(f).

[63] General Assembly Resolution 70/1, Transforming our world: the 2030 Agenda for Sustainable Development (21 October 2015), Target 11.2.

[64] Philip Alston, Bassam Khawaja and Rebecca Riddell, 'Public Transport, Private Profit: The Human Cost of Privatizing Buses in the United Kingdom', *Centre for Human Rights & Global Justice* (2021), 34.

[65] Thomas Coggin and Marius Pieterse, A Right to Transport? Moving Towards a Rights-Based Approach to Mobility in the City, 31(2) *South African Journal on Human Rights* 294 (2015), at 303.

economic classes can transform the city as a whole into a more equal, less economically stratified, place'.[66] This mindset supports the conception of urban land as a resource that can contribute to reducing inequalities by strengthening social bonds and human interaction in general. While immovable property may be privately owned, the area in between – the roads, the squares, the pavement, the parks, etc – are collective spaces, spaces in common of human habitat. That is why public transport that is affordable, accessible and of good quality ties in with the condition of property as a social right. Immovable property has little value in itself. The value of these assets, the way Fennell puts it, hinges on their ability to 'capture the stream of services' that the assets can facilitate – schools, hospitals, green spaces, centres of commerce and leisure, etc.[67] Public transport plays a key role in connecting residential property with those services, thereby increasing, maintaining or decreasing the value of property, both in human and in financial terms. As observed by the South African Constitutional Court in *Grootboom* (2000), basic services, 'such as water, sewage, electricity, and roads', are essential components of the right to adequate housing.[68] This discussion raises other fundamental sociological questions about how cities are designed through urban planning. But as far as the concept of property is concerned, the right to the city calls for an idea of property as a social right: one's property is contingent upon recognition by others, the availability of reliable infrastructure, regulation and public policy developed by democratically accountable actors, and ultimately a natural environment that belongs to all and none at the same time.

Public authorities ought to regulate and oversee private providers of public services, including public transport, to ensure they remain affordable, reliable, of good quality, accessible to all, and accountable.[69] Private providers of public transportation have certain public service obligations. Yet, as discussed earlier in this chapter (section 7.1), the state also bears the responsibility of explaining how it intends to make the privatisation of public transport – or any other public service – compatible with the obligation to fulfil social rights progressively. Furthermore, public transportation can contribute to reducing inequalities and bringing people and communities together, and by connect-

66 Ibid, 298.

67 Lee Anne Fennell, Streaming Property, 117(1) *Northwestern University Law Review* 95 (2022), at 95.

68 *Government of the Republic of South Africa and Others v. Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000), para. 37.

69 CESCR, General Comment No. 24: State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, UN Doc. E/C.12/GC/24 (10 August 2017), para. 21–22.

ing residential properties to the stream of services, public transport can have an effect on the value of privately owned immovable property. More research needs to be done to develop the right to transport and its relationship with all human rights, particularly social rights, and the social function of property.

7.4 RIGHT TO ENERGY, JUST TRANSITION AND THE SOCIAL AND ECOLOGICAL FUNCTION OF PROPERTY

As presented in Chapter 5, the social right to property should set limits to the right to dispose of, transfer and destroy a thing, the so-called *jus abutendi*: it cannot condone the destruction of a good or the sort of use that is contrary to the social function of property. The social right to property is a reminder that not all holdings of property are equally worthy of protection, and this calls for a distinction between personal property, private property necessary to ensure an adequate standard of living, and property as capital investment. Together, these principles invite greater scrutiny of private ownership over the sources and the means of transformation of energy essential for human and environmental flourishing and for the normal functioning of the economy and society.

Access to energy plays a central role in ensuring an adequate standard of living, including food and water, in a clean and healthy environment, with momentous implications for private property as well. Some vignettes from the three country case studies discussed in Chapter 3 can be helpful here. South Africa's *Joseph v. City of Johannesburg* (2009) is significant. This is a case concerning the termination of electricity supply to a residential block of 44 apartments housing largely low-income families, when it was the landlord who had not passed on the payments to the municipal energy company. While the tenants argued that the sudden disconnection without notice had amounted to a breach of the right to housing, the Constitutional Court instead anchored its decision on a public law right to receive electricity as a 'basic municipal service', a right created *ex novo* and derived from the constitutional and legal obligation of public authorities to provide these services.[70] Furthermore, in addition to defining access to energy as a rights issue, 'regardless of the commercialisation or corporatisation of municipal services entities, all policy choices in relation to water, electricity, and sanitation provision must comply with Section 9 of the Constitution – which stipulates the right to equality'.[71]

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[70] *Joseph and Others v. City of Johannesburg and Others* (CCT 43/09) [2009] ZACC 30; 2010 (3) BCLR 212 (CC); 2010 (4) SA 55 (CC) (9 October 2009), para. 34–55.

[71] Jackie Dugard, Urban Basic Services: Rights, Reality, and Resistance, in *Socio-Economic Rights in South Africa: Symbols or Substance?* 275 (Malcolm

Courts have adopted a similar approach precluding the disconnection of water as a matter of rights, with the added value that the contractual relation with the public service provider is subsumed under the constitutional right to water contained in Section 27; this is notwithstanding the legal duty to pay the fees and charges for the service in question.[72]

As opposed to South Africa, Chile has traditionally been based on a neoliberal model of prioritisation of the private provision of services. Yet, the regulation of water experienced a meaningful legal reform in 2022: an amendment to the water code included the formal recognition of the right to water and sanitation and the protection of indigenous peoples' access to water resources. The legal reform also changed the status of water service management from strong private property rights granted in perpetuity to administrative concessions granted for 30 years, renewable under certain circumstances, but also with the possibility of expropriation of private water use rights.[73]

The situation in the informal settlement of Cañada Real, in Madrid, is illustrative of the linkages between energy, property and adequate living conditions, particularly for families with limited economic resources. Approximately 8,000 individuals, a third of them children, live in this informal settlement on public land. Most of these families endure severe economic deprivation. Since late 2020, some 4,500 people have suffered inadequate electricity quality with supply disconnections and frequent and long interruptions. Cañada Real has been labelled 'as a collective disconnection case of unprecedented magnitude in Europe'.[74] Nearly all families – 97% of them – reported being unable to keep their homes warm in winter because of the cuts and/or the unaffordability of gas and electricity.[75] The long-lasting and dire situation in

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Langford, Ben Cousins, Jackie Dugard and Tshepo Madlingozi, eds. Cambridge University Press, 2013), at 281.

[72] Constitution of South Africa, 1996, Sections 27; *City of Cape Town v. Strümpher* (104/2011) [2012] ZASCA 54; 2012 (4) SA 207 (SCA) (30 March 2012), para. 9–10; Juanita Pienaar, Property Meeting the Challenges of the Commons in South Africa, in *Property Meeting the Challenges of the Commons* 347 (Ugo Mattei, Alessandra Quarta, Filippo Valguarnera, Ryan J. Fisher, eds, Springer, 2023), at 392–393.

[73] Elizabeth Macpherson, Cristy Clark, Pía Weber Salazar, Natalie Baird, Afshin Akhtar-Khavari and Edward Challies, Evolving rights to (and of) water in Chile: a case for relationship-based water law and governance, (online first) *The International Journal of Human Rights* 1 (2023), at 19.

[74] Ulpiano Ruiz-Rivas, Sergio Tirado-Herrero, Raúl Castaño-Rosa, Jorge Martínez-Crespo, Disconnected, yet in the spotlight: Emergency research on extreme energy poverty in the Cañada Real informal settlement, Spain, 102 *Energy Research & Social Science* 1 (2023), at 15.

[75] Ibid, 10.

Cañada Real is a reminder of the impact that inadequate and unreliable access to energy can have on multiple and intersecting rights, including the right to health, education, housing, and private and family life, as well as the specific rights of children, older persons and people with disabilities. The situation was brought to the attention of the European Committee of Social Rights (ECSR) in 2022. In fact, it was the first case lodged with the Committee when Spain accepted its jurisdiction to deal with collective complaints under the European Social Charter. After much anticipation, the European Committee's views, dating from September 2024, were finally made public in February 2025. In the decision on the merits, the ECSR recalled that, in its regulatory capacity, the state must ensure the satisfaction of social rights 'irrespective of the legal status of the economic agents whose conduct is at issue'.[76] The involvement of private energy companies in the delivery of public services 'must not result in the enjoyment or achievement of Charter rights being undermined':[77]

> The Committee considers that stable, consistent and safe access to adequate energy is both a prerequisite for and a key element of the enjoyment of Charter rights such as: the right to housing, the right to protection of health, the right to education, the right of the family to social, legal and economic protection, the rights of older persons, persons with disabilities, and the rights of children and young people to social, legal and economic protection. To be "adequate" for the purposes of Charter rights, energy must satisfy a number of conditions, including affordability, cleanness and sustainability. The Committee thus considers that a situation where people experience intermittent access to energy or no access to energy at all over a prolonged period of time render the persons concerned energy poor.[78]

Cases like that of Cañada Real in Madrid demand greater action in relation to energy poverty. As the regulator, the state should prohibit private providers of electricity from disconnecting the energy supply as a matter of minimum core obligations, as has been established for water in the international human rights regime,[79] and take effective action to restore the power and provide alternative sources of electricity as necessary.

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[76] ECSR, *MFHR v. Greece*, Collective Complaint No. 30/2005, Decision on Admissibility (10 October 2005), para. 14; ECSR, *MFHR v. Greece*, Collective Complaint No. 30/2005, Decision on the Merits (6 December 2006), para. 192.

[77] ECSR, *DCI, FEANTSA, MEDEL, CCOO and ATD Fourth World v. Spain*, Collective Complaint No. 206/2022, Decision on the Merits (11 September 2024), para. 56.

[78] Ibid, para. 205.

[79] Special Rapporteur on the Human Rights to Safe Drinking Water and Sanitation, Report: Progressive Realization of the Human Rights to Water and Sanitation, UN Doc. A/HRC/45/10 (8 July 2020), para. 41.

There is technically no right to energy, in so many words, in the current stage of development of international law. However, energy is clearly present in international human rights treaties. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) enshrines the right of women living in rural areas to have access to electricity and water supply as elements of adequate living conditions.[80] The CEDAW Committee has taken this right further, inclusive of other energy needs, such as cooking, heating and cooling, as well as transportation – which is already mentioned in the Convention itself – and calls on states to ensure access to sustainable, renewable and low-cost technologies and sources of energy in rural areas.[81] In interpreting the right to life, the Human Rights Committee also recognises that access to electricity and sanitation are part of the adequate general conditions that can facilitate a good life with dignity.[82] Both the CESCR and the European Committee of Social Rights have specified that the right to adequate housing includes the availability of services, materials, facilities, infrastructures and amenities, including safe drinking water, sanitation and washing facilities, means of food storage, heating, waste disposal, and energy for cooking, heating and lighting.[83] For the African Commission on Human and Peoples' Rights, under the right to health, states must provide safe drinking water and electricity.[84] The CESCR indicated in General Comment No. 24 (2017), dealing with business and human rights, that private providers of electricity have 'public service obligations' to ensure universality of coverage, the continuity, affordability and adequacy of the service, and the participation of users (see section 7.1).[85] The CESCR has also expressed concerns in country reports when it has received evidence suggesting that low-income families struggle to meet basic needs, prompting the Committee to urge the

[80] General Assembly Resolution 34/180, Convention on the Elimination of All Forms of Discrimination Against Women, Article 14(2)(h) (18 December 1979).

[81] CEDAW Committee, General Recommendation No. 34: Rights of Rural Women, UN Doc. CEDAW/C/GC/34 (7 March 2016), para. 84–85.

[82] Human Rights Committee, General Comment No. 36: Right to Life, UN Doc. CCPR/C/GC/36 (3 September 2019), para. 26.

[83] CESCR, General Comment No. 4: Right to Adequate Housing, UN Doc. E/1992/23 (13 December 1991), para. 8(b); ECSR, *Feantsa v. France*, Collective Complaint No. 39/2006, Decision on the Merits (5 December 2007), para. 74; ECSR, *FIDH v. Ireland*, Collective Complaint No. 110/2014, Decision on the Merits (12 May 2017), para. 118.

[84] ACHPR, *Free Legal Assistance Group and Others v. Zaire*, Communications No. 25/89, 47/90, 56/91, 100/93, Decision (1995), para. 47.

[85] CESCR, General Comment No. 24: State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, UN Doc. E/C.12/GC/24 (10 August 2017), para. 21.

states to avoid power shutdowns and to ensure a minimum supply of energy.[86] The Special Rapporteur on Extreme Poverty and Human Rights, Olivier de Schutter, has called on states – and the European Union – to promote policies to transition away from non-renewable energy sources, to maintain an efficient and sustainable energy supply in rural and urban areas alike, and to prioritise energy poverty to secure a more just transition away from fossil fuels.[87] The Special Rapporteur on Adequate Housing, Balakrishnan Rajagopal, has called for measures to decarbonise the energy sources of buildings and to improve the energy efficiency of new buildings without compromising the general affordability of housing.[88] At least five national constitutions explicitly recognise the right to energy – Democratic Republic of Congo, Maldives, Bolivia, Ecuador and Nicaragua – and the right has been formalised in statutory instruments and/or case law in several others.[89] It is also worth recalling that access to affordable, reliable, sustainable and modern energy for all is Sustainable Development Goal No. 7.[90] In light of all this, in recent years there have been proposals to adopt a human rights-based approach to energy, and to insert the 'right to access clean energy' or the 'right to energy services' in the global framework as an autonomous right or a derivative of existing rights.[91]

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[86] CESCR, Concluding Observations: Germany, UN Doc. E/C.12/DEU/CO/6 (27 November 2018), para 56–57; CESCR, Concluding Observations: Belgium, UN Doc. E/C.12/BEL/CO/5 (26 March 2020), para. 42–43.

[87] Special Rapporteur on Extreme Poverty and Human Rights, Report: Ecuador, UN Doc. A/HRC/56/61/Add.2 (2 May 2024), para. 63; Special Rapporteur on Extreme Poverty and Human Rights, Report: Lebanon, UN Doc. A/HRC/50/38/Add.1 (11 April 2022), para. 75; Special Rapporteur on Extreme Poverty and Human Rights, Report: European Union, UN Doc. A/HRC/47/36/Add.1 (20 May 2021), para. 24–25.

[88] Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context, Towards a Just Transformation: Climate Crisis and the Right to Housing, UN Doc. A/HRC/52/28 (23 December 2022), para. 63–75.

[89] Marlies Hesselman, Right to Energy, in *Elgar Encyclopedia of Human Rights* 62 (Christina Binder, Manfred Nowak, Jane A. Hofbauer and Philipp Janig, eds, Edward Elgar, 2022), at 65–66.

[90] General Assembly Resolution 70/1, Transforming our world: the 2030 Agenda for Sustainable Development (21 October 2015), Goal 7.

[91] Adrian J. Bradbrook and Judith G. Gardam, Placing Access to Energy Services within a Human Rights Framework, 28(2) *Human Rights Quarterly* 389 (2006); Margaretha Wewerinke-Singh, A human rights approach to energy: Realizing the rights of billions within ecological limits, 31(1) *Review of European, Comparative & International Environmental Law* 16 (2022); Stephen Tully, The Human Right to Access Clean Energy, 3(2) *Journal of Green Building* 140 (2008);

The experience with the right to water may provide a pathway to connect human rights and energy.[92] Like water, energy is not explicitly named in the ICESCR. More importantly, both energy and water have in common the demand for access and clean sources, while bearing in mind the need to avoid plundering of resources. The UN Special Rapporteur on the Right to Water, Pedro Arrojo Agudo, has urged against serious biases induced by private actors that can pervert the principle that the management of water resources must serve the general interest and life in general.[93] His 2025 report to the Human Rights Council, not yet public (as of September 2025), deals with the nexus between water and energy.[94]

The CESCR's draft General Comment on the environmental dimension of sustainable development, under discussion at the time of this writing,[95] could be an opportunity to recognise, develop and operationalise the principle of the social and ecological function of the right to property in relation to energy. The social and ecological function, a formulation borrowed from the Colombian Constitution,[96] would mean that private property with regard to the production and delivery of energy services must serve the general interests of the community. The principle would also set limits to *jus abutendi*, to prevent private companies from destroying or exhausting goods and resources, or from using them in a way that is contrary to the general interest.

A human rights-based approach to energy is urged to meet multiple demands, starting with the existential environmental challenges of our times, on top of profound material inequalities – both in terms of who is more and less responsible for those challenges, and in terms of who is more and less resilient to deal with them. Irrespective of whether those owning the resources and providing

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Marlies Hesselman, Right to Energy, in *Elgar Encyclopedia of Human Rights* 62 (Christina Binder, Manfred Nowak, Jane A. Hofbauer and Philipp Janig, eds, Edward Elgar, 2022); Estela B. Sacristán, Is there a human right to energy?, in *Research Handbook on Energy, Law and Ethics* 319 (Malik Dahlan, Rosa Lastra and Gustavo Rochette, eds, Edward Elgar, 2022).

92 Alberto Quintavalla, Franz Kienzl and Irakli Samkharadze, The human right to energy: drawing lessons from the development of the human right to water, 14(1) *Journal of Human Rights and the Environment* 49 (2023).

93 Special Rapporteur on the Human Rights to Safe Drinking Water and Sanitation, Water and Economy Nexus: Managing Water for Productive Uses from a Human Rights Perspective, UN Doc. A/HRC/57/48 (31 July 2024), para. 51 and 131.

94 OHCHR, 'Call for Input – Water and Energy Nexus Report' (2025). https://www.ohchr.org/en/calls-for-input/2025/call-input-water-and-energy-nexus-report

95 CESCR, Draft General Comment on Economic, Social and Cultural Rights and the Environmental Dimension of Sustainable Development (2024).

96 Constitution of Colombia, 1991, Article 58.

the services are public entities or private companies, nobody should face a blackout or cessation of water, electricity or any other source of energy as a consequence of being unable to pay the fare – this is notwithstanding possible legal avenues by which companies may seek the payment of arrears. From the perspective of energy sovereignty, there is also a case for the nationalisation or retention of public control over the sources of energy. Ensuring the affordability and universality of energy, global warming and a concern for the rights of future generations plead for an acceleration of the green transition to renewable sources. At the same time, the obligation to fulfil social rights requires public authorities to provide adequate material assistance to people facing energy poverty, and ultimately to ensure that everyone has access to safe and reliable energy to cook, heat their homes and keep the lights on.

8. Conclusion: the utility of property in ensuring rights for all

Property is wherever you look, and nearly everywhere it is unevenly distributed. The idea of property is also entrenched in public discourse. For example, we talk about our bodies as if we owned them ('my body, my choice'), as if my being was somehow separate from but inextricably connected to my build, as if the metaphorical content contained the container. This is despite the fact that we do not really own *our* human body parts, in the sense that we cannot freely dispose of the body, in full or in part.[1] The discourse of property is ingrained in the way we talk about human rights. We think of human rights as possessions, something we (should) *have*, not so much as levers for what we would like to *do* or who we would like to *become*. Rights are generally conceived as preconditions for a life where we can develop as individuals and as members of a community. They would be prerequisites, so individuals, in exercise of their equal freedom, can decide to act upon in whichever way they choose, as long as they do not infringe upon the rights of others and essential rules of coexistence in society. Some of those conditions of equal freedom are material in nature, such as not being cold and hungry, having a roof over one's head, or having a job and other sources of income. This is what Franklin Delano Roosevelt referred to as the 'freedom from want' in his 1941 presidential address to the US Congress.[2] In the parlance of international human rights law, these are economic, social and cultural rights – or social rights in this book.

The right to property is proclaimed in international human rights law (Chapter 2, section 2.1), and the concept of property is deeply rooted in human rights vernacular. Yet, international human rights bodies dealing with social rights have largely bypassed the issue, treating property basically as an inconvenience. They, alongside non-government organisations and campaigners,

[1] Douglas Maxwell, *The Human Right to Property: A Practical Approach to Article 1 of Protocol No. 1 to the ECHR* (Hart, 2022), 130; Imogen Goold, Property in human body parts, in *Research Handbook on Property, Law and Theory* 552 (Chris Bevan, ed., Edward Elgar, 2024).

[2] Franklin Delano Roosevelt, State of the Union Address in front of Congress (6 January 1941). (Source: National Archives – US Government.)

demand the state to do more, to take all reasonable measures, to maximise resources, to advance progressively towards the full satisfaction of social rights. But they essentially avoid the uncomfortable fact that many of those resources necessary to realise social rights are indeed privately owned. I believe this is a strategic mistake and a conceptual blind spot. A reinterpretation of property is very much needed, not as an exclusivist, absolutist and individualist right, as conservative libertarians would desire, but as a social right with an inherent social function.

Chapter 2 made two key points: (1) that property is missing from key international treaties, and where one can find it, property is given different meanings (hence the title: between mutism and polysemy); and (2) that international economic, social and cultural rights (ESCR) bodies have avoided the question of the relation between property and social rights. Chapter 3 offered two key points as well: (1) that the right to property is proclaimed, often with limitations, in most constitutions of the world; and (2) that the social function is recognised in a number of countries, but with different meanings. I show this in detail with three case studies – South Africa, Spain and Chile – two of which have been fundamentally understudied in comparative legal literature in English. In Chapter 4, we travelled through Western political theory (up to the mid-twentieth century), critical approaches (of the last century), progressive property theory (of the last 15 to 20 years), and the principle of the social function of property. A proposal to reinterpret property as a social right with a social function was presented in Chapter 5, with five components: (1) property is a social right; (2) some of the maximum available resources to satisfy social rights are privately owned; (3) there is no free *abusus* under the social right to property; (4) we should reconsider the role and price of compensation for public takings of property when the general interest is the fulfilment of social rights; and (5) not all holdings and amounts of property are the same and deserve the same consideration and protection from human rights law.

There is a tension between property and ESCR. It has remained largely implicit. I wrote this book because I think we need to verbalise and problematise this tension. That is this book's first message. The second message is that, after bringing to the fore the pull between property and social rights, we should redefine the parameters of the relationship. Neither ESCR nor property – nor, more importantly, the interests and needs that underpin them – are going anywhere any time soon. Social rights and property should converse and agree that they must learn to live together, learn from one another, and even appreciate each other's contributions.

There are good reasons to reclaim property from a human rights and social rights perspective. Social rights contribute to articulating an idea of the state as a public authority that embodies the interests of society as a whole, rather than solely those of property owners, emphasising the state's role in safeguarding

the equal right of everyone to a fair portion of the wealth generated by the collective.[3] Many groups have historically been discriminated against and prevented from accessing property by virtue of their sex, the colour of their skin, or a certain idea of what it means to be abled/disabled. The recognition of property was a progressive achievement for many who were and are denied the opportunity to be more autonomous and have greater control over their lives. Furthermore, property and private property are not synonymous. Property is much more than property as investment, as capital or as means of production. Not all property leads to the plundering of natural resources, to accumulation by dispossession and to greater inequality. Property is also personal property (belongings), communal property, public property, and property over certain resources that can help individuals and families to lead a life in dignity with resilience to anticipate and deal with misfortunes as well as to seize opportunities. In this regard, private resources can be part of the means by which households satisfy their right to an adequate standard of living, even when they may still rely on universal public services in education and healthcare.

We need a new notion of property, different from the mainstream conception of property prevalent in Western political thinking and private law. In this book, I have made the case for a social right to property based on the idea that property serves individual interests, but it must also serve the interests of the community, and when it does, it meets its social function. Because everyone is affected by property and lack thereof, the meaning and contour of the institution of property ought to be defined collectively and democratically, involving both those who have and those who have not, making extra efforts to ensure the active participation of people living on the margins of society. This requires the regulation of property to make it conducive to the satisfaction of social rights in a free and fair society. Responsibilities will be commensurate to wealth, and this matters because some people have loads and some have very little. This also requires utilising property law as part of the toolbox of predistributive and redistributive policies, meaning pre-tax wages and post-wage taxes and benefits. A democratic case for social rights would need to design well-established safeguards and clarify who gets to decide what exactly to make sure that personal liberty, space, and property are preserved. This is particularly important in the current political climate, with an abundance of political groupings, some of them in power, shamelessly advocating for racist and xenophobic approaches to general welfare that exclude non-nationals and people of certain ethnic groups. I argued with Marion Sandner elsewhere

[3] Nehal Bhuta, Social rights and the origins of the social constitution: From collective natural rights to the social state, 23(1) *International Journal of Constitutional Law* 11 (2025).

that it can help to ground a solidarity-based approach to social rights on civic responsibility, which 'come from a non-nativist and inclusive notion of belonging to a political community, not from predetermined and pre-political ideas of what is right and wrong behaviour'.[4]

This conception of property would be at odds with maximalist, exclusivist and individualist notions, where different holdings of property – one residential apartment versus large-scale capital investments – are not considered qualitatively relevant. This book calls for a complete overhaul in this respect. This is an appeal to co-opt property, to take it from the hands of influential and wealthy individuals, and from conservative and libertarian voices. Like nation, family, liberty, free speech, citizenship, responsibility, and other terms appropriated by right-wing ideologues, *property does not belong to them in exclusivity*. If property is theft – as Proudhon pronounced – let's steal it from them.

Chapters 6 and 7 explored some of the implications of a social right to property in relation to two human rights issues, namely, adequate housing and the private provision of public services – with a focus on transport and energy. Future research should explore other topics, for example, in relation to intellectual property (can knowledge even be subject to legal enclosure?), digital possessions,[5] 'animal rights',[6] cultural property,[7] and private debt.[8] Moreover, much more work remains to be done to develop the propositions at the level of

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[4] Koldo Casla and Marion Sandner, Solidarity as Foundation for Economic, Social and Cultural Rights, 24(2) *Human Rights Law Review* 1 (2024), at 13.

[5] Mardon, Denegri-Knott and Molesworth observe that people often experience a weaker sense of ownership over their digital possessions and perceive them as less meaningful than physical objects. Rebecca Mardon, Janice Denegri-Knott and Mike Molesworth, "Kind of Mine, Kind of Not": Digital Possessions and Affordance Misalignment, 50(2) *Journal of Consumer Research* 255 (2023).

[6] Bradshaw suggests extending property rights to animals, which would allow them to own land, water and natural resources, managed by human trustees. Karen Bradshaw, Animal Property Rights, 89(3) *University of Colorado Law Review* 809 (2018).

[7] J. Peter Byrne, Cultural Property: "Progressive Property in Action", 10(1) *Texas A&M Journal of Property Law* 1 (2024).

[8] Debts are generally acquired under structural inequality and unfair conditions. Creditors must also consider the risk of default. Repayment of debt is not necessarily the priority that should trump all other social values. Banks are given the power to create money in the form of loans, derivatives and other financial wisecracks; with such power must come responsibility. David Graeber, *Debt: The First 5,000 Years* (Melville House, 2011); Christopher K. Odinet, Of Progressive Property and Public Debt, 51(5) *Wake Forest Law Review* 1101 (2016); Oliver Pahnecke and Juan Pablo Bohoslavsky, Re-regulating the Risk Premium to Realize the Right to Development, 65(2–4) *Development* 145 (2022).

theory and to test them empirically. For example, we need to talk about taxes. In recent years, there has been a lot of debate about the merits and practicalities of some sort of wealth tax. Piketty called for the constitutionalisation of fiscal justice 'so that it will be impossible for the rich to pay proportionately less in taxes than the poor'.[9] In his 2024 report, the UN Special Rapporteur on Extreme Poverty and Human Rights, Olivier de Schutter, urged states to tax wealth instead of income to discourage unsustainable production and consumption.[10] Wealth taxes can also be justified on egalitarian grounds and on fairness grounds – because wealth reproduces itself, and much of it is unearned and does not originate in income earned in life. In its 2025 statement on taxation, the UN Committee on Economic, Social and Cultural Rights called for greater tax cooperation and exchange of information among states to 'contribute to the effective mobilization of resources and redistribution of wealth'.[11] A social right to property provides normative support for wealth taxes, but it does not resolve the doubts and dilemmas about how to make them work effectively.

In general, all policy proposals ought to be scrutinised critically and trialled empirically. As stated in Chapter 6, section 6.4, on rent caps, it is perfectly reasonable to be sceptical about the practicalities of this and, in fact, any other idea. But such scepticism should not be a subterfuge to disguise the ideological position held by some critics that, as a matter of principle, rent caps are contrary to private property rights. That would only be the case if we adopted a maximalist, individualist and exclusivist conception of property. And I wrote this book because that is not the only conception possible, let alone the one most aligned with international human rights law as a whole.

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[9] Thomas Piketty, *Capital and Ideology* (Arthur Goldhammer, trans., Harvard University Press, 2020), 996.

[10] Special Rapporteur on Extreme Poverty and Human Rights, Eradicating poverty beyond growth, UN Doc. A/HRC/56/61 (1 May 2024), para. 54.

[11] CESCR, Statement on Tax Policy and the ICESCR, UN Doc. E/C.12/2025/1 (27 February 2025), para. 16. UN human rights bodies are increasingly paying attention to taxation in their reports, recommendations and statements. See Human Rights Watch's database, and analysis of trends and themes: https://www.hrw.org/news/2025/06/26/human-rights-treaty-bodies-and-tax

Index

‘This brilliant book grasps vital issues that have eluded the human rights movement for many years. Casla reconciles social rights, property, and the social function. Everybody committed to the future of human rights will benefit from his exceptional – and accessible – scholarship on the social right to property.’

– Paul Hunt, University of Waikato, Aotearoa New Zealand

‘Koldo Casla examines the powerful institution of property, showing how it is a social creation, and everywhere is subject to the requirements of society. This social function of property is becoming a major battleground, with modern States obliged to protect human rights, and social and environmental sustainability.’

– Padraic Kenna, University of Galway, Ireland